INDUSTRIAL RELATIONS COURT OF SOUTH AUSTRALIA

OATEN, Lynette

v

DIEMOULD TOOLING SERVICES PTY LTD

-and-

MARKOS, Ian

v

SANTOS LTD

JURISDICTION: Referral of a Question of Law

FILE NO/S: 2768 of 2006 and 487 of 2006

HEARING DATES: 21 and 22 May 2007

JUDGMENT OF: His Honour Senior Judge WD Jennings
His Honour Judge JP McCusker
His Honour Judge BP Gilchrist
His Honour Judge PD Hannon
Her Honour Judge LJ Farrell

DELIVERED ON: 24 August 2007

CATCHWORDS:

Questions of Law - Single charge laid with multiple particulars - Whether each individual act or omission should be the subject of a separate charge - Whether Crown should be required to elect which particular is subject of the prosecution - Whether BHAS v Stevenson should be reconsidered - Long standing authority - Conflicting approaches taken in various cases cited and reasonable minds may differ on construction of the Act - Power to overrule should be "used sparingly" and rarely used to reconsider the construction of a statute - Decision in BHAS v Stevenson to be followed - Multiple charges laid against Santos arising from substantially same facts - Fundamental tenet of system to not be punished twice for the same wrong - Court declines to express view as to the appropriate course - Ss 19, 22(2), 58, 59, 60, 63A Occupational Health, Safety and Welfare Act 1986, s 43 Magistrates Court Act 1991, s 12

Dangerous Substances Act 1979, s 181 Summary Procedure Act 1921, s 120 Workers Rehabilitation and Compensation Act 1986.

BHAS v Stevenson (1991) 58 SAIR 759
Walsh v Tattersall (1996) 188 CLR 77
Johnson v Miller (1937) 59 CLR 467
Chugg v Pacific Dunlop Ltd [1988] VR 411
Byrne v Baker [1964] VR 443
Magill v Boral Gas (Australia) Pty Limited (1994) 53 IR 7
Boral Gas (NSW) Pty Ltd v Magill (1995) 37 NSWLR 150
R v Australian Char Pty Ltd [1999] 3 VR 834
Victorian WorkCover Authority and Anor v Esso Australia Ltd (2001) 207 CLR 520
Federated Miscellaneous Workers Union of Australia (WA Branch) v Nappy Happy Hire Pty Ltd trading as Nappy Happy Service (1994) 56 IR 62
Pearce v The Queen (1998) 194 CLR 610
Western Australia v The Commonwealth (1975) 134 CLR 201
Nguyen and Others v Nguyen (1990) 169 CLR 245
Weinel v Fedcheshen (1995) 65 SASR 156
Broken Hill Associated Smelters Pty Ltd v Stevenson (1991) 42 IR 130
Federal Commissioner of Taxation v Energy Resources of Australia Ltd (2004) 204 ALR 487
Burke v Yurilla SA Pty Ltd and Others (1991) 56 SASR 382
Copping and Others v ANZ McCaughan Ltd and Others (1997) 67 SASR 525
Thompson v Byrne and Others (1999) 161 ALR 632
Babaniaris v Lutony Fashions Pty Ltd (1987) 163 CLR 1
John v Commissioner of Taxation of the Commonwealth of Australia (1989) 166 CLR 417
Little v Levin Cuttings Pty Ltd (1953) 3 WCBD (Vic) 71
Dairy Farmers Co-operative Ltd v Azar (1990) 95 ALR 1
Caltex Oil (Australia) Pty Ltd v Best (1990) 97 ALR 217
Waugh v Kippen and Others (1986) 160 CLR 156
Saraswati v The Queen (1991) 172 CLR 1
James Hardy & Co Pty Ltd v Seltsam Pty Ltd (1998) 73 ALJR 238
Dobbie and Another v Davidson and Others (1991) 23 NSWLR 625
Re Bolton and Another; Ex parte Beane (1987) 162 CLR 514
Stingel v Clark [2006] HCA 37
Qualcast (Wolverhampton) Ltd v Haynes [1959] AC 743
Cornwell v R [2007] HCA 12
Raimondo v State of South Australia (1979) 23 ALR 513
Burch v SA (1998) 71 SASR 12
Gerah Imports Pty Ltd v Duke Group Ltd (In liq) (2004) 88 SASR 419
Nominal Defendant v GLG Australia Pty Ltd (2006) 80 ALJR 688
Romeyko v Samuels (1972) 2 SASR 529
Phillis v Coombe (1987) 47 SASR 416
Daly v Medwell (1986) 40 SASR 281

