IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S ECI 2025 05336

LBJ DEVELOPMENTS PTY LTD (ACN 612 944 064)	Plaintiff
v	
BRENCORP LILYDALE PTY LTD (ACN 613 149 312)	First Defendant
INTRAPAC PROPERTY PTY LTD (ACN 107 291 805)	Second Defendant

JUDGE:	Waller J
WHERE HELD:	Melbourne
DATE OF HEARING:	22 July 2026
DATE OF RULING:	24 July 2026
CASE MAY BE CITED AS:	LBJ Developments Pty Ltd v Brencorp Lilydale Pty Ltd
MEDIUM NEUTRAL CITATION:	[2026] VSC 474

PRACTICE AND PROCEDURE — Application for leave to amend statement of claim — Application to vacate trial date — Trial listed to commence in less than three weeks on an estimate of eight days — Whether leave should be granted to add substantial new claims founded on expert evidence served shortly before trial — Where plaintiff previously directed to bring any amendment application expeditiously — Where plaintiff previously directed that expert evidence be confined to case as pleaded and not used to lay foundation for future amendment — *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 applied — *Northern Health v Kuipers* [2015] VSCA 172 applied — Whether defendants' stated preference to maintain the trial date, even if the amendments are allowed and even at the cost of forgoing responsive evidence, is relevant to the exercise of the discretion — leave to amend refused in part and granted in part — Trial to proceed as fixed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P Crutchfield KC Ms N Papaleo Mr N Dias	Lander & Rogers
For the First Defendant	Mr G Kozminsky Ms J Elliott Mr G Zhang	Mallesons
For the Second Defendant	Mr N Kotzman Mr R Marsh	Baker McKenzie

TABLE OF CONTENTS

HIS HONOUR:

A. Introduction

1 By summons dated 10 July 2026, the Plaintiff (**LBJ**) seeks leave to join a second plaintiff, LBJ Corporation Pty Ltd (**LBJC**), to further amend its Amended Statement of Claim dated 19 December 2025 (**ASOC**) in the form of a Proposed Further Amended Statement of Claim (**PFASOC**) and vacate the trial currently fixed to commence on 10 August 2026 (together, the **Application**).

2 The First Defendant (**Brencorp**) and the Second Defendant (**Intrapac**) do not oppose all of the proposed amendments to the ASOC. They jointly or severally oppose proposed amendments to paragraphs 40, 47 (chapeau), 48(aa), 48(b) (particulars), 49A, 65(a), 65(aa), 65(ab), 78(a), 78(b), 78(c), 78(f), 79 and 80 of the PFASOC (the **Contested Amendments**). The centrepiece of the Contested Amendments, and the focus of most of the argument before me, concerns new allegations about the quarry filling works proposed for Precinct 4 of the Lilydale Land,[1] said to be founded on expert evidence LBJ served on 19 June 2026 (the **Quarry Filling Works Amendments**). LBJ accepts that this aspect of its case has not previously been pleaded in the form now proposed.

3 Both or one of Brencorp and Intrapac oppose leave being granted to make the Contested Amendments.[2] Significantly, both also submit that, even if I allow the Contested Amendments, the trial date of 10 August 2026 should nonetheless be maintained. Each says, in substance, that the prejudice it would suffer from a further delay in the resolution of this dispute exceeds the prejudice it would suffer in having to meet the new claim without an adequate opportunity to instruct and obtain responsive expert evidence, and that each would rather run the trial without that evidence than lose the fixture.

4 For the reasons that follow, I refuse leave to make the Quarry Filling Works Amendments and the Tax Amendments, but I grant leave to make the amendment to

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1 The Lilydale Land is defined as the 'land known as the former Lilydale Quarry and situated at 4 Melba Avenue and 451 Hull Road, Lilydale, more particularly described in Certificates of Title Volume 11584 Folios 192 and 193, Volume 8756 Folio 801 and Volume 8245 536': see ASOC at [4].

2 Intrapac does not oppose the Tax Amendments or the Profitability Amendments.

paragraph 40 of the ASOC (the Profitability Amendment). I also refuse the application to vacate the trial. The trial will proceed on 10 August 2026. I have also concluded that once the Quarry Filling Works Amendments and the Tax Amendments are disallowed and account is taken that the allegations concerning Cave Hill Projects Pty Ltd (**Cave Hill**)[3] are no longer being pursued, the trial can and should be conducted within the eight days originally estimated, with closing submissions to be heard separately at a convenient time after the evidence has concluded.

5 Because I have refused leave to make the Quarry Filling Works Amendments and the Tax Amendments, it is strictly unnecessary to decide what I would have done had leave been granted. I nonetheless record that the defendants' unusual and candid concession that they would prefer to face the new claims without adequate time to prepare responsive evidence rather than lose the trial date has informed my assessment of where the balance of justice lies on the amendment application itself. A defendant's willingness to bear real forensic prejudice rather than see the trial vacated is a strong, practical indication of the weight that ought to be given to the prejudice that would in fact be caused by the amendment if it were allowed. I return to this at Section G below.

B. Factual background

6 The following background facts are not in dispute and are drawn from the parties' Statement of Agreed Facts filed 21 July 2026.

7 LBJ, Brencorp and Intrapac entered into a Tripartite Joint Venture Agreement on about 29 July 2016 (the **Tripartite JVA**) relating to the Lilydale Land. The joint venture thereunder comprised the purchase (the **Land Joint Venture**) and development (the **Development Joint Venture**) of that land (together, the **Joint Venture**). .

