



Royal Commission on the Pike River Coal Mine Tragedy
Te Komihana a te Karauna mōte Parekura Ana Waro o te Awa o Pike

UNDER

THE COMMISSIONS OF INQUIRY ACT 1908

IN THE MATTER OF

**THE ROYAL COMMISSION ON THE PIKE RIVER COAL
MINE TRAGEDY**

Before: The Honourable Justice G K Panckhurst
Judge of the High Court of New Zealand
Commissioner D R Henry
Commissioner S L Bell
Commissioner for Mine Safety and Health, Queensland

Appearances: K Beaton, S Mount and J Wilding as Counsel Assisting
J Haigh QC for Douglas White
J Rapley for Neville Rockhouse
S Moore SC, K Lummis and K Anderson for the New Zealand Police
N Davidson QC, R Raymond and J Mills for the Families of the Deceased
S Shortall, R Schmidt-McCleave and A Gordon for certain managers,
directors and officers of Pike River Coal Limited (in receivership)
C Stevens and A Holloway for Solid Energy New Zealand
K McDonald QC, C Mander and A Boadita-Cormican for the Department
of Labour, Department of Conservation, Ministry of Economic
Development and Ministry for the Environment
G Nicholson and S Stead for McConnell Dowell Constructors
G Gallaway and E Whiteside for NZ Mines Rescue Service
N Hampton QC and R Anderson for Amalgamated Engineering, Printing
and Manufacturing Union Inc
T King and C Baker for The Coal Association of New Zealand/Straterra
Incident
R Wilson for New Zealand Council of Trade Unions
J Kay for MinEx

**TRANSCRIPT OF PHASE FOUR HEARING
HELD ON 4 APRIL 2012 AT GREYMOUTH**

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COMMISSION RESUMES ON WEDNESDAY 4 APRIL 2012 AT 09.32 AM**SUBMISSIONS: MS SHORTALL**

5 May it please the Commission, this is an inquiry about a dream ended and
lives shattered and I plan today to begin with an explanation of what I mean
by that and then rather than repeat the extensive detail contained in our 200
plus page set of written submissions to summarise what is there contained
about the key evidence as it relates to my clients you heard or saw during
10 Phases One, Two and Three, so first to explain the dream ended and lives
shattered.

Before Pike River became synonymous with the tragic explosion that occurred
on the 19th of November 2010 the underground coal mine was heralded as a
showcase for modern mining in this country. It was a dream that had been
15 years in the making. You heard evidence that the project had been
Gordon Ward's baby. Those were the words since 1998, years before any of
my clients became involved with the company. You saw evidence about how
the mine was designed, developed and operated on the advice of numerous
expert consultants to enable underground coalmining adjacent to the
20 Paparoa National Park. You heard evidence about the extent to which
Department of Labour mines inspectors had unfettered access to the mine
and its information. Yet the mine exploded on 19 November 2010. To the
families and friends of the 29 men who lost their lives in Pike's coal mine that
tragic day, my clients on behalf of whom the submission is made, three former
25 Pike directors, John Dow, Ray Meyer, Stu Natrass and three former
managers, Peter Whittall, Steve Ellis and Robb Ridl extend their genuine and
heartfelt sympathy. They know that no words can capture how the loss of the
Pike 29 shattered the lives of those men's families and those others who
loved them.

30 0935

Many other lives on this, the West Coast of New Zealand also were
significantly changed by the explosion. You heard evidence that by
November 2010 Pike employed more than 150 people who were living on the

West Coast. As a result of work at the mine millions of dollars were being spent locally. The company also actively supported the West Coast community sponsoring many events, but as a direct consequence of the 19 November explosion just 11 men are today employed by the company
5 which was forced into receivership within weeks of the tragic explosion.

The lives of the many contractors who provided services to the mine likewise irrevocably changed on that tragic November afternoon. You saw evidence that renowned industry contractors like McConnell Dowell and Valley Longwall
10 Drilling and those that provided other services to the mine like New Zealand Mines Rescue together with the numerous experts who consulted on mine design and development had been involved in the project such that their reputations are or it is submitted at the very least should be on the line.

15 So to the Department of Labour mines inspectors who had frequent and numerous interactions with the mine yet never took any enforcement action. In fact as the evidence has shown 123 separate interactions in 2010 alone and then there are the lives of the companies DNOs. My clients are but six of a much larger group of individuals who had been company directors and
20 officers by the time of the 19 November 2010 explosion. But in choosing to actively participate before you in this inquiry they, like Neville Rockhouse, the company safety manager and one of its longer standing employees at the time of the explosion and Doug White, the former deputy chief inspector of coal mines in Queensland and the mine manager with statutory responsibility
25 for the site and the months leading into that tragic explosion on the 19th of November, had become the most public senior personnel.

Particularly with Gordon Ward having refused to appear before you with the company in receivership and its lawyers taking no active role in this inquiry,
30 with briefs of evidence submitted to the Commission from as I understand it just six of the 15 people who filled senior company management roles from June 2005 and with Oki Nishioka and David Stewart the only two of at least 32 experts who were engaged by the company as consultants to appear at

hearings. You have seen how my clients together with Doug White have shouldered the brunt of the criticism about the mine.

5 Notwithstanding that others have sought to paint targets on their backs it is submitted that my clients have shouldered that criticism with dignity. They have all watched these hearings closely, whether from behind me or over the live stream. They have refused ongoing requests to make public comment, even though they may very much have wanted to do so. Having chosen to actively participate in your inquiry and through a counsel, through me attend
10 all your hearings while other company directors and senior managers have sat quietly in the shadows, they have attracted the harshest comment from others in this room. That is no more plainly evidence than in submissions you heard yesterday and which criticism for not accepting responsibility or blame was shovelled them alone, plus Doug White without any mention of other key
15 names like Gordon Ward or other Pike directors like Tony Radford, Arun Jagatramka, or Gujarat or Dipak Agarwalla or Serastra and I will come to that and while it has been suggested to you in other submissions that my clients may be trying to attribute responsibility to others rather than face their own involvement, I reject that. My clients had not shirked from their
20 responsibility and involvement at Pike River. They have not hidden from public gaze.

Mr Whittall sat in that box for days, so too Mr Dowell, so too Mr Ellis. Lengthy briefs have been filed by my clients. Their commitment to assisting this
25 Commission has been unwavering. Some of my clients have sat stoically in this room as individuals never privy to relevant information, have offered you their opinions. While we may all have the right to an opinion, no one has the right be wrong on the fact.

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30 Yet you saw the likes of Don Elder climb first into the witness box and unload scathing criticism. I invite you to look again at the transcript of my cross-examination of Dr Elder in which he conceded that he had never worked as a geotechnical engineer for a coalmining company. He is not qualified as a

competent person under the JORC code unlike many of the experts who conducted reviews of the company's data, had never visited the mine, does not even work or live anywhere near the mine and did not even recognise the name of renown companies like Behre Dolbear Australia or BDA which
5 conducted favourable independent reviews of the Pike project.

Voltaire wrote that we owe respect to the living and to the dead we owe truth. Yet you know that the truth is that there is no certainty as to what caused the mine to explode on 19 November 2010 or even where in the mine the
10 explosion happened. You know it because independent experts engaged by the police and the Department of Labour told you. The truth is that 16 months after the tragic explosion, after extensive police and Department of Labour investigations, after 10 weeks of hearings before you, we do not know where
15 the explosion happened, what caused the methane source or what caused the ignition. The truth regrettably is that we are all left speculating and in that speculation you have heard evidence and submissions seeking to pin blame on the likes of Peter Whittall, Steve Ellis and the Pike board. But there is no conclusive evidence that anything any of these men did or did not do, caused the explosions. The truth is that they cannot fairly be scapegoated before you
20 on the evidence as it stands.

So let me turn first to Phase One. From the beginning of this inquiry there has been much mention made of the name Peter Whittall. Numerous times you heard about Mr Whittall's involvement in matters concerning the mine and with
25 every such mention, it is possible that someone might make the misassumption that Mr Whittall was the driving force behind mine conception, design and development. You however, know that such an assumption is not true. You know it because you have seen the evidence of John Dow that lays out over 50 odd pages the extensive feasibility work completed by respected
30 mining experts like Peter Gunn of Coal Marketing Services, David Stewart of Minserv International Limited, Graeme Duncan of Minarco and Golder Associates and years prior to Mr Whittall joining the company or even being aware of the project. As far as the single drift is concerned I invite you

to look again at the mine plans contained in the feasibility studies completed by Minserv in 1998 and Minarco in 2000. You saw in those plans that consultants to the company proposed a single entry drift.

- 5 That mine plan existed before any one of my six clients became a Pike director or officer. If you look carefully at the Phase One evidence in this inquiry as I know you will, you will recall that Mr Stewart had a wealth of West Coast experience including as the technical services manager at Spring Creek and the operations manager at Roa and Mr Duncan, similarly,
10 had substantial experience in West Coast mines. You saw in Mr Duncan's brief that at least 20 separate experts contributed to the feasibility study work carried out between 2000 and 2005, the year that Mr Whittall joined the company. You saw the list, experienced mining engineers who advised on matters including ventilation modelling and gas management and mine
15 planning and hydromining, geologists, geotechnical engineers and you URS Corporation New Zealand Limited which carried out a risk analysis for the Department of Conservation access agreement.

You heard evidence that Oki Nishioka was not in his words, "A key contributor
20 to the company, during the feasibility phase," but he is squarely included on Mr Duncan's list.

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When we asked Mr Nishioka about his involvement on cross-examination he accepted that he had sent email correspondence in 2005 providing guidance,
25 together with reports he had prepared at that time, in addition to him telling you you've seen those email documents and not only that but Mr Nishioka told you that his feasibility work was so limited that it went unpaid. Yet you saw evidence from Mr Duncan describing that Mr Nishioka was in fact paid for these consulting services. I invite you to look again at the contemporaneous
30 invoices and payment receipts corroborating that payment to Mr Nishioka was made.

On a different front, you also saw briefs of evidence from Mr Gunn who had extensive West Coast experience having worked as a senior geologist Solid Energy's predecessor and Mr Duncan of Minarco about the work undertaken to explore the geology of the mine site. You saw documents

5 confirming that the company's geological work was reviewed by Minarco, Golder, BDA and Resource Developments Consultants or RDCL. I invite you to look again at BDA's independent technical review completed in May 2007 in which BDA scored the company's risk level in respect of geological information as, "low/medium." What else do you know from this BDA

10 document? You know that BDA found, and I'm quoting directly from BDA's independent technical review that the, "ultimate mitigating factor for the resolution of coal seam structural interpretation and geometry issues as well as in the detection of structures that may materially affect the development and/or panel designs was the proposed ongoing programme of in-seam

15 drilling" at the mine and do you know that BDA explicitly commended the company in its review for its approach to in-seam drilling. You heard evidence about how the company retained the underground drilling company Valley Longwall Drilling Limited, a market leader in the supply of in-seam directional drilling services to the world's underground coalmining industry to

20 undertake that drilling. You heard nothing in the evidence that Valley Longwall raised concerns with any of my clients about the use of in-seam drilling to mitigate geological risk.