James v Prider [1999] SASC 136
Benedetto v Huffa (1969) SASR 448
State Rail Authority of New South Wales v Dawson (1990) 37 IR 110
*Coombs v Patrick Stevedores Holdings Pty Ltd (*2002) 118 IR 401
Meiklejohn v Central Norseman Gold Corporation Ltd (1998) 19 WAR 298
Interstruct Pty Ltd v Wakelam (1990) 3 WAR 100
Shannon v Comalco Aluminium Ltd (1986) 19 IR 358
Vrisakis v Australian Securities Commission (1993) 9 WAR 395
Peterson; Ex parte Brick & Pipe Industries Ltd t/as Nubrick (1994) 76 A Crim R 291
Ex parte Polley; Re McLennan (1947) 47 SR (NSW) 391
Australian Oil Refining Pty Ltd v Bourne (1980) 28 ALR 529
Softwood Holdings Ltd v Stevenson (1986) 188 LSJS 487
WorkCover Authority of NSW (Inspector Twynam-Perkins) v Maine Lighting Pty Ltd (1995) 100 IR 248
Fielders Steel Roofing Pty Ltd v Moore [2004] SAIRC 62
Hudson v Australia Food Group Pty Ltd [2006] TASSC 48
Police v Caldwell & Wright [2007] SASC 266
S v The Queen (1989) 168 CLR 266
John L Pty Ltd v The Attorney-General for the State of New South Wales (1987) 163 CLR 508
Crafter v McKeough (1943) SASR 371
The Queen v Elliott; Ex parte Elliott (1974) 8 SASR 329
Schultz v Pettitt (1980) 25 SASR 427
Brinkworth & Anor v Dendy [2007] SASC 120
Director of Public Prosecutions v Merriman [1973] AC 584
R v Jiri Fiala; Ex parte GJ Coles & Co Ltd (1986) 46 SASR 47
Parisienne Basket Shoes Pty Ltd v Whyte (1938) 59 CLR 369

REPRESENTATION:

Counsel:

MR C KOURAKIS QC, with MR S HENCHLIFFE, appeared on behalf of Ian Markos

MR C KOURAKIS QC, with MR K SOETRATMA, appeared on behalf of Lynette Oaten

MR D EDWARDSON QC, with MS C SCHULTZ, appeared on behalf of Santos Ltd

MR J WELLS QC, with MR A CROCKER, appeared on behalf of Diemould Tooling Services Pty Ltd

JENNINGS SJ AND GILCHRIST J:

1 Pursuant to s 43 of the *Magistrates Court Act 1991* a number of questions of law have been referred to this Full Court. Primarily they concern the nature of the offences created by ss 19 and 22(2) of the *Occupational Health, Safety and Welfare Act 1986* and s 12(2)(a) of the *Dangerous Substances Act 1979.* These statutory provisions impose in various ways obligations to maintain certain standards of safety. The point at issue is if for a variety of reasons the particular standard has not been maintained, has the relevant entity committed one offence or several.

2 They arise out of various charges relating to unrelated incidents that have been laid against Diemould Tooling Services Pty Ltd and Santos Ltd. As the arguments that each sought to put forward appeared to be substantially the same it was resolved that there would be one hearing.

Diemould

3 A complaint and summons has been issued against Diemould alleging a single offence against s 19 of the *Occupational Health, Safety and Welfare Act.* That section imposes a duty upon an employer to ensure, so far as is reasonably practicable, that each employee employed by or engaged by the employer is, while at work, safe from injury and risks to health. The complaint alleges that on 5 June 2004, as the employer of Daniel Madeley, Diemould failed to comply with this obligation. The complaint then sets out a series of particulars that include various allegations about the safety of the plant that Mr Madeley was using, the safety of the systems of work for its employees who were using the horizontal borer that Mr Madeley was using when he was fatally injured, and the adequacy of the information, instructions, training and supervision provided to Mr Madeley in connection with his use of the borer.