8 On 4 August 2016, LBJ and Brencorp entered into a contract for the purchase of the Lilydale Land for approximately $21.6 million and, on 15 September 2016, HBI Lilydale Pty Ltd was incorporated to act as the 'Nominee' under the Tripartite JVA.

3 ASOC [18]-[27].

The purchase of the Lilydale Land settled on 5 July 2017.

9 The development of the Lilydale Land involves the subdivision and development of the land in precincts, described as (a) the Southern Stage; (b) Precinct 1/the Western Precinct; (c) Precinct 2/the Heritage Site; (d) Precinct 3/the Eastern Precinct; and (e) Precinct 4/the Urban Core.

10 Precinct 4 is largely occupied by the former Lilydale quarry, and the development includes filling that former quarry. It is this quarry filling work that lies at the heart of the Quarry Filling Works Amendments.

11 The dispute between the parties concerns, among other things, the conduct of the Development Joint Venture, the methodology used by Brencorp in preparing the Joint Venture's accounts for the 'Built-Form Trial' and calculating the net income of the Development Joint Venture (the **Hume Methodology**),[4] the profitability of built-form versus vacant-lot sales, and decisions of the management committee of the Joint Venture concerning the proposed quarry filling works, including the question of whether a geotechnical 'fill trial' is required before those works proceed.

C. Procedural History

12 LBJ commenced this proceeding by writ and statement of claim filed on 12 September 2025. On 19 December 2025, LBJ filed the ASOC, and the Court made orders requiring LBJ to file and serve witness outlines by 13 March 2026. Brencorp and Intrapac filed defences to the ASOC on 30 January 2026, and LBJ filed replies on 16 and 17 March 2026.

13 There have been four case management hearings in the proceeding on 7 November 2025, 19 December 2025, 24 April 2026 and 11 June 2026. Two of those hearings are of particular significance to the present Application.

14 The first is the directions hearing on 24 April 2026. At that hearing, senior counsel for LBJ acknowledged that he was not then in a position to say whether, or to what extent,

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4 ASOC [47].

LBJ would seek to amend its pleading, and proposed that the Court make orders timetabling any amendment application to occur shortly after the filing of LBJ's expert evidence. I declined to make that order. I fixed the proceeding for trial to commence on 10 August 2026 on an estimate of eight days, and I made orders requiring LBJ to, *inter alia*:

(a) serve a list of the fields of expertise in which it proposed to instruct experts, and the documents and questions to be provided to each expert, by 15 May 2026;

(b) file and serve its expert evidence by 5 June 2026;

(c) serve a draft list of issues by 29 June 2026; and

(d) serve a draft court book index by 6 July 2026.

15 At that hearing I said:

> I would expect any party seeking to amend their pleadings to inform the opposite parties as soon as possible, and that any application to amend a pleading be brought as expeditiously as possible by that party.[5]

16 LBJ filed and served four witness outlines on 21 April 2026.[6] Brencorp filed three witness outlines on 15 May 2026 and Intrapac filed one on 18 May 2026.

17 On 12 May 2026, a discovery application brought by LBJ in March 2026 was heard by a judicial registrar but remains undetermined.

18 On 15 May 2026, LBJ notified the defendants of its intention to instruct experts in geomechanics and geotechnical engineering, quantity surveying, technical and forensic accounting and taxation, and of the documents and questions for two of those experts. On 5 June 2026, LBJ notified the defendants of documents and further questions to be provided to the accounting and taxation experts and of its intention to

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5 Transcript of Proceedings, *LBJ Developments Pty Ltd v Brencorp Lilydale Pty Ltd* (Supreme Court of Victoria, S ECI 2025 05336, Waller J, 24 April 2026) 52:21–25 (**April Transcript**).

6 On 27 April 2026, LBJ filed a further version of one of those four witness outlines, due to the inclusion of privileged information in the earlier version: Witness Outline of Daniel Hernando Petroni.

obtain a report from a property development and feasibility expert.

19 LBJ did not comply with the order made on 24 April 2026 requiring it to file and serve its expert evidence by 5 June 2026. That default was the occasion for the mention on 11 June 2026. At that hearing I extended the time for LBJ to file its expert evidence in geomechanics and geotechnical engineering, quantity surveying and technical and forensic accounting to 19 June 2026, and in tax accounting and property development and feasibility studies to 3 July 2026 (the **June Orders**).

20 In granting that indulgence, I made clear that the extension was not an invitation to enlarge the scope of the proceeding. I said:

> [t]he extensions granted by this order are not to be taken as an invitation to expand the scope of the proceeding. Expert evidence must be directed to the issues arising on the pleadings as they currently stand. It is not the function of expert reports to lay the groundwork for some future application to amend the pleadings, to introduce new causes of action, or to reframe the case in a manner inconsistent with the case as pleaded.[7]

21 I also said:

> [t]he court in making the orders it makes today has to strike a fair balance between the competing interests of the parties. The plaintiff has a legitimate right to adduce expert evidence to support its case, and the defendants have an equally legitimate right to receive that evidence in sufficient time to consider it, to brief their own experts in response, and to prepare their cases accordingly.
>
> Where the plaintiff's delay in serving expert evidence compresses the time available to the defendants to respond, that balance is disturbed, and the court will not permit the plaintiff's conduct of its own case to prejudice the defendants' ability to conduct theirs … The plaintiff has been on notice of the issues in this proceeding for a considerable period, and the fields of expertise identified in this order ought not be matters that have emerged recently or unexpectedly.[8]

22 At that hearing counsel for LBJ said they were not seeking to vacate the trial date.[9] Addressing the possibility that the trial date itself might come under pressure, I said:

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7 Transcript of Proceedings, *LBJ Developments Pty Ltd v Brencorp Lilydale Pty Ltd* (Supreme Court of Victoria, S ECI 2025 05336, Waller J, 11 June 2026) 61:18–26 (**June Transcript**).