You also saw a March 2010 report from RDCL concluding and I quote directly

25 from the report, "In-seam drilling is seen as a key to managing risk associated with the previously unrecognised geological features in the mine. The new data shows that in-seam drilling is providing a much improved insight into the detail of the structural controls of the Brunner coal measures." And then you have the evidence of Dr Elder and what did this man tell you? He told you

30 that the company had done insufficient coal seam and geological investigation work, but his review was based on just three things, meetings and briefings with company management, briefings and discussions with Solid Energy with its own staff and public information, three things, and you know because

Dr Elder admitted during my cross-examination that he had little, if any, familiarity with public information, like the independent BDA and RDCL reports. His internal discussions were with just Solid Energy personnel and Mr Ward was the only company employee or director with whom he discussed the mine project. Dr Elder also conceded that his evidence criticising the company's geological work was based in the main on just one meeting he had with Mr Ward in 2000.

You also heard evidence from Dr Elder that Pike River had largely unique, his word, "unique safety issues." Ask yourselves why that would be. As sure as anyone has a reason to try to convince you that the 19 November 2010 explosion at Pike was not an accident, but foreseeable and preventable as argued in Solid Energy's submissions, Solid Energy does.

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The more Solid Energy can make the explosion about Pike River and not the risks of underground coalmining generally the greater possibility that your findings don't harm its commercial interests as the largest operator of underground coal mines in New Zealand and not only that, but you heard evidence from Dr Elder that the economics of mining the Pike River coal field are in his view marginal and contesting the quality of the company's coal. Ask yourselves as well why that would be. With Solid Energy seeking to purchase the mine which sale has now been announced, it was in the commercial interests of Solid Energy for Dr Elder to attempt to drive the price down by providing the type of public evidence and widely reported evidence including internationally that he did. The choice it is submitted is clear. You must either give weight to the evidence of Dr Elder with its clear limitations and motives or find as Dr Elder conceded, with respect to my director clients, that the reports obtained by the company from the likes of Minarco, Golder, BDA and RDCL, in Dr Elder's own words, "Comprise the sort of outside advice that I would expect a board and directors on a board who are not executive directors to be able to rely on." I submit that it is reasonable for all of my clients to have been able to rely on these expert reports.

I invite you to look again at Dr Newman's evidence too. You heard criticisms from her about the company's geological information. But you also heard that her request for funding from the company to test her strata-graphic geological model was declined. It is submitted that the evidence of such a witness must
5 be examined and weighed with greater care than you would give the evidence of a witness who had not been so rebuked by the company she later criticised.

You also heard because I asked Dr Newman on cross-examination that she had never been told by senior management that her request for further work
10 was denied or not approved because of financial constraints at the company. She conceded that she'd never even spoken with any of my director clients. You also heard evidence about the West Coast experience of geologists and others working for the company. When I asked Dr Newman about those people on cross-examination she appeared not to have considered in her
15 evidence the extensive specialist knowledge and experience of those involved in obtaining geological information to determine the feasibility of the mine.

And so I would like to change topic and talk a little –

20 **THE COMMISSION:**

Well Ms Shortall just before you do we hear the criticisms of course, we heard the cross-examination. At the end of the day from this Commission's perspective, the important point is whether or not the development and operation of this mine proceeded in the face of the inadequate geological
25 information. That is our concern. Are you suggesting that there was adequate geological information at the development and operational stages?

MS SHORTALL:

I'm submitting that my clients believed at the time that it was adequate
30 Your Honour and that that belief was formed based by the outside consultants that came in and provided services to the company at the time. I'm also and I will deal with this in a moment, I'm also going to talk to some of the comfort that my clients took from the involvement of Government departments.

THE COMMISSION:

Well we're conducting an inquiry and I think we should make that plain from the outset. Our concerns are the terms of reference. We are not here to try
5 your clients in relation to allegations and some instances even charges that they did things with full knowledge and acted wilfully as might be required in a criminal context, so we're really talking about different things.

MS SHORTALL:

10 I think the difficulty we have Your Honour, I understand the position that the Commission is in and I understand that you are not here to try my clients but I am also as has been reflected in the way in which my clients have had to provide evidence.

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15 I am mindful that at least one of them is currently subject to prosecution and I do not know what the police are going to do and I stand before you and give answers mindful of all those things. So point taken around the adequacy or inadequacy of the geological information. But –

20 THE COMMISSION:

Well what are we to take from your answer, that you don't have a view about whether it was adequate?

MS SHORTALL:

25 No, I have a view, I have a view that in order for my clients to have in the positions that they held, proceeded with mine development. They relied upon the advice that was provided to them and they believed, given the quality of those experts –

30 THE COMMISSION:

Well I think we well understand that. But the answer to the question that I asked?

MS SHORTALL:

Is that in that context they believed it was adequate.

THE COMMISSION:

- 5 I know. That's not the question. The question was – are you contending that there was adequate geological information at the development and production stages?

MS SHORTALL:

- 10 At the time my clients believed that, yes. With the benefit of hindsight –

THE COMMISSION:

Well that's not to answer the question.

15 **MS SHORTALL:**

- With the, my clients believed it at the time Your Honour, that's all I can give you. With the benefit of hindsight all of us in this room are second guessing choices we made. All of us, 29 men are dead. There's no question that's not lost on my clients but at the time they believed it was adequate. To the extent
20 that some of them were involved at that point. Remember I'd got two clients that only very recently joined the company. I've got director clients that were only on the board since February of 2007.

THE COMMISSION:

- 25 Right.

SUBMISSIONS CONTINUE: MS SHORTALL:

- I would like to change topic and talk a little about the approval process in relation to the mine by Government departments. You heard evidence from
30 Alan Sherwood, a senior geologist in the New Zealand Petroleum and Minerals branch at the Ministry of Economic Development that this Government department granted Pike a mining permit in 1997. Mr Sherwood told you that a condition of holding such a permit was that Pike had to submit

an annual work programme and mine plan to MED, every year programme and mine plan. Those programmes and mine plans are included in documents produced to you by the Department of Conservation and MED. You heard evidence from Mr Sherwood about MED officials visiting Pike's mine. Documents produced to you from the company's files show that two such officials were at the mine on 1 October 2010, just six weeks before the 19 November 2010 explosion. Now when Commissioner Henry asked Mr Sherwood, "You mentioned the annual work statement and planning in answer to Mr Wilding, would it be unkind of me to say it sounds as if, having received it you'd file it away?" You were told in response to Commissioner Henry's question and I'm quoting directly from Mr Sherwood's evidence, "That's not too far from the truth." But there is absolutely no evidence before you that anyone at any Government department ever told this to any of my clients or that they ever had any reason to believe that this was happening.

Turning for a moment to the Department of Conservation you heard evidence from Craig Jones, a DOC employee that there were extensive interactions between DOC and the company. He told you that plans and documents required by the access agreement, including Pike's annual work plans containing details of proposed operations were considered by DOC. Those work plans also are included in documents produced by DOC to you. You also heard from Mark Smith, a DOC liaison officer. That he commented on draft company work plans. He told you that Pike was required to submit detailed work plans to DOC for each drillhole the company sought to bore. In their submissions, however, DOC's counsel has emphasised that DOC never declined a request by the company to bore a drillhole. But with respect that's not the point. Craig Jones told you that he knew a number of drillholes at Pike's mine site. You heard evidence that just once, in 2004, a Government department required additional drillholes to be bored and you heard that they were. But you saw no evidence that ever again did a Government department require or request additional drillholes.

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Ask yourselves whether, by their conduct, if you were one of my clients you reasonably would have believed that the Government had approved the mine's development on the basis of the drillholes bored. Yet department witnesses have told you that the Government departments didn't consider that they had approved the mine. Their counsel has made lengthy submissions saying essentially that they're not in the business of giving approvals, but you know that if the Government departments had evidence of them making that point clear to Pike they would have shown it to you. You know this because they've shown you everything else under the sun. You know that if they had letters or emails to Pike stating that in receiving work programmes and mine plans and raising no objection they were not exercising any approve, they'd have shown it to you. The Government with all of its resources has produced to you hundreds of documents and institutional reports totalling over 800 pages, not one of those documents shows that the Government departments made it clear to any of my clients that they were just recipients of paper and not approvers. In the wake of tragedies it is accepted that people create narratives that make sense to them. Memories are shaped accordingly, explanations are generated.

I would like now to talk a little about the design and development of the mine and evidence that you also heard during Phase One and as I do I invite you to consider the diagram contained at page 18 of our written submissions and perhaps Ms Basher if we could please have that consultant diagram brought up. This is a diagram that we put together based on evidence you have heard or documents that have been produced to you that identify the consultants who advise the company on the design and development of its mine. Thirty-two consultants were identified in the diagram, but the diagram is not intended to be exhausted, rather you've already seen evidence from Mr Duncan at Minarco, which is identified on the diagram displayed, utilised at least 20 experts itself when undertaking feasibility work between 2000 and 2005 that was utilised for mine design and development.

Mr Nishioka is one of only two expert consultants to have appeared before you as a witness and we didn't separately identify him, so he's a good example of the non-exhaustive nature of the diagram, but based on the information available to us just seven, just seven of the 32 experts identified in the diagram have provided evidence to you and you know that the Rockwell brief only came in recently, it was six at the time that we'd filed our written submissions and that submission, as you know, refutes Tony Reczek's evidence as implausible.

10 Now you heard evidence from the head of the Department of Labour investigation during my cross-examination that certain experts deemed sufficiently qualified and respected to assist the Department of Labour in their investigation into the explosion were conflicted out because of their prior work for the company. It is submitted that there can be no dispute that many, many
15 experts were involved. I don't intend to go into this diagram in any depth, but I would for the record like to note that the categories in which consultancy services were provided to the company included safety management.

Rob Storey - Independent Consultancy Services Limited and David Moylan -
20 Platinum Safety Limited provided services.

On spontaneous combustion Basil Beemish provided services.

On strata control and subsistence the experts identified in the evidence before
25 you, Rob Thomas - Strata Engineering; John St George - Auckland University;
Dr William Lawrence - GeoWorks Engineering; Strata Control Technology,
Cam Wylie of RDCL.

On design and geological assessment URS Sinclair (inaudible 10:04:34),
30 Peter Crossdale - Energy Resources Consulting Limited; Peter Gunn - Coal
Marketing Services; Minarco; Dr John St George - Auckland University;
Mr David Bell - Canterbury University; David Stewart - Minserv,
Jane Newman - Newman Energy Research.

On ventilation, the list on this diagram illustrative, not exhaustive, Phil Mitchell – Minarco; Andrew Self - Australia Coal Mining Consultants; Flakt Woods Fans; Jim Rennie; John Rowling - Dallas Mining Services.

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On gas management CRL Energy Limited; Valley Longwall; Miles Brown - Dried Mining Limited, GeoGas Limited, Chris Marne from Mechanical Technology Limited.

10 And on electrical and commissioning, Comlek; iPower Solutions; Switchbuild Limited; Rockwell Automation; AMP Control and Electrolet West Power.