Santos

4 An information and summons has been issued against Santos alleging a single offence against s 12(2)(a) of the *Dangerous Substances Act.* That sub-section imposes a duty upon a person in charge of a plant used or reasonably expected to be used in connection with any dangerous substance, to take such precautions and exercise such care as is reasonable in the circumstances to ensure that the plant is in a safe condition. The information alleges that on 1 January 2004 Santos was in charge of a plant used in connection with dangerous substances and that it failed to ensure that such plant was in a safe condition. It contains a series of particulars that include various allegations about Santos' failure to take adequate precautions and its failure to exercise reasonable care to ensure

that its plant was in a safe condition whenever it was used in connection with various specified substances.

5 The information and summons also alleges eight separate summary offences against s 19 of the *Occupational Health, Safety and Welfare Act 1986* in respect of eight specified persons who are alleged to have been Santos' employees. In respect of each it alleges that on 1 January 2004 Santos failed to ensure, so far as is reasonably practicable, that the named employees, while at work, were safe from injury and risks to health. It contains a series of particulars in connection with each offence. Apart from the identity of the particular employee the particulars are identical. They include various allegations about Santos' failure to address or adequately address factors which affected the integrity of its plant, its failure to take any or any adequate steps to control conditions or factors to minimise or avoid risks associated with the presence of mercury and its failure to take any or any adequate steps to minimise any release of gases or other substances in the event of a failure of its plant.

6 The information further alleges five separate offences against s 22(2) of the *Occupational Health, Safety and Welfare Act 1986*. That sub-section imposes a duty upon an employer or self-employed person to ensure, so far as is reasonably practicable, that while at a workplace that is under their control persons who are not employed or engaged by them are safe from injury and risks to health. It alleges that on 1 January 2004, in respect of five specified persons who were not employees of or engaged by Santos, Santos failed to take reasonable care to avoid adversely affecting their health or safety. It contains a series of particulars in connection with each such offence. Apart from the identity of the particular person the particulars are identical. They include various allegations about Santos' alleged failure to provide the plant in safe condition and its failure to maintain safe systems of work.

BHAS v Stevenson

7 It will be apparent that in laying these charges the Crown regarded the offences created by ss19 and 22(2) of the *Occupational Health, Safety and Welfare Act 1986* and s 12(2)(a) of the *Dangerous Substances Act 1979* as pertaining to a state of affairs such that it was appropriate to lay an individual charge relying upon multiple particulars.

8 In doing so it relied upon a majority decision of this Court in *BHAS v Stevenson*[1]. Underpinning the referral of the questions for the opinion of this Court is the submission by Diemould and Santos that *BHAS v Stevenson* should be reconsidered.

[1](1991) 58 SAIR 759

9 We now turn briefly to that case.

10 BHAS was charged with four counts of breaching s 19(1) of the *Occupational Health, Safety and Welfare Act 1986*. Section 19 of that Act relevantly provides:-

> "An employer, must, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular–
>
> (a) must provide and maintain so far as is reasonably practicable –
>
> (i) a safe working environment;
>
> (ii) safe systems of work;
>
> (iii) plant and substances in a safe condition; and
>
> (b) must provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer; and
>
> (c) must provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health."

11 Each count made an allegation that BHAS had not, so far as was reasonably practicable, ensured that a specified employee was safe from injury and risk to health while at work. Each charge contained particulars. The first referred to an alleged failure of having a safe system of work. The second referred to an alleged inadequacy of facilities of a prescribed kind for the welfare of the specified employee while at work. The third referred to an alleged failure to have a safe working environment. The fourth referred to an alleged failure to provide such information, instruction and training to ensure that the specified employee was safe from risks to health.

12 A learned Industrial Magistrate found the first, third and fourth charges proved. On appeal various arguments were put, including a submission that the complaint was bad for duplicity. BHAS contended that the Crown should have laid an omnibus count which incorporated allegations of the different ways in which it allegedly failed to comply with its single statutory obligation, that is to create a safe working environment for each of its employees. The majority accepted that submission and held that it was impermissible for the complaint to allege multiple offences. We will

return to this case and discuss the reasoning of the majority and that of the dissenting judge later in these reasons.