8 June Transcript 62:4–8; 20–23.

9 June Transcript 38:9–11.

the matter's been set down for trial and, without very good reason, the trial will proceed.[10]

23 On 19 June 2026, in purported compliance with the June Orders, LBJ filed expert evidence in geomechanics and geotechnical engineering (a report of Dr Sanjive Narendranathan), quantity surveying (a report of Mr Steven Bolt) and forensic accounting (a report of Ms Christine Oliver). LBJ has since indicated that it will not adduce evidence from Mr Bolt at trial.

24 On 3 July 2026, LBJ filed further expert evidence in taxation (a report of Mr James Head) and feasibility modelling (a report of Mr Zoran Pavlovic), and served a draft list of issues.

25 On 29 June 2026, ten days after filing Dr Narendranathan’s report and before filing its remaining expert evidence, LBJ’s solicitors wrote to Brencorp and Intrapac’s respective solicitors enclosing a proposed further amended statement of claim and seeking their consent to amend, and separately foreshadowed an application for injunctive relief which has not since been pursued.

26 On 6 July 2026, Brencorp and Intrapac’s solicitors each responded, consenting to some of the proposed amendments and opposing others.

27 On 16 July 2026, LBJ filed and served its summons and submissions in support of the Application, together with a further revised statement of claim, being the PFASOC, that contained amendments additional to those in the 29 June draft, including further refinements to the Quarry Filling Works Amendments made in response to matters raised in Brencorp's solicitor’s letter of 6 July 2026. Brencorp and Intrapac filed their responding submissions on 20 July 2026, and I heard oral argument on 22 July 2026.

D. The Application and the Contested Amendments

28 The PFASOC contains six categories of amendment: (a) amendments to join LBJC as second plaintiff and related consequential pleas (the **Joinder Amendments**); (b) an amendment to the particulars of loss said to flow from the 'Built-Form Trial' (the **Loss**

[10] June Transcript 42:31–43:2.

Amendment); (c) an amendment concerning a component of the Hume Methodology relating to the attribution of costs (the **Phase Costs Amendment**); (d) amendments alleging that the Hume Methodology has also caused defects in the Joint Venture's income tax returns, exposing LBJ and LBJC to legal risk (the **Tax Amendments**); (e) an amendment to the outcome alleged to follow from the parties' proposal to sell built-form lots as opposed to vacant-lots (the **Profitability Amendment**); and (f) the Quarry Filling Works Amendments described above.

29 Intrapac consents to the Joinder Amendments and does not oppose the Phase Costs Amendment, the Profitability Amendment or the Tax Amendments (which are not pleaded against it), but opposes the Quarry Filling Works Amendments. Brencorp does not oppose the Joinder Amendments, the Loss Amendment or the Phase Costs Amendment, but opposes, the Tax Amendments, the Profitability Amendment and those aspects of the Quarry Filling Works Amendments that specify the geotechnical and regulatory risks said to arise from Intrapac's proposed quarry filling works.

30 It is unnecessary to resolve every point of difference in the parties' characterisation of each amendment. For present purposes, the amendments that are genuinely opposed, the Contested Amendments, fall into three categories: (i) the Quarry Filling Works Amendments, which introduce a substantially new and more elaborate claim founded on Dr Narendranathan's report; (ii) the Tax Amendments, which likewise depend on expert evidence filed after the pleadings closed and introduce a materially new allegation and new relief; and (iii) the Profitability Amendment to paragraph 40, which, as I explain below, stands on a different footing because it does not introduce any new claim or cause of action.

31 By the Quarry Filling Works Amendments, LBJ seeks to plead: additional management committee decisions concerning the proposed quarry filling works said to have occurred since the ASOC was filed; that a 'fill trial' is necessary to enable LBJ's related contractor, Bayport Civil Pty Ltd, to determine the suitability of fill material and to satisfy regulatory requirements under Work Authority WA-199 (the **Work Authority**) and the *Mineral Resources (Sustainable Development) Act 1990* (Vic); and that

Brencorp's conduct in proceeding on a project brief that does not provide for a fill trial constitutes a breach of its obligations of good faith and co-operation. LBJ accepts that these matters have not previously been pleaded in this form, but submits that they are not 'wholly new' and were foreshadowed, in substance, in earlier correspondence and in the ASOC itself.

32 LBJ's explanation for the timing of the Quarry Filling Works Amendments is that its solicitor, Mr McKenzie, was not satisfied that it was possible to plead the relevant risks with precision until he received Dr Narendranathan's final report on 19 June 2026, and that LBJ then notified the defendants within six business days. Brencorp and Intrapac dispute that explanation. They point to evidence that: LBJ's related entity, Bayport Civil Pty Ltd, is itself an experienced quarry contractor with its own registered quarry manager and detailed knowledge of the requirements of the Work Authority; LBJ's solicitors raised the substance of the geotechnical and regulatory concerns as early as 17 February 2026, before any expert was retained; and Dr Narendranathan was not even contacted until 24 March 2026, more than five weeks later, was not formally engaged until 9 April 2026, and did not receive a formal letter of instruction until 14 May 2026. Brencorp also submits, and I accept, that at the mention on 11 June 2026, counsel for LBJ submitted that the 'most efficient way' to proceed was to use expert evidence to draw the amendments — a course I rejected at the time, for the reasons recorded at [20]–[22] above.