I invite you to carefully consider the calibre of the consultants identified in this diagram about which evidence has been put before you and who my clients placed trust.

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To assist in that consideration I would like to refer briefly to the summary which we prepared based on evidence heard before you, documents provided to you and in several instances some information from publicly available websites. Let's pull that document up it is Ms Basher please the Qualifications Summary at DAO.042.0013. This summary runs 20 pages. It lists the qualifications and experience of the myriad of consultants I just listed. What does this summary show? In the interests of time I'm not going to go through all of the detail here, it is broken down by category but it shows you that there was a vast array of expertise. There were mining experts, people with industry knowledge, people from different backgrounds. There was a mix of academic and practical experience and I invite you in the interests of time without going through it in length today to review that as I know you will and the course of reaching your findings.

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One question for you will be whether you think that it was reasonable for my clients and for that matter the other company directors and officers to rely on the expertise of all these consultants in designing and developing the mine.

Notably none of the other written submissions provided to you anywhere mention these consultants. Rather, submissions filed on the behalf of the likes of the EPMU and the families appear to try to sheet home to management or the board full responsibility.

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Now what did Mr Reece say when I asked him about the use of consultants like those on the diagram that we've talked about and described in the summary that's currently displayed? Let me read directly from the hearing transcript. Question, "Would you agree with me Mr Reece that it's reasonable for mine management to bring in external consultants and experts to assist?" Answer, "Absolutely yes." Question, "And as a mine manager you've got an extensive career as a mine manager among other things. Did you engage subject matter experts to assist you?" Answer, "Certainly, yes." Question, "Do you consider it reasonable for management to rely on experts?" Answer, "Well you need to because you're getting into technical areas, yes." Remember too, the evidence from Tony Reczek the other expert to give evidence before you and what did Mr Reczek say, let me again read directly from the transcript. Question, "Now would you agree that it's reasonable for an underground coalmining company to engage people with appropriate expertise and skill to design and install its electrical system wouldn't you?" Answer, "Yes I do." There may be those in this courtroom who want you to believe that Mr Whittall or perhaps the Pike board deserve to be scapegoated for mine design and development in the wake of the November tragedy, but ask yourselves whether that is fair or justified or consistent with the evidence. In order to conclude that any of my clients or for that matter any of the other company directors and officers should specifically be subject to an adverse finding in connection with mine design and development. You would have to believe that much of the advice received from those 32 if not more expert consultants should've been disregarded.

30

Before changing topics I also just want to briefly touch on one particular design feature of the Pike mine that has come up including in submissions, namely the underground fan. Submissions have been made by counsel for

the families and the EPMU criticising the underground placement of the man fan at Pike.

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But remember the tender response received from fan manufacturer
5 Flakt Woods, the one in which appears Flakt Woods proposes the option of
locating the main fan underground at the companies mine and you will recall
that Flakt Woods has provided ventilation equipment for most underground
mines in Australia and not only that but remember the risk assessment
10 undertaken in 2007 to determine the viability of establishing the main
ventilation fans underground. You saw that risk assessment when Mr White
gave evidence. I invite you to take another look at page 5 of that risk
assessment. Where you'll see that the assessment was facilitated by
David Moylan who's included on our list of consultants and his extensive
15 qualifications are there described. Other members of the risk assessment
team also included among others two further experts, identified on the
diagram and summary we have talked about. Ian Millar of Flakt Woods and
Jim Rennie. And remember too that Mr Firmin told you that the
Department of Labour knew of the fans proposed location underground from
20 at least 2007, three years before its installation and remember that Mr Poynter
inspected the mine on 2 November 2010 after the underground fan was
installed. You have heard no evidence that Mr Poynter took any exception to
its underground location during or following that inspection. I would like now
to move to Phase Two. You heard much evidence during Phase Two about
25 the efforts made by scores of people to assist with the search, rescue and
recovery operation at the mine. You have seen in our written submissions
that my clients thank all those people, all of them who sought to assist the
operation and do everything possible to reach the men. I wish to reiterate that
heartfelt thanks before you now and I want to talk about five topics that arose
30 during Phase Two, in the following order, before covering to the extent not
already canvassed in those topics the Department of Labour's oversight which
also was addressed as part of the Phase Two hearings before you. The five
topics are, first, the second means of egress. Second, what has been
described as the fresh air base at the bottom of the Slimline shaft. Third the

absence of a tube-bundle system, underground from 19 November 2010. Fourth, emergency response planning at the mine and fifth, but by no means of lower importance than any other topic I speak to today, communications with the families and the accusation that Mr Whittall gave false hope. So let's

5 look at each of those things one by one. Second means of egress – throughout this inquiry there has been much discussion of the second means of egress from the mine. Considering the ladder climb up the ventilation shaft an escapeway pending the installation of a permanent second means of egress has been widely criticised before you. Scapegoats are convenient,

10 how much easier it is to try to pin blame to an individual or group of individuals rather than consider notions of collective responsibility. Yet that, it is submitted is exactly what the Commission must do here. Let me explain. You saw evidence that URS was a pivotal consultant to the company throughout the mine design process but you have seen no evidence that URS raised any

15 concerns about the second means of egress from the mine with any of my clients. You know that the Department of Labour was well aware of the second means of egress. You know this because Mr Poynter very candidly told you. Let me read what Mr Poynter said directly from a hearing transcript, “It was common knowledge that there was going to be an egress for a period

20 of time in the shaft.” Mr Firmin told you that he and Mr Poynter conducted a joint inspection of Pike’s mine in May 2008, he told you that he discussed with Kobus Louw the mine manager at the time how a ladderway in the shaft would be a second egress from the mine.

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25 John Walrond from the Department of Labour attended a meeting at McConnell Dowell’s Auckland offices in 2008 with Farra Engineering concerning the shaft. I invite you to look again at those Department of Labour documents which show that the plan, quote from the documents, “To install a vertical escape ladder with platforms at nine metre intervals, was to be

30 discussed between McConnell Dowell and Mr Poynter before the design was finalised.” When I asked Mr Poynter about this on cross-examination he recalled emails from 2008 confirming as much. You saw documents showing that Mr Poynter and other Department of Labour representatives met in

January 2009 with Farra Engineering, without anyone from Pike present, to discuss the construction of the ventilation shaft.

5 Mr Firmin also told you that he knew for more than two years prior to 19 November 2010 that the climb up the ladderway was more than 100 metres. In his evidence to you, Mr Poynter criticised use of the ventilation shaft as a second means of egress but you saw Mr Poynter's notes made an insight, made after a visit to the mine in 2010, where he wrote that the shaft met minimum requirements as a means of egress from Pike's mine. Perhaps 10 of equal significance in this note made at the time, not following the tragic explosion, is that Mr Poynter made plain his understanding that the egress was through the shaft which, and I'm reading directly from Mr Poynter's note, "Allows the evacuation of employees one at a time up the ladderway." Mr Whittall told you that he was informed by Mr White that the mines inspector 15 had approved the ladder climb up the ventilation shaft as an escapeway pending the second walkout being developed.

Mr Dow also told you that he was told that the second means of egress had been inspected by the mines inspector who found it adequate. You also know 20 from the evidence that McConnell Dowell had men working underground in Pike's mine from the moment that that first stick of dynamite was used to break ground so that tunnelling could begin. Yet you saw no evidence that McConnell Dowell with its extensive experience in underground coal mines ever raised any concerns about its men working in a mine where the second 25 escapeway required a ladder in the ventilation shaft to be climbed. Remember, too, that Valley Longwall is a company well known in underground coalmining circles, yet you saw no evidence that Valley Longwall ever raised any concerns either about any of its men working underground at Pike where the vent shaft climb was the second escapeway. You saw no 30 evidence that any of the other consultants or contractors who went underground at Pike, men as recorded in the summary that's been put before you, have long years of experience of underground coal mines, raised any

concerns before 19 November 2010 about the second means of egress with any of my clients.

You also know that Mines Rescue was aware of the second means of egress.

5 You know that Mr Coll, Matt Coll of Mines Rescue, attended the risk assessment on the second means of egress as a representative of Mines Rescue. Mr Watts told you that he only conveyed his disquiet about the ventilation shaft to Neville Rockhouse, not to any of my clients. Whatever view you may ultimately form as to the adequacy of the ladderway in the
10 ventilation shaft as an escapeway from the mine, the evidence is clear that this feature of Pike's mine was no secret. It was, as Mr Poynter told you, widely known.

Neville Rockhouse has told you that he, before 19 November 2010, did not
15 consider that the shaft ladderway provided an appropriate means of escape. He was especially critical of Mr Whittall for not attending a planned climb up the shaft in 2009, yet Mr Whittall told you how Gordon Ward required him to attend to office work that day instead of participating.

1020

20 Mr Rockhouse also told you that he raised his concerns about the shaft as an escapeway at management meetings, yet you know those meetings were minuted and that the minutes have been produced to you and that none of those minutes, including the ones taken and prepared by Mr Rockhouse himself record the level of concerns that he has told you about here.

25

You also saw the final risk assessment document relating to the emergency evacuation of persons underground at the mine. You saw that Mr Rockhouse prepared the document and that the document records a risk assessment meeting conducted on 5 March 2010 that was attended by, among others,
30 Mr Rockhouse as the company safety manager, Mick Lerch as the mine manager, and Doug White as operations manager. No Peter Whittall. You know that Mr Whittall had been relocated to the company's corporate offices in Wellington two months earlier. Mr Dow told you that Mr Rockhouse never

raised with him any concern about the shaft ladder providing an escapeway from the mine. You know that Mr Dow was physically present at the mine at least eight times in 2010 and also in prior years. You know this because he told you. Mr Dow also told you about the informal gatherings held between
5 Pike directors and Pike senior managers including Mr Rockhouse. Notwithstanding what counsel for Mr Rockhouse said yesterday, the substantial personal loss suffered by Mr Rockhouse is acknowledge by my clients. They feel his grief and they continue to extend their condolences, but they refuse to accept that Mr Rockhouse can through this inquiry seek to
10 distance himself from the operation of the mine with the shaft ladderway providing the second escapeway. You know he was part of the senior management team. You know he was the only safety manager at the mine, one of the company's longest standing employees.

15 Finally, one more point on the second means of egress. You know that there is no conclusive evidence that even had a second walkout exit existed from Pike's mine on 19 November 2010 any of the men would not have died. No party before you has sought to re-open the Coroner's finding that the 29 men sadly died during the first explosion or shortly after. I will not detail that finding
20 here. But when asked by Your Honour yesterday what the families accept shortly thereafter to me, Mr Raymond referred to a matter of minutes. That accepted timing, which is consistent with the medical reports on which the Coroner's findings were based and that have not been disputed before you, does not support any finding that any of the men would have been able to
25 attempt to climb the ladder to exit the mine that tragic November day.