Diemould and Santos contend that BHAS v Stevenson was wrongly decided and that the complaint and information are bad for duplicity

13 Diemould and Santos contended that contrary to *BHAS v Stevenson* offences such as those created by ss19 and 22(2) of the *Occupational Health, Safety and Welfare Act 1986* comprise of individual acts or omissions. Hence it was said that if there are several particulars of breach, each should be the subject of a separate charge and the failure to do so renders the complaint and the information bad for duplicity.[2]

14 In particular Diemould complained that the complaint is bad for duplicity because it alleges that Diemould failed to keep employees safe from injury <u>and</u> risks to health. It contended that each is a separate offence.

15 Next it said that if the plant that Mr Madeley was using was unsafe, if the systems of work for its employees who were using the horizontal borer were unsafe and if the information, instructions, training and supervision provided to Mr Madeley in connection with his use of the borer were inadequate, each constitutes a separate offence.

16 It submitted that it was inappropriate for the summons to make reference to the fact that Mr Madeley was fatally injured. It argued that as s 19 concerns the obligations that an employer has for its employees the actual, as opposed to potential consequences of the alleged breach, are irrelevant. This can be immediately disposed of. The fact of Mr Madeley's death is relevant because it demonstrates the magnitude of the risk to which Diemould's employees were exposed. That provides a particular from which the determination as to whether Diemould had taken such steps as were reasonably practicable can be made.

17 It contended that the approach that found favour with the majority in *BHAS v Stevenson* has the potential to cause an injustice. It said that it permits the laying of a single charge underpinned by a series of allegations, the proof of any one of which would constitute an offence. It said that as the evidence unfolded the prosecution could select which allegation stood the best chance of conviction and focus upon that allegation. In the meantime the defendant was required to defend each allegation and even if exonerated on all but one, would not have the benefit of any acquittals.

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[2] In *Walsh v Tattersall* (1996) 188 CLR 77 at 84 Dawson and Toohey JJ approved of the proscription against duplicity as stated by *Archbold*: " The indictment must not be double; that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences…"

18 It referred us to the judgments of Dixon and Evatt JJ in *Johnson v Miller*[3]. That case concerned whether a Magistrate was right to dismiss a complaint made under the *Licensing Act 1932-5.* The complaint alleged that about 30 men were seen coming into and out of licensed premises during prohibited hours. The complaint only alleged one offence. The defendant asked the prosecutor to identify which was the man whose emergence from the hotel was to be the subject of the complaint. The prosecutor refused the request and this resulted in the Magistrate dismissing the complaint. In upholding that dismissal Evatt J wrote:-

> "I think it *is* an abuse of the court's process to refuse to particularize or specify an offence until in effect the defendant has been compelled to answer thirty charges, after being charged in the complaint with one only. The court functions for the purpose of determining guilt or innocence in relation to a specific charge, not for the purpose of assisting the prosecutor by ascertaining which of a large number of possible charges holds out to such prosecutor the best chance of a conviction."[4]

19 It said that "the complainant is claiming to be in a position to throw as much mud as it wishes on the basis that if only a bit sticks, that's good enough".

20 It argued that the Crown should allege separate offences for each particular or be put to an election as to which of the alleged breaches of the *Occupational Health, Safety and Welfare Act 1986* is to be the subject of the prosecution and that in either case this would require an amendment. It submitted that as the time limit for the issue of proceedings prescribed by s 58(6) of the *Occupational Health, Safety and Welfare Act 1986* had expired no such amendment was permissible.

21 Diemould took us to the wording of s 19. It noted that after stipulating that there is a duty upon an employer to ensure, so far as is reasonably practicable, that each employee employed by or engaged by the employer is, while at work, safe from injury and risks to health, the section then provides: "in particular". Diemould contended that it was apparent from this that parliament did not impose a mere general duty of care, but rather it also specified particular acts or omissions that comprised of a contravention of the section. It said that this suggested that the relevant offence was a breach of each act or omission.