33 Both Brencorp and Intrapac oppose the Contested Amendments on the footing that they cannot properly investigate and respond to the new allegations, in particular the geotechnical and regulatory case now advanced, without instructing their own experts and taking further factual evidence, and that there is no realistic prospect of doing so before trial. Both nonetheless submit that if I were to allow the Contested Amendments, the trial should proceed regardless, on the basis that each defendant would rather run the trial without full responsive evidence than lose the fixture.

E. Applicable Principles

34 Rule 36.01 of the *Supreme Court (General Civil Procedure) Rules 2025* (Vic) (the **Rules**)

provides that the Court may, at any stage, grant a party leave to amend its pleading for the purpose of determining the real question in controversy between the parties. It is well established that pleadings are not an end in themselves, but a means of ensuring that the real issues in controversy are identified in a way that is procedurally fair to both plaintiff and defendant, and that, absent extraordinary circumstances, leave to amend will ordinarily be granted where that is necessary to determine the real questions in dispute.[11]

35 That said, the High Court's decision in *Aon Risk Services Australia Ltd v Australian National University* (***Aon***)[12] marks a decisive shift away from any notion that a plaintiff is entitled, as of right, to raise an arguable claim subject to payment of costs. It also makes clear that the 'real issues in the proceeding' only captures issues already latent in the existing controversy between the parties at the time leave is sought, not any new claim a party now wishes it had pleaded, so that a party's own prior tactical choices in framing its case fix the boundary of what constitutes a 'real issue'.[13]

36 The plurality made clear that limits will be placed on a party's ability to amend its pleading, particularly where the litigation is well advanced.[14] Considerations of case management, the efficient use of court resources, and the effect of amendment on other litigants awaiting hearing dates are now legitimate and weighty considerations in the Court's exercise of the discretion to allow amendment.

37 At the same time, *Aon* did not convert case management into an end in itself. In *Northern Health v Kuipers* (***Kuipers***),[15] the Court of Appeal accepted that while *Aon* 're-invigorated the procedural paradigm' and confirmed that time, cost and the efficient use of judicial resources are relevant, 'the primary question still remains: what do the interests of justice dictate?'[16]

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11 *ACN 074 971 109 v The National Mutual Life Association of Australasia Ltd* [2010] VSC 186, [28] (Croft J).
12 (2009) 239 CLR 175 (***Aon***).
13 Ibid [4] (French CJ) and [111] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
14 Ibid [112] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
15 [2015] VSCA 172 (Kyrou and McLeish JJA) (***Kuipers***).
16 Ibid [33] citing *Ultra Thoroughbred Racing v Those Certain Underwriters & Ors* [2011] VSC 370, [9] (J Forrest J).

38 In *Kuipers*, Kyrou and McLeish JJA identified the following factors as relevant to that question:

(a) whether there will be substantial delay caused by the amendment;

(b) the extent of any wasted costs;

(c) whether there is an irreparable element of unfair prejudice caused by the amendment;

(d) concerns of case management arising from the stage of the proceeding at which the amendment is sought;

(e) whether the grant of the amendment will lessen public confidence in the judicial system; and

(f) whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.[17]

39 LBJ placed particular reliance on the observations of Stynes J, as extracted by Delany J in *Wadren Pty Ltd v Probuild Constructions (Aust) Pty Ltd* (***Wadren***),[18] to the effect that in construction disputes case managed in the Technology, Engineering and Construction (**TEC**) List, it is commonplace for pleadings to be amended once expert evidence clarifies the real technical issues in dispute. I do not accept that those observations are apposite here. This proceeding has not been entered in the TEC List, has not, at any point, been case managed by reference to the particular procedures and expectations that apply in that list, and senior counsel for LBJ properly disclaimed at the hearing any application to transfer it to the TEC List.[19] The observations in *Wadren* describe a practice that has developed within, and is calibrated to, the particular case management architecture of a specialist list in which parties and the Court proceed on a shared understanding that pleadings will ordinarily be settled only after expert

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17 *Kuipers* [2015] VSCA 172, [28] (Kyrou and McLeish JJA).

18 (2024) 78 VR 199, [52(b)] (Delany J).

19 Transcript of Proceedings, *LBJ Developments Pty Ltd v Brencorp Lilydale Pty Ltd* (Supreme Court of Victoria, S ECI 2025 05336, Waller J, 22 July 2026) 10:12-13.

evidence is available. That is materially different from a proceeding such as this, conducted in the Commercial Court's general list, where the parties pleaded, and prepared for trial, on the footing of the case as pleaded.

40 As to the application to vacate the trial, r 48.06 of the Rules empowers the Court, at any time after a trial date is fixed, to vacate that date. There is no single, universal approach to such an application. The overarching purpose in s 7 of the *Civil Procedure Act 2010* (Vic) to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute must be balanced against the parties' right to a fair hearing on the substantive merits, and against the legitimate interests of other litigants and the Court in the orderly and predictable conduct of listed trials.[20]

F. Consideration

F.1. Quarry Filling Works Amendments

41 Applying the *Kuipers* factors to the Quarry Filling Works Amendments, I have concluded that leave to amend should be refused. My reasons are as follows.