Let me turn to my second topic under the Phase Two banner. What has been described as a fresh air base at the bottom of the Slimline shaft also has been criticised in evidence before you, but again you have heard evidence that the
30 location and nature of this base was no secret, including to the Department of Labour or Mines Rescue. I asked Mr Poynter on cross-examination about his knowledge of the vicinity of the gas drainage line to the fresh air base location. Mr Poynter told you that he went underground at least seven times after the

gas drainage riser was installed in the same stub as the Slimline shaft. Mr Poynter also told you that he went inside the mine's fresh air base. Yet you know he never exercised any of his enforcement powers in relation to the base or otherwise at Pike's mine. Glenville Stiles from New Zealand Mines
5 Rescue also told you that he audited the supplies of medical equipment inside Pike's fresh air base. You also know that there is no conclusive evidence before you that had the fresh air base at Pike been in a different location or of a different standard on 19 November 2010, any of the men would not have died. And let me touch briefly on one additional matter here. Mr Whittall
10 received further flack in Mr Rockhouse's evidence for not authorising the purchase of an underground refuge chamber.

1025

But before you decide what weight to give to that evidence remember that Mr Rockhouse admitted when I asked him in cross-examination that he only
15 ever made a verbal proposal and failed to produce a business written case justifying the purchase for addressing the controversy in the industry about installation of refuge chambers underground.

I now want to briefly address the absence of a tube-bundle system in the Pike
20 mine on 19 November 2010. Darren Brady of SIMTARS told you that even if that system was in place at – I'm using his words, "May or may not," have provided additional information as to the mine atmosphere following the explosion. Now both Mr White and Mr Whittall told you about how the company had included a tube-bundle gas monitoring system and its
25 2010/2011 budget which was to be implemented to monitor the goaf area once sealed. But Mr White told you he had budgeted to purchase the system in November 2010 and that Mr Whittall had pushed it out the date.

Now people had been trying to put the blame on each other since the
30 beginning of time and my clients have no desire to engage in the blame game, which it is submitted has on occasion surfaced in hearings before you and I do not understand that Mr White is intending to do that either. So I simply invite you to look again at the budget document that I showed to Mr White on cross-

examination and I asked you to remember that Mr White accepted that the document shows that the tube-bundle system was to be purchased in January 2011 and that it was possible he had in fact proposed January 2011 for the purchase of the tube-bundle system and not earlier. And I add that, 5 whatever the difference between these two men is on timing, the evidence is consistent that the company planned to install a tube-bundle system. You know that notwithstanding submissions made, Mr White also accepted when I asked him on cross-examination that the plan to install a tube-bundle system was in place before he joined Pike River.

10

Let me turn to my next Phase Two topic. There has been much criticism before you that the company had not planned for an explosion and of the company's emergency response management plan. You saw that plan. You heard Assistant Police Commissioner Nicholls acknowledge when I asked him 15 in cross-examination that the plan does reference an explosion. You also saw evidence about Mr White's extensive qualifications and experience in emergency management. Mr Moore highlighted that expertise in his presentation to you on Monday. You also saw Mr Rockhouse's evidence about his credentials and experience in emergency response management. I 20 invite you to look again at exhibit 48 which is the enrolment form for a conference held in Brisbane in May 2010, just six months before the explosion. The conference topic, "Mine site emergency management." The exhibit shows and Mr Rockhouse told you when I asked him about it in cross-examination that Mr Rockhouse presented at that conference on thorough 25 preparedness in an emergency response plan. That was his conference presentation.

Ask yourselves, if you were my clients whether these facts, this combination of facts, would cause you to believe that the company did not have as its 30 senior onsite team in 2010 people to appropriately prepare for an explosion emergency.

During the Phase Two hearings there also was much discussion of whether Mr Whittall had given the families false hope in the days following the explosion. And during the months that I've been sitting here in this courtroom during the hearings I've had an opportunity to think about what that means.

5 False hope. Ask yourselves, why, would Peter Whittall give hope to grief stricken families unless he truly believed that survival was possible. While Mr Whittall's hope may have been proved false, it doesn't follow that he gave false hope.

1030

10 It doesn't follow that he gave hope falsely. You heard Mr Whittall poignantly explain his thinking at the time and in his submission to you yesterday counsel for the families acknowledged that Mr Whittall had no intent to mislead anyone. Mr Raymond referenced how the families would have preferred to also have Trevor Watts of Mines Rescue speaking to them at the time about
15 survivability, and you saw evidence from Mr Whittall about his repeated efforts made at the time to have Mr Watts do so. You also saw from the evidence filed by family members that there are a range of views as to how they felt Mr Whittall handled communications. I do not intend to canvass that range today. I cannot and would never speak to the families' views, but I can speak
20 about Mr Whittall's. So as you consider the question of communications with the families, I ask only that you remember Mr Whittall's words when I asked him if he had any regrets in terms of his communications. Let me read directly from the transcript question. "Do you regret the way that you delivered the message on the 24th Mr Whittall?" Answer, "Oh yeah, only for about
25 10 months." Question, "Just one final question Mr Whittall. Do you have any regrets more generally in terms of your communications with the families?" Answer, "I suppose my general regret and regret's probably a good word and my general regret is that anyone could have..." Question, "Just take your time sir." Answer, "I suppose my regret is that anyone could at any stage believe
30 that I had anything other than the best intentions to tell the truth at all stages and to give the families all the support I could possibly do."

I would like to turn very briefly to the Department of Labour regulatory oversight to the extent I've not already covered it off. You heard evidence from both Mr Firmin and Mr Poynter about their extensive dealings with the mine. You have seen materials recording over 120 separate interactions
5 between the Department of Labour and Pike in 2010 alone. Just using rough math, that's one almost every three days. You have heard in evidence and submissions from the Department of Labour that its inspectors were under-resourced and overworked, but there is no evidence that this issue was communicated to any of my clients before 19 November 2010. And ask
10 yourselves, if you were my clients would this level of interaction have caused you to believe at the time that there was any such issue? Remember too that Mr Poynter accepted, when I asked him on cross-examination, that no one at the company ever denied him access to information at the mine. Choices as to what to inspect and at what level of scrutiny were made by the inspectors
15 themselves. There is a saying that the best defence is good offence, and how better to take the offence and seek to deflect responsibility than to prosecute, including the former CEO of the company based on an investigation that you have heard did not explore the role of the Department of Labour's own inspectors at Pike River. Whatever weight you give the conclusions contained
20 in the Gunningham and Neal report in light of what you have seen and heard in this inquiry, the summary attached to that report identifying the litany of inspections, visits, calls, letters and emails between the Department and Pike as corrected when some small errors were identified by Mr Wilding in his questioning, must still provide something of use to you.

25

You heard when I asked him on cross-examination, Brett Murray, the head of the Department of Labour's investigation, concede that Mr Poynter and Mr Firmin to a lesser extent, attended interviews of Pike workers and questioned them during the Department of Labour's investigation.

30

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Yet you heard that the Department of Labour did not interview Mr Poynter or Mr Firmin as part of its investigation into the Pike tragedy. Mr Davidson asked yesterday as to the Pike Board, three of whom are my clients, for you to

consider who guards the guardsman. I ask no less of you for the Department of Labour mines inspectors who had frequent and unrestricted access to Pike's mine.

5 Let me move to Phase Three. In your list of issues you very clearly used just five words to capture the heart of your inquiry in Phase Three, what happened at Pike River? What happened at Pike River? What caused that terrible explosion on 19 November 2010? What caused good people to lose the men they loved? You don't know. None of us do. Not the experts who sat in that
10 witness box and told you that there is very little in the way of absolutes to determine what caused the explosion, who could not be conclusive about where the explosion happened or the methane source or the ignition source and whose evidence as to arching induced by harmonic currents providing the most likely ignition source has now been rejected by Rockwell Automation
15 which provided the variable speed drives at issue on that theory. Not any of the other witnesses who had given you evidence either, but you do know that there were shortcomings in the company's systems. You know that mine and oversight systems did not function as they were intended. You know that information fell through cracks. You know it because witnesses have told you,
20 documents produced to you show it and summaries prepared by your analysts highlighted. My clients do not dispute that. They have been as dismayed as everyone else to see during the course of this inquiry the shortcomings in the company's systems and you may ask, by way of your report, whether any of the six men on behalf of whom I stand before you today should have known
25 about those shortcomings before 19 November 2010, but you have no evidence that they did, and as other counsel have stood before you expressing outrage that the six men I am here for had not accepted blame or responsibility it bears noting that your schedule only permits me to speak today. My clients are here through me and they publicly acknowledge the
30 shortcomings. You know that their ability to accept responsibility or blame is no easy thing. There is a pending Department of Labour prosecution against one of my clients. It remains unclear, at least to me, whether there will be a police prosecution that I strongly believe that there is no evidence to support

any such prosecution is of no weight. The risk is there. I have had no option in those circumstances but to advise my clients to remain silent as to responsibility or blame in submissions. They have taken that advice. If any of the families of the Pike 29 have anger or frustration as to my clients' silence, 5 that sentiment should be directed at me, the lawyer providing legal advice, not at my clients.

I also must mention that when other lawyers made these comments yesterday they did not even mutter the names of the others who you know from the 10 evidence were involved with the company. To use a stark example, despite being prosecuted by the Department of Labour, there is no mention let alone criticism of Valley Longwall in the families or in fact any closing submissions. None of the other company directors or officers were mentioned in counsel's comments yesterday. Gordon Ward, Gordon Ward, Gordon Ward, the CEO 15 until six weeks before the explosion. He's refused to come before you. He's provided no witness statement and yet he drew no fire from my learned friends. It is almost though, in being prepared to front up in actively participating in this inquiry, in filing submissions, seeking to assist you in distilling lengthy evidence, instead of cowering in other countries or locations 20 that my clients have become more deserving in the eyes of some of angry criticism.

1040

Ask yourselves whether that is fair and what message it sends to company directors and officers should, heaven forbid, this country ever need to 25 convene another Commission inquiring into a tragedy. Better to hide than to stand up. You know that when the company went into receivership and became unable to provide the assistance you sought through having company files and materials collected, copied and provided to you it was my clients who took on that burden. They did so readily because they want to assist you and 30 you know from such documents that the board was receiving reports on the company's health and safety performance, through monthly operations reports. Those monthly reports have been produced to you. You know that health and safety is the first topic discussed in each of those reports. You

have reviewed the agendas for the board meetings held. You know that health and safety is on each of those agendas and you have seen the minutes of Pike Board meetings, you have seen that those minutes record board discussion of health and safety matters.

5

Mr Dow also told you that health and safety was reported on and discussed at every board meeting. Mr Dow told you too that the board never denied funding for a health and safety related matter. In addition you have seen the charts in our written submissions showing the frequency with which
10 Gordon Ward participated in weekly site management meetings that were consistently attended by others including Mr Rockhouse. You know that Mr Ward was at the helm of the Pike Project for at least 12 years through the time that hydromining commenced. You know it because you've seen it in written briefs from New Zealand Oil and Gas, Mr Dow, Tony Radford, the
15 former chair of Pike's board and from Mr Gunn. Mr Dow told you how the board of directors drew comfort from the fact that Mr Ward attended weekly management meetings and was able to hear directly from management about operational matters and why? Because as you know not only was Mr Ward the most senior company manager, but he was also company director until
20 just six weeks before the November 2010 explosion. You saw evidence too from Mr Dow about the role of statutory officials at Pike's mine. You know that the role of mine manager at a mine site is a statutory position with statutory responsibilities. You heard Mr Dow tell you about the confidence that the board placed in a mine manager of the quality of Mr White.