22 Diemould also argued that there had been amendments to the *Occupational Health, Safety and Welfare Act 1986* that warranted a re-evaluation of *BHAS v Stevenson*. In particular we were taken to ss 60 and 63A of the Act. Section 60 creates an offence for a person, convicted

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[3] (1937) 59 CLR 467
[4] *Johnson v Miller* at 499

of an offence against the Act, if that person continues to perform the act or omission that constituted the original offence. Section 63A is an evidentiary provision. Section 63 enables the formulation of a code of conduct for the purposes of the Act. Section 63A provides that proof that a defendant has failed to observe the code of practice dealing with the matter in respect of which an offence under the Act is alleged, is in the absence of proof to the contrary, proof that the defendant has failed to exercise the standard of care required by the Act. We were told that there were of the order of 60 codes of practice that have been approved under s 63.

23 It said that s 60 would work much better if the Court could identify with precision the offence under the Act with which the defendant was charged. It submitted: "There are going to be otherwise questions about proportionality that would arise if … there is a series of particulars alleged to be only one offence."

24 In the case of s 63A it contended that: "the defendant is going to be placed in a position of singular prejudice and disadvantage [in]…having to deal with a code of practice and the reversal of the onus of proof that arises wherever a code of practice is called in aid."

25 Diemould took us to s 59 of the *Occupational Health, Safety and Welfare Act 1986*. That section provides that a breach of a provision contained in Part 3, which contains general provisions relating to occupational health, welfare and safety, including ss 19 and 22 is a minor indictable offence, if the breach occurs in prescribed circumstances; the prescribed circumstances being that the person knew that the contravention was likely to endanger seriously the health and safety of another and was recklessly indifferent to whether the health or safety of the other was so endangered: s 59(1) (a) and (b).

26 Diemould argued that it made no sense to allege a knowing and reckless contravention by reference to s 19 if what was alleged was in the form of a series of particulars. It said: "the legislature expects and contemplates" that an offence under s 59 will relate "to each and every separate and distinct breach".

27 Santos similarly complained that the information issued against it is bad for duplicity because it alleges that Santos failed to keep employees safe from injury <u>and</u> risks to health.

28 It submitted that if it failed to provide and maintain so far as was reasonably practicable plant in a safe condition, and if it failed to provide and maintain so far as was reasonably practicable safe systems of work, each failure constitutes a separate offence.

29 Santos contended that the information is also bad for duplicity because it alleges in the one charge that Santos was in breach of its duty to persons not employed or engaged by it in respect of both their safety and risks to health.

30 Like Diemould, it argued that the Crown should be put to an election as to which of these allegations was to be the subject of the prosecution and that this would require an amendment. Like Diemould it submitted that as the time limit for the issue of proceedings prescribed by s 58(6) of the *Occupational Health, Safety and Welfare Act 1986* had expired, no such amendment was permissible.

31 Santos also complained that the information is duplicitous because it alleges multiple offences under ss 19 and 22 of the *Occupational Health, Safety and Welfare Act 1986* in respect of multiple persons. Again it argued that the Crown should be put to an election as to which was to be the subject of the prosecution, that this would require an amendment, and that as the time limit for the issue of proceedings prescribed by s 58(6) of the *Occupational Health, Safety and Welfare Act 1986* had expired, no such amendment was permissible.

32 Santos adopted the submissions made by Diemould and it made a further submission based upon s 59 of the *Occupational Health, Safety and Welfare Act 1986*. Santos submitted that upon such a charge a defendant could elect to be tried by a jury. It said: "If all of the charges, that is all of the particulars to the one charge as currently framed, are said to be committed with knowledge and reckless indifference…were on the one information, then one would have to ask the question, apart from the general complexity of instructing a jury, how would one have any idea of the basis upon which a jury returned its verdict…?"

33 The questions that Diemould and Santos posed[5] have been formulated so as to evoke answers that conform to these submissions.

Conflicting authority as to the correct characterisation of offences under Occupational Health, Safety and Welfare legislation

34 In arguing their positions for and against, counsel referred us to many cases including a number that concerned similar legislative provisions in other States. Although some of these suggest that there are material differences between the various legislative schemes that would justify adopting one approach over another, we agree with counsel that the differences between these legislative schemes are relevantly immaterial.