42 First, and most significantly, LBJ has not provided a satisfactory explanation for the late stage at which the Contested Amendments have been brought, having regard to the clear direction I gave on 24 April 2026 that any amendment application be brought 'as expeditiously as possible'. LBJ's own evidence is that its solicitor recognised, as early as the 17 February 2026 letter, the need for expert opinion to substantiate the concerns it wished to raise about the proposed quarry filling works. Notwithstanding that recognition, LBJ did not contact a geotechnical expert until 24 March 2026, more than five weeks later, and did not brief its accounting and taxation experts in substance until days before, or after, the (extended) date for filing that evidence. LBJ is a sophisticated commercial litigant with the benefit, through its related entity Bayport Civil Pty Ltd, of considerable in-house expertise in quarry filling works and the requirements of the Work Authority. I am not satisfied that LBJ could not, with reasonable diligence, have identified the substance of the case it now wishes to plead

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20 *Traffic Technique Pty Ltd v Burgmann* [2020] VSCA 319, [56]–[57] (Tate, Sifris and Osborn JJA); *Dawn v Carlisle Homes Pty Ltd* [2025] VSCA 58, [31] (Niall CJ, Emerton P and Gray AJA).

considerably earlier than it did, or that the sequence of events was outside its control.

43 Secondly, and relatedly, the manner in which LBJ's expert evidence was obtained and deployed is inconsistent with the direction I gave on 11 June 2026. I made clear, in terms that could not have been misunderstood, that the extension of time granted to LBJ to file its expert evidence was not an invitation to expand the scope of the proceeding, and that it is not the function of expert evidence to lay the groundwork for a future amendment application or to reframe the case inconsistently with the pleadings as they then stood. LBJ nonetheless directed questions to its experts that went beyond the issues raised by the ASOC, and now seeks to rely on the resulting reports as the foundation for a materially expanded case. I do not need to characterise this as deliberate to conclude that it does not sit consistently with the directions given, and that LBJ's own choices about how to run its case have brought it to the position it is now in, less than three weeks from trial, seeking to introduce substantially new claims.

44 Thirdly, allowing the Quarry Filling Works Amendments at this stage would cause real and, in the time available, effectively irreparable prejudice to Brencorp and Intrapac. The Quarry Filling Works Amendments raise technical questions of geotechnical suitability and regulatory compliance under the Work Authority and the *Mineral Resources (Sustainable Development) Act 1990* (Vic) that neither defendant has previously had to meet in this form. Both defendants would need to identify and instruct their own experts, provide those experts with adequate instructions and time to form and express a considered opinion, and prepare to cross-examine Dr Narendranathan on his report. I accept the defendants' evidence that this cannot realistically be done, to a proper forensic standard, in the time remaining before trial.

45 Fourthly, given the stage the proceeding has reached, the Quarry Filling Works Amendments raise serious case management concerns. This is not a case in which an amendment is sought at an early interlocutory stage, before evidence has been prepared or exchanged. Witness outlines have been filed by all parties, and expert evidence has already been exchanged. The trial is listed to commence in less than three

weeks. An amendment of this kind, introduced at this stage, does not merely add a new issue to be argued; it risks converting a trial that has been prepared for many months into one that neither defendant can be ready to meet.

46 Fifthly, I do not accept LBJ's submission that no relevant prejudice arises because the 'substance' of the Quarry Filling Works Amendments was already apparent from earlier correspondence and the ASOC. The ASOC's plea concerning the Purported 17 November 2025 Resolution and the necessity of a fill trial was, on any fair reading, directed to a narrower and more immediate controversy than the case now sought to be advanced, which depends on a detailed geotechnical opinion about compliance with a specific project brief and specific regulatory instruments. A defendant is entitled to prepare its case by reference to the claim as pleaded, not by reference to what a plaintiff might conceivably come to allege once its expert evidence is finalised.

47 Sixthly, I have weighed against these matters LBJ's legitimate interest in having its claims, including the Quarry Filling Works Amendments, determined on their merits, and the public interest identified in *Kuipers* in the grant of amendments where that is necessary to determine the real questions in controversy. LBJ submitted that the Quarry Filling Works Amendments are of particular importance because they go to the underlying safety of the works: if the quarry filling works proceed without a fill trial and do not comply with the Work Authority, the Approved Work Plan and the *Mineral Resources (Sustainable Development) Act 1990* (Vic), Dr Narendranathan's evidence is that improper backfilling and compaction may affect the final landform, giving rise to structural risks to buildings, cracking of pavements, rupturing of underground utilities and, in the worst case, the formation of sinkholes. On that basis, LBJ submitted that these amendments should be permitted notwithstanding the lateness of the application and the prejudice to the defendants, because the interests at stake go beyond the ordinary commercial interests of the parties to the safety of the completed development.