25

You know that Mr White was the deputy chief inspector of coal mines in Queensland at the time he applied for the senior mine site management role at Pike. A miner who described in his written brief having spent 32 years working underground including in some of the most challenging mines in
30 Australia. Remember too that Mr White told you that in November 2010 he was in control of the mine site as the most senior official and that he was considered that under the legislation. He told you that. Mr White also told you that he accepted responsibility for ventilation when he took on the statutory

role as mine manager. When Commissioner Bell asked Mr White if he felt he could shut the mine down his response was, yes. You saw the minutes of the board meeting held at the mine site on 15 November 2010, just four days before the tragic explosion which record Mr White telling directors and I'm
5 reading directly from the minutes, "That from a mining perspective risk management practices at the mine were very advanced, following the Queensland recommendations, the dealing with gas emissions rather than the New Zealand recommendations. The Queensland recommendations being more stringent""and then the minutes record Mr White describing "Gas in
10 higher in the eastern area of the mine at approximate eight cubic metres per tonne of coal but it is drained and with adequate ventilation is more a nuisance and daily operational consideration than a significant problem or barrier to operations."

1045

15 Remember also when Mr White told you that the minutes accurately reflect what he said to the directors at that meeting. Recall too, that in the transcript of one of Mr White's interviews by police and Department of Labour, investigators which has been produced to you, he described getting a, "grilling," his word from directors in this meeting. Remember too, the
20 submission made by Mr White's lawyer yesterday about all the good health and safety work that it was known Mr White was doing at the mine. I invite you to look again at the 15 November 2010 board minutes. Is it reasonable to think that my director clients accepted Mr White's reassuring words as to risk management practices in the mine had anything other than face value? I
25 submit it is not. And you may properly ask whether my director clients should have done more to check this reassurance from the former deputy chief inspector of coal mines for Queensland and with the benefit of 20/20 hindsight Mr Dow sat there and told you that he wished the board had pressed the third party audits sooner.

30

You also know that on the one occasion when an issue was brought to Mr Dow's attention he immediately acted on it. You heard from both David Stewart and Mr Dow about how when Mr Dow was approached by an

external person about a cultural issue he perceived developing at the mine, Mr Dow promptly arranged for Mr Stewart to conduct an external audit and recommend improvements. I asked Mr Stewart about this retention in his cross-examination and this is what he told you. Question, “So you would agree with me that the company of its own volition had retained you as a consultant to conduct audits to check that it was complying with New Zealand legislation relating to mining, right?” Answer, “At that period, yes.” “And you would agree with me that retaining you in that role indicated that the board and senior management took compliance with its health and safety obligations seriously.” Answer, “Yes, yes absolutely otherwise they wouldn't have employed or asked me to do the work.”

COMMISSION ADJOURNS: 10.47 AAM

COMMISSION RESUMES: 11.06 AM

SUBMISSIONS CONTINUE: MS SHORTALL

I'll just pick up from where I left off, Commissioners, there also is no evidence
5 that had the health and safety sub-committee of the board met more with the
mine safety manager that Mr Rockhouse would have told the directors about
the serious issues that had been laid there before you. You know that
Mr Rockhouse himself didn't learn of the unsafe practices underground until
after the explosion. You know it because he told you. His lawyer also has
10 referred to Mr Rockhouse's shock and dismay in his closing submissions. My
clients share that reaction. Remember that Mr Murray told you that the
Department of Labour did not find in its investigation, its extensive
investigation that any of the companies, directors and officers new about
instances of safety features being over-ridden by underground workers by, for
15 example, fresh air from compressed air pipes or Venturi fans being blown over
sensors.

Mr Murray also told you that the department did not find that any of the
companies directors or officers knew about men working underground having,
20 on occasion, placed plastic bag or tape over sensors. Even as to those
pre-explosion concerns that Mr Rockhouse told you he knew about there is no
evidence before you that Mr Rockhouse would have told them to, the health
and safety sub-committee had it met more frequently. Mr Rockhouse did not
say that to you in any of his live evidence. It's not in any of his written briefs
25 and it's not in any of the extensive transcripts of his police or Department of
Labour interviews. We've checked. We can't find it. It's not there.

Remember, too, that Mr Dow told you about the director's informal interactions
with senior management, including Mr Rockhouse. There were dinners and
30 other social events. Now if Mr Rockhouse held the safety concerns about
which he has given evidence before he personally suffered such a tragic loss
on 19 November 2010, don't you think he would have pulled aside Mr Dow or
any one of the other Pike directors. You know that Mr Rockhouse is someone

who takes safety seriously. You heard evidence about his standing in the safety industry. Mr Rockhouse told you about being the president elect of the international network of safety and health practitioner organisations. The operations manager of the New Zealand Institute of Safety Management, an ACC accredited auditor. He has a masters degree in occupational health and safety.

1110

You know that Mr Rockhouse spoke up publicly at things like conferences about safety issues. When he was asked on cross-examination by counsel for the families whether he felt intimidated or bullied by Mr Whittall, such that he might have hesitated to raise safety concerns, Mr Rockhouse agreed. But I invite you to look again at the email Mr Rockhouse sent to Mr Whittall on 14 September 2010, warmly congratulating him on his appointment as CEO. I'd like to read just briefly directly from that email. Mr Rockhouse writes, "Hi Peter, just wanted to wish you the warmest congratulations to your new role as CEO." Mr Whittall responds, "Thanks Neville, if my health starts to suffer I will call you in. I appreciate your ongoing support as always. Peter." Mr Rockhouse almost immediately responds, "No problems mate always here to help. I must say it will be a challenge. I think that you will do well because you know your stuff but she'll be a big job mate." If Mr Rockhouse was being intimidated by Mr Whittall and having real concerns as to Mr Whittall about egress from the mine or safety being compromised for production, ask yourselves whether he would've sent such an email.

In this inquiry, if you have to shift any blame, who could be a more convenient fall guy than Peter Whittall? He had held the general manager position before being appointed CEO at Pike. He became the public face of the company after the tragic explosion, notwithstanding that he had never sought any limelight. Contrary to the implication made by other counsel in closing, Mr Whittall has not sought to unfairly distance himself from the mine's systems in place in November 2010. As you weigh the Phase Three evidence put before you remember that Mr Whittall relocated from Greymouth to corporate offices in Wellington in January 2010. You have heard evidence

from Mr White about his onsite role from that time as operations manager and that Mr Lerch had the statutory responsibility, not Mr White, as mine manager until June that year.

5 Mr Whittall doesn't deny that he went to the mine site from January. He doesn't deny that but he was based in Wellington, he has told you in evidence what his workload involved and how it turned in that year to corporate matters. Mr White and Mr van Rooyen told you about the significant changes underground in 2010, roadways were driven out to the first hydromining
10 panels. Ventilation structures were developed. You know too, that the main underground fan was installed and commissioning work progressed in 2010, not earlier. I invite you to look again at exhibit 33, which is the mine plan from January 2010, when Mr Whittall was relocated to Wellington and I invite you to contrast that with the plan used during hearings showing the mine by
15 November 2010. A copy of that latter plan is included for you at page 60 of our submissions, the change it is submitted is dramatic.

I invite you too, on the topic of hydromining which has been of considerable focus before you to look again at the evidence of Mr van Rooyen about the
20 commencement of hydromining. He told you about the layout of the panel. The expert advice that was obtained regarding its location and the decision to widen the panel and the permit to mine which was signed by Mr White as the mine manager. You saw no evidence that my clients Mr Whittall or Mr Ellis were handling these operational matters in 2010. You also have been
25 provided with documents identifying the hydro team, with Terry Moynihan as the pivotal manager of that team. None of my clients were on that team either.

You have however heard some evidence seeking to point the finger at Mr Ellis
30 around the reporting of gas levels no longer happening at daily production meetings after he became the company's production manager, just six weeks before the 19 November 2010 explosion.

1115

But you've seen Mr Ellis' reply evidence about Mr White having charge of ventilation at the mine. You know too, that this criticism came from Greg Borichevsky, who has not appeared before you or been subject to cross-examination and you've seen Mr Ellis' evidence explaining how he was hardly
5 at the mine prior to 19 November 2010 and rather focused on completing the necessary requirements to obtain his first class mine managers ticket in New Zealand and he did not take up the role of mine manager at Pike until Mr White left the company around Christmas Eve 2010.

10 In his closing argument yesterday when answering from Commissioner Henry about reporting structures, Mr White's lawyer said to you that deficiencies, including ventilation issues and gas spiking weren't reported to Mr White after Mr Ellis took over at production manager and began running the production
15 meetings and I submit to you that the evidence does not link those events in the way it could've been interpreted yesterday. To clarify what the evidence shows at least two of the gas spikes about which you have heard evidence occurred before Mr Ellis even assumed the role of production management at Pike on 1 October 2010. Also Mr White's position would appear inconsistent
20 with Mr Borichevsky's criticism to the extent you give it any weight that the gas information wasn't discussed at production meetings after Mr Ellis started running them. You've seen the evidence too that Mr Borichevsky reported to Mr White not Mr Ellis and to the extent that the EPMU in their written submissions criticise Mr Ellis' qualifications, I invite you to look at his resume
25 attached to his written brief and to form your own view as to his expertise.

And just before I move on, you heard evidence that was widely reported outside this courtroom that Oki Nishioka, the Japanese expert who helped design and commission the company's hydromining system told three senior
30 managers about an explosion fear. You know that this has been flatly rejected as false by each of those managers. As to Mr Whittall you know too that he was not in New Zealand but in London at the time Mr Nishioka claims he told Mr Whittall about his concern on site in person. And I must also respond to the criticism in the EPMU and family submissions about the

location of the main fan underground in which lawyers reference in support in a footnote what they have described to you as the evidence of Udo Renk criticising Mr Whittall on this matter. The document cited by those lawyers is in fact a self described summary of a Department of Labour investigator's
5 phone call with Mr Renk on 4 October 2011, well after this inquiry was very publically underway. It is not a transcript of a conversation, it is not a verbatim account of what Mr Renk said, it has not been subject to any cross-examination. You also know that there is no conclusive evidence that had the fan being located above ground the explosion would not have occurred or any
10 of the men would not have died.

Just as briefly addressing certain other Phase Three matters, there is no conclusive evidence that even if the gas drainage pipeline had been larger on 19 November 2010 the explosion would not have occurred. Just as also there
15 is no conclusive evidence that had the mine stoppings been constructed differently the explosion would not have occurred and this list could go on. The same point could be made in response to the criticisms levelled during hearings about the type of mining equipment in use, the maintenance of equipment, the absence of tube-bundling, the gas monitoring, the extent of
20 union involvement at the mine, the experience level of the workforce. I must response too to it is submitted in an outrageous statement made in the EPMUs submissions that deliberate steps were taken by Mr Whittall to employ Cleanskins so that work could be done his way and union presence at Pike's mine would be limited. The EPMU cites absolutely no evidential support for
25 the accusation.