[5] These are set out at the end of these reasons.

35 We will limit our analysis of these cases to that which is sufficient to identify the different approaches that have been taken in dealing with provisions of the type under consideration here.

36 We commence with *Chugg v Pacific Dunlop Ltd.*[6] Fullagar J sitting in the Supreme Court of Victoria was asked to review a decision of a Magistrate that an information laid under the *Occupational Health and Safety Act 1985* (Vic) was bad for duplicity.

37 The information alleged a single breach stipulating that the defendant:-

> "… did fail to provide and maintain so far as was practicable for employees a working environment that was safe and without risks to health when it did fail to provide and maintain plant and systems of work that were so far as was practicable safe and without risks to health, and when it did fail to provide such information, instruction and supervision to employees as was necessary to enable the employees to perform their work in a manner that was safe and without risks to health…".

38 The information contained various particulars such as an allegation that there was absent a system of work to ensure that the interaction of an electrical and hydraulic system of a mill did not result in danger; a failure to provide up to date circuit drawings relating to the mill; a failure to inform of modifications that had been made to the mill; and of allowing an apprentice to work without adequate supervision.

39 Before the Court, the Crown contended that the information was proper. Underpinning its submission was an assertion that the relevant provision of the Act contemplated "a single continuing offence". It was said that the offence was failing to keep an environment that, so far as was practicable, was safe and without risk to health.

40 Counsel for *Chugg* contended that the offence did not create a continuing offence but rather contemplated the prosecution of every breach of the relevant duty owed by an employer to an employee.

41 Fullagar J found the *Chugg's* submissions persuasive. In his opinion the relevant offence created a duty that was the same or substantially the same as the duty of care owed at common law by an employer to an employee in tort.

42 In reaching this conclusion he seemed to be particularly influenced by the reasoning of the Full Court of the Supreme Court of Victoria in *Byrne v Baker.*[7]

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[6] [1988] VR 411
[7] [1964] VR 443

43 *Byrne* concerned an information made pursuant to s 107 of the *Companies Act 1958 (Victoria)* which created an offence if a director did not at all times act honestly and use reasonable diligence in the discharge of the duties of his office. Mr Byrne was charged on an information that he had been in breach of this provision. The information alleged one offence but relied upon 61 particulars in support of the charge.

44 The Full Court noted the competing arguments put by counsel. It said:-

> "The applicant contended, both below and in this Court, that what is made an offence under the section on the part of a director, so far as reasonable diligence is concerned, is an act or omission constituting a failure to use reasonable diligence, and not a discharge of the duties of the office which, when regarded as a whole in relation to some specified period, shows a lack of reasonable diligence. … For the informant, on the other hand, it was said that this construction fails to give their true meaning to the words 'at all times' and that a charge under the section should be framed in the way the charge was framed in the information in this case, namely, that the applicant did not at all times during some specified period use reasonable diligence in the discharge of the duties of his office. The gist of the offence, it was said, is that the applicant has failed to be a reasonably diligent director. Such an offence, it was submitted, is of a continuing nature and, therefore, it was proper, here, to specify a period of time over which it was charged, it being open to the prosecution to select any period of time thought appropriate and to examine the whole of the conduct of the applicant in his office over that period in order to find evidence in support of the charge. Furthermore, it was submitted that it mattered not how often or in how many ways a director was shown to have failed to exercise reasonable diligence; he was guilty of one offence and one offence only during the period. The fact that a very large number of particulars had been given did not operate as an allegation of more than one offence…".