48 I do not accept that this consideration carries the weight LBJ ascribes to it, for the reasons advanced by Brencorp and Intrapac, which I accept. Both defendants point to

contractual and regulatory mechanisms, independent of anything pleaded or sought to be pleaded in this proceeding, that are designed to ensure the quarry filling works are in fact carried out in compliance with all applicable legislative and regulatory requirements, such that the risk of the kind of non-compliance LBJ fears is not, at least at this stage, a live or unmanaged one. Brencorp's evidence, which I accept, is that the works are to be undertaken pursuant to a contract that requires the contractor to comply with all applicable legislative requirements and to do so in consultation with the relevant regulator — a matter on which Dr Narendranathan was not asked to, and did not, opine. Intrapac's evidence goes further: the proposed Works Contract requires the contractor to warrant that it will perform the works in accordance with the planning permit, all approvals and all other legislative requirements; requires the contractor to comply with all legislative requirements affecting the work, and to bear the cost of doing so; requires the contractor to indemnify the principal against fines, penalties and other liabilities arising from any breach of legislative requirements; treats a failure to comply with any legislative requirement as an event of default; and defines practical completion so as to exclude works that have not been completed to the satisfaction of the applicable regulatory authorities. On that evidence, the regulatory risks LBJ apprehends are, at least at present, contingent on the manner in which the works are in fact carried out, and the contractual structure is designed precisely so that the Joint Venture is not left in a position where it must accept non-compliant works.

49 I also accept the defendants' submission that if LBJ genuinely held the urgent safety concerns it now presses in support of the Quarry Filling Works Amendments, an application for interlocutory injunctive relief restraining the commencement of non-compliant works was available to it. LBJ has, on more than one occasion, foreshadowed such an application, including as recently as 29 June 2026, but has never brought one. That inaction is not consistent with the degree of urgency now attributed to the safety concerns said to justify a late and disruptive amendment of the pleadings, and it reinforces my conclusion that those concerns, whatever their ultimate merit, can be adequately protected without derailing the trial presently listed.

50 Taking these matters together, I accept that the subject matter of the Quarry Filling Works Amendments is not trivial, but I do not accept that refusing leave to plead them now leaves LBJ or the development exposed to an unmanaged safety risk. Refusing leave does not necessarily extinguish LBJ's ability to have those matters determined; it means only that they cannot be forced into a trial that is not equipped to hear them fairly in the time available.

51 Finally, allowing the Quarry Filling Works Amendments in these circumstances, after two clear directions from the Court about both the timing of amendment applications and the permissible use of expert evidence, would not, in my assessment, promote confidence in the administration of the case management processes of the Commercial Court. Directions of the kind I gave on 24 April and 11 June 2026 serve a real purpose in complex litigation of this kind. If they can be circumvented simply by filing expert evidence that ranges beyond the pleaded case and then using that evidence, close to trial, as the springboard for a substantially new claim, those directions, and the certainty they are intended to provide to the parties and to the Court's list, would be of little value.

F.2. Tax Amendments

52 I have also concluded that leave should be refused in respect of the Tax Amendments. Many of the considerations set out above apply with equal force to these amendments but they have additional, particular features that warrant separate attention.

53 The ASOC has, since 19 December 2025, alleged that in preparing the accounts for the Built-Form Trial, Brencorp adopted a methodology for allocating costs (the Hume Methodology) that was contrary to accounting standard AASB102 and did not conform with legal and accounting advice LBJ had obtained and provided to Brencorp. In support of that plea, LBJ particularised two advices from Pitcher Partners and an advice from senior and junior counsel, all obtained in 2024 and 2025, opining on the tax accounting treatment of certain costs. LBJ's own evidence, and its witness outline of Ms Fernandez served on 21 April 2026, confirm that LBJ has held those advices, and has been concerned about the correctness of Hume's tax accounting

treatment, for a considerable period and well before this proceeding was even commenced.

54 At the 11 June 2026 hearing, Brencorp drew a distinction between two different allegations: first, whether Hume's accounting methodology complied with advice that Hume or LBJ had received (which Brencorp accepted was raised by the ASOC); and secondly, whether that advice was itself correct as a matter of tax law (which Brencorp submitted was not raised by the ASOC, and on which no expert evidence was therefore permitted). LBJ submits that this distinction is artificial. I do not accept that submission. Compliance with advice received is a different question from the objective correctness of that advice, and a defendant is entitled to know which of those two questions it must meet.

55 The ASOC's plea, read fairly, was concerned with the former. It sought no relief in respect of income tax returns at all. The Tax Amendments seek to introduce the latter, and to add a new and materially different form of relief, namely a mandatory injunction compelling Brencorp to revise the Joint Venture's income tax returns so as to conform with taxation law, and a new plea that the Hume Methodology exposed LBJ and LBJC to the risk of enforcement action by the Commissioner of Taxation. That is a different and more far-reaching case than an allegation that Brencorp breached its obligations by departing from advice it had received.

56 LBJ has not provided a satisfactory explanation for the lateness of the Tax Amendments. LBJ accepts that each of the 2024 and 2025 advices it has long held addresses the correctness of the Hume Methodology from a tax accounting perspective, yet no explanation has been given as to why, holding those advices, LBJ waited until mid-2026 to brief a taxation expert. LBJ's own evidence is that its solicitor did not turn his mind to the need for a taxation expert until 4 May 2026, a month before expert evidence was originally due, and first contacted Mr Head, the proposed expert, on 13 May 2026. Mr Head was not given instructions until 4 June 2026, the day before expert evidence was due under the orders then in force. Nor is it apparent why an expert report was necessary at all before the Tax Amendments could be pleaded, given

that LBJ already held taxation advice from senior counsel addressing the same question; LBJ's evidence that independent expert opinion was 'necessary' before it could plead a breach of an accounting standard it had already pleaded since the ASOC was filed does not sit easily with the fact that AASB102 compliance has been squarely in issue since December 2025.