1120

The accusation was never put to Mr Whittall and the excuse in the EPMU's written submission that this is because Mr Whittall did not appear at Phase
30 Three hearings ignores that he was not called to appear. From the bench you should know that accusation is flatly rejected.

I address briefly a couple of points from the submissions of counsel for Solid Energy too. Counsel in oral submission noted that paragraph 1.132 of

our submissions provided in counsel's words no citation for the comment, the sentence in our submission that Dr Elder claimed that the company had done insufficient coal seam and geological investigation work and that he had conceded in cross-examination points around that. I would just refer the
5 Commission to the entirety of our statement at paragraph 1.132 which explains the basis for the comment we made as to Mr Elder and it refers in the footnote at the end of that sentence to the transcript of Dr Elder's evidence.

Second, counsel for Solid Energy referred the Commission to paragraph
10 7.2.13 of our submissions and Mr Wylie's evidence that there were no differences between Spring Creek and the company, but again the full part of that paragraph has not been put before you in making that criticism. I invite you to look at again at it where the language, read in its totality, refers to Mr Wylie's evidence being and made in comparison to just hydromining
15 between the company and Spring Creek and if you look to page 14 of Mr Wylie's brief of evidence you will see that he makes the exact point referenced in our submissions.

So let me draw towards the end, and as I do so I ask you to think of a child
20 standing at the edge of a pier with a fishing net that he throws out into the water in search of some fish to take home and then he scoops it up containing his catch. The child looks at what he's caught and he sees that his net is very full. He's scooped up many fish, albeit of different sizes, and the child starts to struggle with the net, there are so many fish, and while many flap against
25 each other, others try to slip quietly off the side and back into the ocean and the child is about to throw some of the fish back to make the net more manageable for him to hold but his mother, who is older and wiser, says to him, "Wait, let me help you take all those fish home. They were all caught in the net. It would be unfair to pick and choose which ones to keep and which
30 ones to throw back into the sea so that they can swim far away from us." My clients are like most other people. To those that love them they are very important, but in the world of people who were involved with the Pike River Mine they are of no more importance than many others. In that world they are

six fish scooped up in a net that is almost bursting at the seams given the number of other fish also caught. They should be no more scooped up into the sweeping references, made in submissions before you, to management or the board in scores of other men whose names have hardly been mentioned
5 before you. They also should be no more scooped up to face scrutiny and, than this myriad of consultants who were paid to advise the company or the Department of Labour inspectors who visited the mine.

As your inquiry draws to a close I expect you will ask yourselves whether the
10 evidence that you've seen and heard during this inquiry is the kind of evidence that supports adverse findings being made against any of my clients. You will ask yourselves whether their actions or inactions are relevant to any causes of the tragic explosions and the tragic subsequent loss of life or the rescue operations at the mine.

15 1125

What I ask of you is that you return from that process and by your reports, say that none of my clients' actions or inactions caused the explosions because of the absence of any conclusive evidence about what did cause the mine to explode or where it happened because the lead expert for the police and the
20 Department of Labour investigations accepts that there's very little in the way of absolutes to determine what caused the 19 November 2010 explosion and because in the words of the head of the Department of Labour investigation, we obviously can't rule out that the action or inaction of an individual working underground at the mine that day caused the explosion. I also ask that by
25 your report you say that the Pike River mine was designed, developed and operated in consultation with numerous respected consultants and under the direct watch of Department of Labour inspectors who conducted an inspection just two weeks before the explosion and who were on full notice of matters like the second means of egress, the fresh air base, the underground fan,
30 Spaghetti Junction, tube-bundling yet none of whom took action to prevent ongoing operation.

I ask too, that by your report you say that my clients to the extent they were involved sought to do their very best in harrowing circumstances to assist rescue operations at the mine and in their communications with the families following the tragic explosion.

5

I thank you very much for the attention that you have paid me throughout this inquiry and in making these submissions and I welcome any questions if you have them.

10 **COMMISSIONER HENRY:**

My questions Ms Shortall are restricted to governance by the board. By way of background the value of this Commission will be in what it can say, at least substantial value will be what we can say in future to prevent future tragedies.

And therefore, my questions are not aimed at blaming anyone. What I am
15 concerned about is the systemic reasons that surround this tragedy and how we can discern those reasons. No my understanding of the position taken by the chair of the board, I'll use the chair because he's the chair, is that prior to his arrival certain decisions have been taken and they've been taken with expert advice and he was entitled to rely on that advice having been
20 competent and those decisions having been correct, is that the position?

MS SHORTALL:

I believe that's consistent with Mr Dow's evidence yes Commission Henry.

25 **COMMISSIONER HENRY:**

Yes, and then since he took over he's had expert advice. He's relied on that advice, he's relied on the advice of the managers who he considered competent and he's relied on or taken comfort from the fact that the Department of Labour and other regulators have taken the approach that they
30 have to the mine?

MS SHORTALL:

I believe that's consistent with his evidence yes sir.

COMMISSIONER HENRY:

Now one assumes it's fairly normal in any complex undertaking to have lots of advisors, would that be a fair assumption?

5

MS SHORTALL:

Well I think some undertakings have more advisors than others.

COMMISSIONER HENRY:

10 Yes.

MS SHORTALL:

And I would submit that there were a lot of advisors here.

15 **COMMISSIONER HENRY:**

Yes and I'm sure that's accepted, there were a lot of advisors. But the question I've got is, looking to the future if as the chair of the board I'm entitled to rely on these people, what is my responsibility as chairman of the board?

20 **MS SHORTALL:**

Well I'm mindful of speaking from the evidence, I don't know that that question was specifically put to Mr Dow in that way but I can make some observations, perhaps glean from his evidence, would that be fair Commissioner Henry?

25 **COMMISSIONER HENRY:**

Sure.

MS SHORTALL:

I think that Mr Dow in his evidence alluded to a concept which is widely
30 debated in boardrooms around this country. You know corporate governance where does the buck stop and start?

1130

And he talked about a separation between church and state which you referenced in some questions yesterday, I know has come up in other submissions and that separation, whether that language in particular is used or something else, it exists, it is accepted as a matter of corporate governance that the delegated authority, the day-to-day operations goes to management. Now that doesn't mean that the board abdicates its role in terms of oversight and in this situation I think that what we have learnt, one of the lessons to come from Pike and with the benefit of hindsight I think Mr Dow accepted some of this in his evidence that things could have been done differently, some of the third party audits that he referenced in his evidence could have occurred sooner, that there could have been more frequent meetings of the health and safety sub-committee of the board.

Notwithstanding that Mr Dow's evidence and its undisputed before you is that the board was addressing health and safety as an entire board, it was being dealt with at that level. So I think in terms of looking forward as I accept that you are and I appreciate that, then I believe he would, it would be consistent with his evidence and consistent with what I understand to be the broader debate that bringing in third party audits is a helpful tool in terms of giving directors some additional comfort as to what's happening on the ground.

COMMISSIONER HENRY:

Yes, the third party audit, I remember that conversation very well and that's a tool for verification but as we look at this situation it seems to me anyway that there's a big question mark over the amount of verification done by Mr Dow and his board and that's the thing that's bothering me, looking to the future. Whether, are the rules of governance clear enough, are they good practices and so on clear enough to deal with a situation where as you've said, there are shortcomings, but put it slightly stronger than perhaps, in the health and safety systems of the mine. But you know what does that say about corporate governance when that situation can exist where there is only one mine, this is not a big business; it's not a business that has a dozen sites, only one site. It just causes me to reflect what that really means if the idea is that the board

can rely without much verification on experts and consultants and employees, what does that mean for governors?

MS SHORTALL:

5 Well, sorry sir, have you finished?

COMMISSIONER HENRY:

Yes, thank you.

10 **MS SHORTALL:**

I would comment that, I don't think any of my director clients would accept that there wasn't much verification. You will recall that the board was made up of a number individuals, I represent just three of them. Tony Radford, one of the other directors has an extensive career, it's detailed in his evidence before
15 the Commission with New Zealand Oil and Gas, he was the Pike Chairman, there were two Indian based directors who their skills again are laid out in our submission, have background in the industry and have corporate governance experience. We had Gordon Ward who was on the board, a direct conduit into the management of the company up until around six weeks before the
20 explosion so I believe that from the perspective of my clients, my director clients which is just three, Mr Dow, Mr Nattrass and Mr Myer that given the combination of expertise on the board including as to corporate governance matters and the fact that they had someone directly into the management side of things, that they felt adequate verification, at the time the felt adequate
25 verification was there.

Now looking forward with the benefit of hindsight then, you know, you have seen Mr Dow sit in this box and say that there are some things that could've been done differently.

30

COMMISSIONER HENRY:

I'm conscious of the fact that Mr Dow gave evidence that the board was well aware of the methane risk and the consequences. When he was questioned

by Mr Mount he was asked, "Did the board or the committee ever call for a specific risk analysis on the risk of underground explosion at Pike?" Answer, "You mean a catastrophic explosion?"

1135

5 Question, "Yes." Answer, "Not specifically. I think the board was keenly aware that the management of methane underground is a principal hazard in coal mines, has been ever since men went underground. The risk management and mitigation processes in place were focussed with that as a primary understanding. It's a risk that's ever present every day." Now he told
10 us that the board did not perform, as I recollect, any overall risk management processes in relation to these risks.

MS SHORTALL:

I believe that's consistent with his evidence.

15

COMMISSIONER HENRY:

And whatever else we know about the cause we know pretty confidently, don't we, that it's a methane explosion?

20 **MS SHORTALL:**

That would appear, it would appear from the expert reports that they say that more likely than not it is a methane related explosion.

COMMISSIONER HENRY:

25 Yes, so the board being keenly aware that this was a very important risk, how much work did they do themselves to make sure that that risk was being managed?

MS SHORTALL:

30 Well again, just going to the evidence, Commissioner Henry I believe you'll form your own views based on the minutes of all of the board meetings, the regular meetings of this board, all of whom, all of which are minuted. You'll also form a view, I suspect, around the weight that you think it was reasonable

for my director clients to attach to someone of Mr White's calibre being the senior onsite operational person, you know he has been talked about in glowing terms before this Commission and my clients share that. They took great confidence in someone who had been the Deputy Chief Inspector of the
5 Coal Mines in Queensland, at the time he recruited into Pike taking that role. Now whether or not that confidence should have been supplemented with more will be a question that you are asking and you'll form views on.

COMMISSIONER HENRY:

10 So, in essence, to come to the end of it, is it the proposition from Mr Dow and the board that they acted in accordance with good governance principles.

MS SHORTALL:

At the time they believed they were, my, I can only speak, I just want to be
15 clear I can only speak for three of the directors, sir.

COMMISSIONER HENRY:

Yes.

20 **MS SHORTALL:**

I don't want to overstate, others should speak for their clients if they want to come into this room but from the perspective of my clients then they believed at the time that they were acting in accordance with good corporate governance, yes.