45 Of the construction urged upon it by the Crown the Court said:-

> "It is a construction which involves a departure from the important principle that crimes should be so defined as to enable the accused to know with precision what he is charged with; and a construction producing that result should not be adopted unless the language of the legislature requires it. Here the language, far from requiring it, points away from the construction. It may be added that the view put forward by the prosecution, if adopted, would give rise to grave practical difficulties, which the magistrate certainly recognised below, and which became even more apparent during the course of the argument in this Court. One of these would be the difficulty of determining how you establish that over a period of years a person has failed to be a reasonably diligent director, and how far his

> unusual diligence in some things should weigh against his lack of diligence in others."[8]

46 The Full Court accepted the defendant's submission and held that the information was bad for duplicity.

47 Returning to *Chugg*, Fullagar J said:-

> "Using the word 'gist' in the same sense as, I think, the Full Court intended in *Byrne v Baker* I am of (sic) opinion that the gist does not lie in a failure to have maintained at all times a constant environment…it is each and every failure by the employer to provide the environment or the information, that is to say, each and every particular act or omission amounting to such a failure, that constitutes an offence under the sections. This position is in no way altered by the circumstances that a failure may sometimes consist of an act of a continuing character, or of an omission persisted in over a period of time."[9] (footnotes omitted)

48 This Full Court considered *Chugg* in *BHAS v Stevenson.*

49 Stanley P, in dissent, found the reasoning in *Chugg* persuasive. He said:-

> "It seems to me that the gist of the offence created by section 19(1) is not a failure to have maintained a safe working environment, or even a failure to have provided at all times the information required by paragraph (c) of the subsection. Rather it is each and every particular act or omission which amounts to a failure to provide the constant environment which constitutes the relevant offence."[10]

50 In rejecting that approach, one of the majority judges, Allan J, said:-

> "… I think the complaint breached the fundamental principle that a person is not to be prosecuted twice for the same offence. In laying the four charges, the complainant exposed the defendant to four convictions and penalties with respect to the one set of circumstances; and I think Parliament could not have intended such a result. It is true that the way the learned magistrate dealt with the matter meant that such a situation did not arise, but I think that does not cure what I see as a defect in the complaint."[11]

51 Allan J distinguished *Chugg*. He said:-

> "The legislation in Chugg's case is expressed differently from the section presently under consideration and the point under consideration there was whether the information was bad for

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[8] *Byrne v Baker* at 453
[9] *Chugg v Pacific Dunlop Limited* at 416
[10] *BHAS v Stevenson* at 776
[11] *BHAS v Stevenson* at 791

> duplicity because it contained more than one offence without complying with the statutory requirements relating to the inclusion of more than one offence in an information; and, as best I can tell, the point which I think decides the present case seems not to have been argued."[12]

52 The other majority judge, McCusker J, came to the same conclusion, albeit by a slightly different path. He said:-

> "It seems to me that the very intent behind Parliament's approach is to inflict a far greater penalty on those who, in the conduct of their affairs, have suffered the warning of one conviction, but fail to consequently, 'put their houses in order'. That would support a construction of section 19(1) constituting one offence rather than a number of distinct offences. These considerations, to my mind, outweigh the presence of the words 'in particular'. I would in any event question the restricted notion of the meaning of those two words in common usage. If one was to say the Australian climate was warm and in particular in the northern part of the continent, one would not be using the words to restrict the climatic warmth to those northern areas. It would merely be a usage drawing special attention, without contradiction or limitation, to the initial general observation. It is always a matter of context. In conclusion, it seems to me the provision creates one offence for any given work task or situation, namely the failure to take reasonable steps to ensure employees are safe from harmful effects to their person. That duty may be breached by the presence of one or a number of aspects in the circumstances."[13]

53 The issue next came before a court in *Magill v Boral Gas (Australia) Pty Limited.*[14] Marks J sitting as the Industrial Court of NSW was asked to rule upon the validity of an information issued against Boral. Boral had been issued with a summons alleging its breach of s 15 of the *Occupational Health and Safety Act 1985* (NSW). The information made a general allegation against Boral that as an employer it failed on 2 June 1991 to ensure the health, safety and welfare at work of all of its employees. Boral's solicitors sought and obtained particulars, which Marks J described as traversing a wide-ranging area.