57 I also accept Brencorp's submission that accounting and taxation are distinct disciplines, each requiring separate expertise, as demonstrated by LBJ's own decision to retain separate experts, Ms Oliver (accounting) and Mr Head (taxation); by the evidence of both of those experts that accounting and taxation treatments commonly diverge; and by the fact that Mr Head's report neither refers to, nor appears to have been prepared with the benefit of, Ms Oliver's earlier accounting report. Mr Head's own evidence is that the taxation issues in dispute are heavily fact-dependent, complex and subject to uncertainty. Those are not matters on which Brencorp or Intrapac can properly be expected to obtain and serve responsive expert evidence in the less than three weeks remaining before trial, particularly where, as with the Quarry Filling Works Amendments, the new allegations raise a risk (here, of adverse action by the Commissioner of Taxation) that neither defendant has previously had cause to investigate or to defend, and where Brencorp's evidence is that it would also need time to investigate a possible third-party claim against, among others, its auditors, a process estimated to take some months.

F.3. Profitability Amendments

58 The proposed amendment to paragraph 40 of the ASOC also warrants separate mention, but for a different reason. Unlike the Quarry Filling Works Amendments and the Tax Amendments, I have concluded that leave to make this amendment should be granted.

59 Paragraph 40 of the ASOC has, since 19 December 2025, alleged that development and sale of the lots forming part of the Lilydale Land without constructed dwellings would 'generate greater profits' for the Development Joint Venture than if the Proposed Further Built-Form Works were undertaken. The question whether vacant-lot

development is more profitable than built-form development has accordingly been a live issue in this proceeding from its inception. LBJ now proposes to amend that allegation to plead instead that such development and sale 'would be more profitable', with the particulars referring to the expert report of Mr Pavlovic and identifying four 'profitability performance indicators' said to determine the point: development profit, development margin, net present value and internal rate of return.

60 Brencorp advanced two points in opposition. The first was that it could discern no relevant difference between an allegation that a course of development would 'generate greater profits' and one that it would 'be more profitable', since a thing that is more profitable is, on ordinary usage, a thing that generates greater profits. I put to counsel for Brencorp that this might be regarded as a distinction without a difference, and I do not accept that this first point provides any basis to refuse the amendment.

61 Brencorp's second and substantive objection was that the particulars newly introduced by the amendment, read with paragraph 40 itself, are incomprehensible, because they do not explain how the four indicators are to be weighed where, as Mr Pavlovic's own report shows, they can point in different directions for the same development option.

62 What distinguishes the Profitability Amendment from the Quarry Filling Works Amendments and the Tax Amendments is that it does not plead any new claim, cause of action, or additional relief, and it does not depend on any expert evidence beyond that which LBJ was already permitted, by the June Orders, to obtain and serve. The question of the relative profitability of built-form and vacant-lot development is not new. It is, and has been since the ASOC was filed, the very question addressed at paragraph 40. Mr Pavlovic was foreshadowed as LBJ's feasibility expert on 5 June 2026 and his report, addressing that same question, was served on 3 July 2026 in compliance with the timetable then in force.

63 LBJ has not used the Pavlovic Report to advance any new head of claim; it has used it only to support, and to bring the language of its existing plea into line with, the case

it was already running. The profitability of the two forms of development was always going to be tested at trial by reference to whatever expert evidence the parties adduced, whether or not paragraph 40 was amended in these terms.

64 I do not accept that the difficulty Brencorp identifies in the particulars, namely, that they do not explain how the four indicators are to be weighed against each other, justifies refusing leave altogether, although I accept there is some force in the criticism. That however is a matter for trial.

F.4. Conclusion

65 For these reasons, leave to make the Quarry Filling Works Amendments and the Tax Amendments is refused. Leave to make the Profitability Amendment (paragraph 40) is granted, I grant leave to make the balance of the amendments in the PFASOC that are either consented to or not genuinely opposed, namely the Joinder Amendments, the Loss Amendment and the Phase Costs Amendment.

G. The Application to Vacate the Trial

66 It follows from my refusal of leave to make the Quarry Filling Works Amendments and the Tax Amendments that there is no proper basis to vacate the trial date in order to accommodate them. LBJ's Application to vacate the trial was advanced principally, though not exclusively, on the footing that those amendments should be allowed and that the defendants required more time to meet the case as amended. Once those amendments are disallowed, that foundation falls away.

67 I would, in any event, have refused to vacate the trial even if I had been persuaded to allow the Quarry Filling Works Amendments and the Tax Amendments, for two related reasons.

68 First, both Brencorp and Intrapac submitted that even if the Quarry Filling Works Amendments and the Tax Amendments were allowed, they would prefer the trial to proceed on 10 August 2026 rather than be vacated, notwithstanding the reduced opportunity that would leave them to prepare responsive expert and factual evidence concerning the new allegations. Each defendant's position is that the prejudice it

would suffer from further delay, in circumstances where this project has already been on foot for close to a decade, each defendant has substantial capital committed to it, and delay defers the realisation of returns and increases holding costs, outweighs the prejudice it would suffer in proceeding without a full opportunity to meet the new claims.