25

COMMISSIONER BELL:

Ms Shortall, I've listened to your presentation and it's really about getting the Commission to have confidence in your clients to a certain extent to believe that they did the best they could. I've just got three points I actually want to
30 sort of raise on three of your clients. Mr Whittall, and you've given us a list of all the consultants that were used by Pike and it's a very wide and varied list, provided advice, did Mr Whittall always take that advice?

MS SHORTALL:

I can only, again I'm constrained by the evidence. I can't think of a specific example where without consultation with others he didn't. There were times when advice was taken, you've seen that I think in some of the documents put
5 before you.

COMMISSIONER BELL:

I'm thinking, for argument's sake, the size of the methane drainage line which was recommended on more than one occasion to go to 12 inch and it never
10 happened.

MS SHORTALL:

Yes, I've seen those documents and I think they have been put before other witnesses. I don't, standing here, recall that they were specifically put to
15 Mr Whittall but the record, as I recall it, is consistent with Mr Whittall consulting with other senior managers in connection with some of those determinations such as, and again I caveat this, I don't have the record directly in front of me and I'm very mindful of not mis-stating things, but I believe that Mr van Rooyen has given evidence about the upgrade and the
20 reports that were coming in around the size of the gas drainage lines.

COMMISSIONER BELL:

Just going on to Mr Ellis, I mean once again you're asking the Commission to take on board Mr Ellis as a reasonable witness but the problem I have, to be
25 honest with you, is he failed his exam in Queensland three times to be a first class mine manager. He comes over here and gets the ticket in a matter of weeks. Now part of the reason he failed the exam was because he couldn't handle the emergency situation component of the exam was what he failed.

1140

MS SHORTALL:

I'm not aware of that being in the record sir. So you're telling me –

COMMISSIONER BELL:

I'm just saying to you, that it makes it difficult to have confidence when the person you're putting forward is the manager of the mine – well today as a matter of fact up until recently and for a while when White stepped back.

5

MS SHORTALL:

Well I think in fairness to Mr Ellis, that wasn't put to him when he was here nor has it been raised with us such that we could file any reply.

10 **COMMISSIONER BELL:**

Well it was put to him that he failed three times though wasn't it?

MS SHORTALL:

That was, but not on the emergency response management piece.

15

COMMISSIONER BELL:

It's a component of the test which is pretty common knowledge to anyone in the mining industry. Mr Dow, just on Mr Dow he commissioned a report from Mr Stewart I understand, I think he got Mr Stewart to do a report for him?

20

MS SHORTALL:

David Stewart, yes.

COMMISSIONER BELL:25

Am I correct in saying he never actually looked at that report?

MS SHORTALL:

That's the evidence, yes.

30 **COMMISSIONER BELL:**

Why wouldn't he look at that report if he commissioned that himself?

MS SHORTALL:

I think his evidence on that was that he had after speaking with Mr Stewart, raised the matter with Mr Ward, who spoke with Mr Whittall and then Mr Stewart was engaged and that Mr Dow believed that it was being dealt
5 with by management. Whether he should have followed up and done more around that, again will be a question that you will weigh in your deliberations but I don't believe that was put to Mr Dow directly whether he should have.

COMMISSIONER BELL:

10 Did the board get – on where the company put out a range of safety alerts and newsflashes, were they propagated up to the board or did they stop at the mine site and the board never saw them?

MS SHORTALL:

15 I don't know, standing before you. I don't think there's anything in the record on that. I'm happy to look into that to come back you through counsel.

COMMISSIONER BELL:

Yes.

20

MS SHORTALL:

But I would note that there was information coming on a monthly basis to the board through the operation's report and again, with the caveat that I don't have them in front of me, I do recall that there was some references in those
25 operation's reports to the circulation of materials at that level.

COMMISSIONER BELL:

What sort of concerns me there is that Mr Ward has, I think you've said, "was a conduit from – two the board and in fact Mr Ward wasn't a mining person,
30 didn't have any mining qualifications anyway so I'm just interested as to how a mining problem could've been taken to the board by someone who had no appreciation of mining problems.

MS SHORTALL:

I'm not suggesting and if my submission suggested that Mr Ward was the only conduit to the board, that was not accurate. He was one conduit. The monthly operations reports is that you may recall is broken down by category and there are operational mining related, production related, development related categories in that report, so information was flowing in paper that way in addition to having one of the directors in a management role and I believe that the board minutes also reflect that on occasion there were mining personnel from the company speaking to the board such as – it happened with Mr White on the 15th of November and Mr Whittall was in attendance at some board meetings. The minutes reflect that sir.

THE COMMISSION:

Ms Shortall you've throughout the inquiry and again today conducted matters on the basis that unless your clients had actual knowledge of matters, it's inappropriate for the Commission to make adverse findings in relation to them and I just have an overarching concern about that. Do not duties and do not senior managers and directors have duties and responsibilities including fundamentally a duty to exercise oversight of the enterprise with which they're concerned?

MS SHORTALL:

Yes Your Honour, two comments in relation to that. I think that the submission that I have made today around the conclusive evidence, the actual knowledge piece is in relation to the, perhaps what I'm calling the heart of the inquiry, what caused the explosion, what caused the loss of life.

THE COMMISSION:

I'm not even talking about that.

MS SHORTALL:

No, no and I understand that you're talking more generally, but I'm just saying that my submission points on that were on that topic as to whether or not my

clients had duties. Of course they did, they don't dispute that. They've talked about that in this room. They had filed briefs talking about it.

1145

5

THE COMMISSION:

That highlights the problem. Your entire submission today has repeatedly been saying they didn't have actual knowledge therefore we cannot make, this Commission cannot make a finding and I'm suggesting that is unreal because
10 we have got to factor in the duties and responsibilities of directors and senior managers in making an assessment of their actions.

MS SHORTALL:

My submission has been that based on that factual evidential point it would be
15 in my submission inappropriate for the Commission to make a finding that anything my clients did or did not do caused the explosion. That's my submission point. As to whether or not anything they did or did not do contributed to the shortcomings, what has been described by others as some systemic failures at the company. That is appropriately before the
20 Commission, we do not dispute that.

THE COMMISSION:

But certainly not the way I'd understood things. I'd understood you to be consistently saying in relation to most of the issues that you broached that, it
25 was not competent or appropriate for us to make findings, absent actual knowledge –

MS SHORTALL:

That –

30

THE COMMISSION:

- but you're not saying that?

MS SHORTALL:

- that they, that, let me just step back Your Honour. I'm not saying it with respect to what caused the explosion or the loss of life. I understand that your terms of reference are broader than that.

5

THE COMMISSION:

Well just so we're clear about this, in terms of assessing the responsibility and duties we would have regard, do you accept, to the legislation and the Act itself, Health and Safety in Employment Act to the internal requirements of the company about which there's been cross-examination of their own documents at governance level and also to best practice, what is properly to be expected of directors and senior managers.

10

MS SHORTALL:

15 I accept that, sir.

THE COMMISSION:

Thank you. Another major theme that you've advanced today and indeed throughout your cross-examination and in leading evidence has been the reliance upon external consultants and you provided us with the diagram earlier this morning. Obtaining advice is one thing and I think Commissioner Bell has touched upon this. You would accept, I take it, that there is then an obligation to consider and act upon the advice, obtaining it is not enough?

20
25**MS SHORTALL:**

I would accept that it has to be reviewed and then a decision formed as to whether or not to take it, yes, and that I think is consistent with some of the documents before you around peer review that were conducted of some expert advice.

30

THE COMMISSION:

Right. Mr Nishioka, you've referred to I think both in your written submission and also at least in passing in your oral presentation this morning, and you particularly challenge the evidence he gave concerning conversations he had with certain of your clients. Another aspect of his evidence comprised the extensive work notes that he prepared on a contemporaneous basis while he was at Pike River in which he relied upon and giving a good deal of his evidence. I'm very conscious that you're asking us to reject any evidence he gave about direct conversations with people. Do you have anything to say concerning reliance upon his work notes?

MS SHORTALL:

No, I accept that contemporaneous documents are a helpful indication as to people's views held at the time as opposed to tragedy like this, Your Honour. I believe that the point that I'm disputing from his evidence relates to a conversation, it's not reflected in his notes and wasn't in his written brief. It arose for the first time in this room around Mr Whittall and what he said to Mr Whittall. So I am standing here, I believe we may have in cross-examination asked some further questions of Mr Nishioka and raised some additional issues around the length of his involvement such that went back into the early 2000 period but with respect to the time period when he came into assist with the commissioning of the hydro panel in 2010 I do not recall standing here that we challenged what those notes show. I may be corrected by the record but I don't recall it.

1150

THE COMMISSION:

Finally, just a matter that was raised a moment ago, in relation to the cause of the explosion you've made an argument that it is not effectively competent for us to reach a definitive view concerning the cause, but the issue of methane was also raised with you and I can't recall now exactly what phrase you used but my recollection is that if there is one thing that is quite plain it is that this was a methane explosion caused by an outburst or an accumulation of methane within the mine.

MS SHORTALL:

I believe that's what the expert reports say, Your Honour, yes.

5 **THE COMMISSION:**

Yes, but with a real degree of assurance of certainty about that as I recall it.

MS SHORTALL:

10 As I recall the expert evidence it is that the methane nature of the explosion is
accepted but the source of that methane is unclear and inconclusive. I'm not
challenging that finding of the experts. I have no evidential basis to do so,
Your Honour.

THE COMMISSION:

15 Thank you Ms Shortall. Mr Stevens?

MR STEVENS:

Thank you, Your Honour, Commissioners, there is one matter I would like to
very briefly address you on if I might please sir.

20

THE COMMISSION:

25 Well can you just pause there. We've had an indication during the morning
tea break that you and perhaps others are seeking leave to respond in some
way to some thing, we're not sure what, but are you – you're wanting to
respond to something that's been said subsequent to your presentation?

MR STEVENS:

30 That was raised this morning, sir, as to the motivation of my client and
Dr Elder's participation in the Commission. It's a very brief point, sir, but I'd
prefer to be able to do it on my feet rather than subsequently in writing.

THE COMMISSION:

Just before we deal with that, I just want to check to see whether we've got other people who are in a similar situation because we had not contemplated further submissions from counsel at this stage so can we just see how wide
5 an issue this is?

MR STEVENS:

Certainly sir.

10 **THE COMMISSION:**

Mr Davidson are you wanting –

MR DAVIDSON:

Sir, I do. I'll be less than a minute, however. I wish, there's been a reference
15 made in submissions this morning which goes to Dr Newman's credit and I want to respond. It will take me less than a minute by reference to further evidence she's filed.

MR NICHOLSON:

20 Sir, I seek leave file written evidence just in relation to the issue of the second egress to the ventilation shaft in submissions by the (inaudible 11:53:28) as well.

THE COMMISSION:

25 Well you, as I recall Mr Nicholson, actually had credit. You have some time in the bank, don't you? You seek leave to file a reply submission.

MR NICHOLSON:

Sir.

30

MR GALLAWAY:

Sir, I'm sure Your Honour will be cognisant of the fact that I too have a credit of about five minutes.

THE COMMISSION:

No, I'm not actually.