69 That is a significant concession, properly made against interest, and it is one I accept I should give weight to. A litigant does not lightly forgo the opportunity to obtain and adduce evidence responsive to a claim made against it. That both defendants would rather do so than see the trial vacated says something important about the relative weight each attaches to delay as against the forensic disadvantage of meeting a new claim under-prepared, and it confirms my own assessment, reached independently for the reasons given in Section F above, that the balance of prejudice in this case favours preserving the trial date over accommodating a late and substantial amendment.

70 Secondly, and independently of the defendants' position, I am not satisfied that LBJ has demonstrated the kind of irreparable prejudice, arising from matters genuinely outside its control, that would justify disturbing a trial date fixed some three months ago on the parties' own estimates, particularly having regard to my clear statement on 11 June 2026 that without very good reason, the trial will proceed. No such good reason has been shown.

71 The Application to vacate the trial date is refused. The trial will proceed on 10 August 2026.

H. Estimated Length of Trial

72 When the trial was set down on 24 April 2026, LBJ's estimate was eight to ten days, and Brencorp's and Intrapac's estimate was eight days, in each case excluding closing submissions. LBJ's estimate at that time expressly included one day for cross-examination of a quantity surveying expert, one day for a geotechnical expert, and two days for accounting experts.

73 In its written submissions filed on 16 July 2026, LBJ contended that the trial would now require fifteen sitting days, even if the Contested Amendments were not allowed. At the hearing on 22 July 2026, LBJ's position shifted again. Senior counsel submitted that if the Contested Amendments were allowed, the trial would require twelve to thirteen days, inclusive of closing submissions, and one day less than that if the Contested Amendments were disallowed. I do not accept either estimate.

74 Two matters materially reduce the length of this trial from what was contemplated even as recently as 16 July 2026. First, and most significantly, I have refused leave to make the Quarry Filling Works Amendments and the Tax Amendments. The scope of the trial is accordingly confined to the case as pleaded in the ASOC, together with the Joinder Amendments, the Loss Amendment, the Phase Costs Amendment and the Profitability Amendment, none of which materially expands the technical or evidentiary scope of the trial beyond what was contemplated on 24 April 2026.

75 Secondly, and importantly, I was informed that the allegations concerning Cave Hill and the Cave Hill Related Party Payments are no longer being pursued. It follows that the expert evidence of the quantity surveyor, Mr Bolt, will not be required at trial. That removes an entire discrete stream of technical evidence and cross-examination that the parties anticipated when the original eight-to-ten day estimate was given on 24 April 2026, including the day specifically allocated in LBJ's own estimate for cross-examination of the quantity surveying expert.

76 Once the Quarry Filling Works Amendments and the Tax Amendments are excluded and the redundancy of the quantity surveying evidence is taken into account, I am satisfied that the estimate of eight days given by Brencorp and Intrapac, which was also substantially LBJ's own estimate on 24 April 2026 removing the quantity surveying component, remains realistic and achievable, provided the trial is conducted efficiently and within reasonable time limits. I do not accept that the trial now requires anything approaching twelve, thirteen or fifteen days for openings and evidence.

77 I recognise that closing submissions in a matter of this complexity may not comfortably be accommodated within the eight-day estimate. I consider the more efficient course is to hear opening submissions and evidence within the eight days presently allocated commencing on 10 August 2026, and to list closing submissions separately, for a date to be fixed at the conclusion of the evidence, at a time convenient to the parties and the Court. That course preserves the trial date, avoids any need to compress the parties' evidence unfairly, and allows written and oral closing submissions to be prepared with the benefit of the evidence given at trial.

I. Orders

78 For the reasons given, I will make the following orders:

(1) The Plaintiff has leave, pursuant to r 9.06 of the Rules to join LBJ Corporation Pty Ltd (ACN 614 267 999) as the Second Plaintiff to the proceeding.

(2) The Plaintiff has leave to file and serve a Further Amended Statement of Claim containing the proposed amendments to or insertions of paragraphs 17(b), 17(c) (particulars), 40, 47(a), 47(b), 51, 54, 54A, 57, 63, 64, 65(b), 65(c), 66, 68, 68A, 68B, 69, 71 to 77, 78(d) and 78(e), and prayer for relief paragraphs E, L and M in the form of the draft Proposed Further Amended Statement of Claim annexed to the Plaintiff's written outline of submissions dated 16 July 2026.

(3) Save as provided in order 2, leave to amend is refused, including in respect of the Quarry Filling Works Amendments and the Tax Amendments.

(4) The Plaintiff file and serve its Further Amended Statement of Claim by 4.00 pm on 27 July 2026.

(5) The Defendants file and serve their defences to the Further Amended Statement of Claim by 4.00 pm on 3 August 2026.

(6) The Plaintiff's Application to vacate the trial date is refused.

(7) The trial will proceed on 10 August 2026 on an estimate of eight sitting days for opening submissions and evidence.

(8) Closing submissions will be heard on a date to be fixed following the conclusion of the evidence, at a time convenient to the parties and the Court.

(9) The parties are required to confer and, by 4.00 pm on 29 July 2026:

a. submit a proposed form of order as to costs; or

b. failing agreement, file and serve submissions of no more than three pages addressing the question of costs and attaching their preferred form of order as to costs.

(10) The proceeding is listed for a mention at 10.30 am on 31 July 2026 to address any outstanding matters concerning the conduct of the trial.

CERTIFICATE

I certify that this and the 22 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Waller of the Supreme Court of Victoria delivered on 24 July 2026.

DATED this twenty-fourth day of July 2026.

Associate