5 MR GALLAWAY:

It's a risky proposition, but that's my calculation, sir. I just wish to address some of the criticisms that were made by the families of Mines Rescue. I'm happy to do that in a written document, but I do wish to address one aspect of it, namely the window of opportunity given, in this forum, sir given the
10 prominence that it has received in today's press.

1155

THE COMMISSION:

Yes well with some reluctance there just has to come a point at which replies end, submissions end. The factor is guess which has weighed with us is that
15 the topics that have been raised appear to be circumscribed, narrow and able to be dealt with very economically and we're also conscious of the fact that they are topics which have raised a good deal of media interest and have been subject to comment in the main so perhaps for that reason and in the interests of balance we will allow the three applications that have been made
20 to be heard, but strictly limited (inaudible 11;55:52) and restricted in time as you've indicated as well.

FURTHER SUBMISSIONS: MR STEVENS

Thank you Your Honour, Commissioners. I'm obliged. There has been a
25 significant aspersion raised this morning as to the motivation of Solid Energy and its Chief Executive Dr Elder in their participating in this inquiry. Solid Energy's motivation in being here and assisting was directly put to Dr Elder in cross-examination. Can I say sir that I'm confident and I've got no doubt that Solid Energy is confident that the Commission will reflect upon the evidence
30 and see the assertions for what they are, but I would that said, like to remind the Commission of the question put to Dr Elder and his answer on this topic, it is simply line 6 to 23 of page 82 of the transcript and if I could just cite that please to the Commissioners given what has been said. And the question

was, "It would be in Solid Energy's interest for any price that it ultimately may have to pay for Pike's assets to be as low as possible wouldn't it?" And the answer, "The answer is yes but I have to state that I take offence at the implication of the question." And Ms Shortall continues, "And one way of
5 trying to lower the price would be to discourage other potential buyers by providing the sort of evidence that you have over the past two days wouldn't it?" "I reject that and I take great offence at the question. Twenty-nine people are dead. There are 29 people that didn't come back from the mine. That's 29 very good reasons to present my evidence if it can assist the
10 Commission to find the right answer. I take great offence at the implication of the reason I am here is to talk down the value of the Pike River assets. That's already been done by the company, that's been successfully achieved, that's not why I am here. My purpose in being here is to support the community, to support the Royal Commission finding the best possible answers to the
15 questions and I'm sorry, I'm very offended at that point." And sir, can I just add that in the 17 months of my involvement in this or 16, I have never heard even a hint of the suggestion put to you this morning and that's all I wish to say sir unless there are any questions.

20 **FURTHER SUBMISSIONS: MR DAVIDSON**

The point is very short Your Honour and Commissioners. The written submission made by certain directors and officers was that Dr Newman's criticisms of the geological modelling were carried out by the company and this is the wording of the submission, "It must be weighed in the context of her
25 request for funding from the company having been declined." Now that's buried in the written submission but today it's been lifted into the oral submissions made to you. It is an imputation as to her credit before this Commission.

30 Dr Newman has filed a reply brief which is before you which notes that she did not request funding to undertake her work. Instead, and relevantly, she made a professional recommendation that PRC facilitate testing of the model they have purchased and now wish to use prematurely for mine planning purposes.

That must be put into the record and understood against the public criticism that's been made of this professional person.

FURTHER SUBMISSIONS: MR GALLAWAY

5 As I've indicated to the Commission I simply wish to deal with the issue of the window of opportunity and it's against the background of submissions that were made on behalf of the families yesterday or some of the families and of course appears emblazoned on page 3 of the press that there is still a belief that the window of opportunity existed.

10 1200

The basis for my submission to the Royal Commission is to encourage, to seek a finding that there was in fact no window of opportunity based on the evidence which is the before the Commission. In my respectful submission it's not reasonable or fair to continue to maintain that there was a window of opportunity. In the submissions put forward on behalf of those families there were references to MRS' proud history of rescuing people, there was references to not leaving men behind on the battlefield, against a belief that there was a window of opportunity. The comparison in my submission to the heroic rescues in Christchurch, in the earthquakes, the references to citizens spontaneously helping each other, the fact that they did not take risk assessments before they did so was in my submission unfair and not rational. This submission was put on the basis that it's easy to say that it's a very different situation but then it was advanced further with references to men and women, construction workers, city office workers, passers-by, people of all persuasions spontaneously help each other and putting their lives at risk. There is in my submission an inference from that, that there was somehow a lack of courage from mines rescue and from the emergency services who were gathered at Pike River and that is refuted absolutely. The initial decision not to enter the mine was made by Mr White, it was agreed with by mines rescue and not one person at the mine, throughout the time that these explosions took place, from the time of the first explosion was of the view, in terms of the evidence that's been heard, that the mine should be entered.

I wish to refer very briefly to the evidence of the two experts who gave evidence in relation to this issue, Mr Brady first said that the determination and the reference on the record is at page 1950 line 12, the determination of whether a window of opportunity exists for re-entry into the mine can only be done with the data available, to predict what could possibly occur and not going back over existing data and saying there was an opportunity. Not only do we have to work out what's happening at the mine, we also need to be able to predict how long that time will available. So it's not just about what's happening now, it's predicting into the future as well. So it's much easier in hindsight which we don't have the luxury of. And there was reference from Mr Devlin and the reference is at transcript 2046 line 17, in my opinion the decision not to send personnel underground in a search and rescue was correct. In light of the lack of information available regarding atmospheric conditions underground the mine itself is a source of fuel in terms of explosive gases, coal dust and coal. It was self evident that a source of ignition was underground at the time of the explosion and that subsequent source of ignition was likely to have been created from the first ignition. There are other references in the evidence which are contained in the closing submissions filed on behalf of mines rescue that deal with this issue. Finally I just wish to say that there seems to be an inference on behalf of those families that because there was five days between the first and the second explosion, it, we know that that was the window of opportunity of course for the reasons outlined in those references the situation is of course very different and that is not an accurate representation of the situation. So in closing I invite the Royal Commission to make a finding that there was no window of opportunity and I ask that the speculation around this issue which is unfair and not based on any evidence be put to an end. Thank you.

THE COMMISSION:

That's already been foreshadowed Mr Gallaway.

MR GALLAWAY:

Yes.

THE COMMISSION:

It's an issue we're alive to and it's an issue about which a finding will be made.

5 **MR GALLAWAY:**

I appreciate that, sir, thank you.

THE COMMISSION:

Yes, it is plainly enough from the families perspective a very difficult aspect.

10

MR GALLAWAY:

And I understand that.

THE COMMISSION:

15 All the more so on account of the difficulties that have ensued in relation to recovery so it's perhaps unsurprising that Mr Raymond was in the situation he was of making something of a dual submission yesterday.

MR GALLAWAY:

20 And I understand that, sir, but think from Mines Rescue's point of view the position needs to be made clear.

THE COMMISSION:

Of course, right.

25

MR GALLAWAY:

Thank you, sir.

THE COMMISSION:

30 Now Mr Nicholson your application for leave to file a reply submission is granted. Can you indicate how long you may need to do that?

1205

MS NICHOLSON:

Fourteen days sir.

THE COMMISSION:

5 Now is there anyone who's in a similar boat and –

MR GALLAWAY:

Just, sorry –

10 **THE COMMISSION:**

You do as well Mr Gallaway?

MR GALLAWAY:

Yes, I do sir, 14 days please just to deal with a couple of those other issues
15 that were raised in relation to sealing and a few other issues but I can have it
done within 14 days, most of it's done now.

MS McDONALD:

If the Commission pleases, just to follow up on one or two questions that were
20 asked after my submissions. It won't be lengthy and certainly within 14 days
but probably sooner.

MR MOORE:

The police are in a similar position.
25

MR HAIGH:

I'd like to seek that right as well sir. I haven't been able to consult with
Mr White with regards to some of the oral evidence, oral submissions other
than by email because he's living in Australia so I just ask to reserve that right
30 and again accept 14 days.

THE COMMISSION:

Well if you're not going to file one could you at some stage –

MR HAIGH:

I will.

5 **THE COMMISSION:**

- advise counsel assisting that you're not so we know not to wait any longer, otherwise 14 days please Mr Haigh.

MR STEVENS:

10 Sir, I was asked to obtain for the Commission some details in respect of the Jonah Group survey and would certainly anticipate being able to do that within the 14 days' timeframe. There's been some additional evidence filed in the last couple of days. I'd just seek leave to reserve my position sir but doubt that a response will be necessary. I'll keep the Commission informed.

15

MS SHORTALL:

Your Honour, if I could raise one question, I understand it's unusual coming from me at this juncture but I just in response to a comment that Commissioner Bell raised about Mr Ellis, I would like to just take his
20 instructions on that and there may be a need for us to file something in response because of his current position and I suspect he'll have a very strong reaction so I'd just like to take an opportunity to speak with him and then submit something and we can do it within the 14 days.

25 **THE COMMISSION:**

Likewise if you're not going to take it up –

MS SHORTALL:

Yes, sir.

30

THE COMMISSION:

Well thank you for the input we've had over the last two and a half days and I think it's appropriate as well to acknowledge the submissions that the

Commission has received from other participants who did not appear to speak to the submission. In quality some of those submissions is such that they will require close attention as obviously is the case with the submissions we had at the hearing. Submissions have been helpful to us both in relation to

5 factual issues in that they have served as a prompt through evidence, some of which we've heard many months ago, but also with the evaluation that is contained in relation to some of the key factual issues and also valuable, obviously, in relation to the policy aspects given the views and in some instances, markedly difficult, perspectives which have emerged including

10 some rather new ideas which have not previously featured in our thinking and which we now have to grapple with as well.

We're grateful also for your ongoing co-operation. We issued minute whatever it was, number 11, setting certain requirements and then a hearing

15 plan which contained a variable timetable in terms of the allowances that were granted and that wasn't a very enviable task in trying to strike a balance between competing demands for time but from our perspective at least the timetable seems to have been satisfactory and people have been able to meet their allocations even with the imposition of questions either interrupting them

20 or at the end. This of course is the last public hearing here in Greymouth and therefore something of a milestone in terms of the progress of the inquiry.

1210

Perhaps more so for participants and families, it's a significant milestone, maybe less so from a Commission perspective because we are very much in

25 the midst of the policy work. Our next step is that next week we will discuss and determine the policy direction.

In light of the submissions that we've received and heard about, at this hearing, from our perspective there's still a great deal more work to be done in

30 reaching final positions in relation to the policy aspects and then formulating recommendations to go into the report and there's also the detail of a report to be written between now and September.

I repeat something that I think I said at the end of the Phase Three hearings that we anticipate that there may be a need for consultation with some of the agencies most affected by the policy questions and where that is the case and anything of an evidential nature is discussed or emerges, that will be carried
5 onto the secure website as we've already done in relation to one meeting that was held in Brisbane. All in all the Commission remains open for business and there is, we recognise the possibility and scope for developments to occur in relation to some aspects and should that be the case of course we would welcome and expect that people possessing knowledge of any such
10 developments keep us abreast of them.

Finally our report date is the 28th of September and there is a resolve to have a report ready to be issued at that time. Thank you.

COMMISSION ADJOURNS: 12.13 PM