54 Boral contended that the information was bad for duplicity because it should have charged Boral with individual offences for each alleged breach. Marks J was taken to *Chugg* and *Byrne*. He thought the Victorian legislation was materially different to the New South Wales Act such that *Chugg* was distinguishable. He found against Boral. He said:-

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[12] *BHAS v Stevenson* at 795
[13] *BHAS v Stevenson* at 799
[14] (1994) 53 IR 7

> "Experience dictates that in most cases of industrial accidents there are a number of factors at play traversing most of the areas set out in s 15(2). Merely to consider each of the lettered paragraphs in that sub-section demonstrates without further comment the inter-relationship and inter-play of each of the matters described in each of the lettered paragraphs. To confine the WorkCover Authority in the institution of prosecutions for a breach of s 15 to a particular identifiable allegation restricted to one lettered paragraph in s 15(2) would seriously inhibit the manner in which the Act would function. I do not raise this issue as one which is determinative of the approach which I should adopt in this matter, but as a means of testing the appropriateness of the invitation which Mr Joseph has addressed to me, namely to force the prosecution to elect to proceed only under one of these paragraphs. It is possible, in an imperfect world, that the legislation having been framed in such a manner brings about the result which Mr Joseph contended for because of the overwhelming consideration of procedural unfairness. However, on balance, whilst I have some sympathy for the defendant in these proceedings faced with the wide-ranging nature of the allegations made against it I do not propose at this stage of the proceedings to force the prosecution to make an election."

55 The decision was appealed to the Full Court of the Industrial Court of NSW.

56 Fisher CJ dismissed the appeal. He said:-

> "Most accidents have multiple causation. This case as the particulars show is typical. Some matters are breaches of safe working practice, safe working codes and regulations under other statutes. The device of bringing the central allegations together under one count, under s 15, is inherent in the structure of the Act itself and a long tradition of industrial litigation. Every dangerous machinery count can be presented as a breach of legislative standards…a failure to employ a safe system of work, a failure to supply safe plant and machinery, a failure adequately to train an employee in safe work practices, a failure to warn and advise, to name but a few.
>
> It has been long the practice to avoid a multiplicity of actions and to note the double jeopardy provision earlier cited, and what it seems to infer. ...
>
> Section 15(1) is a general provision establishing a far reaching obligation upon the employer and imposing a duty in absolute terms. Sections 15(2) spells out with particularity the heads or particulars of that absolute duty without in any way cutting down its rigour. … the central concept of this statute is to raise the standard of the duty of care to *ensure* the safety of employees and

> others. It could have been possible to deploy s 15 to lay out a series of separately itemised industrial offences each one standing separately. That is not what had been done. Each itemised failure is referred back as a failure under s 15(1) and the list is not exhaustive. Other allegations can enter the *umbra* of s 15(1)."[15]

57 Hill J and Hungerford J took a contrary view and allowed the appeal.

58 Hill J said that he preferred the reasoning and conclusion of Stanley P in *BHAS v Stevenson* and the reasoning of Fullagar J in *Chugg* to the majority view in *BHAS v Stevenson*. This led him to conclude that the information was bad for duplicity.

59 Hungerford J, in a separate judgement, agreed with that conclusion. Hungerford J stated that he found the reasoning in *Chugg* persuasive. He stated that he found *BHAS v Stevenson* distinguishable. He said of it that it:-

> "…was not really a case about duplicity at all but rather with the other question whether the relevant section created only one offence so as to prevent a charge with a number of different counts. Once that be seen, then its reasoning and result must, I think, be distinguished from the present case."[16]

60 In *R v Australian Char Pty Ltd* [17] the Court of Criminal Appeal of Victoria was asked to reconsider *Chugg*. It was taken to various cases including the judgments of Marks J and of the Full Court in *Magill v Boral Gas* and the majority and minority decisions in *BHAS v Stevenson*. It said: "Upon careful examination we are unpersuaded that the reasoning of Fullagar J admits of error."[18]

Consideration and conclusions

61 For the reasons expressed in the joint judgment of McCusker, Hannon and Farrell JJ there is nothing in the argument that because s 19 refers to injury <u>and</u> health, it creates separate offences.

62 As to the other arguments put by counsel for Diemould and Santos they were not without merit. It is understandable that arguments like theirs found favour in many of the judgments in the cases that were cited. The submissions identifying potential difficulties that an omnibus charge may present in connection with ss 59, 60 and 63A of the *Occupational Health, Safety and Welfare Act 1986* raise some legitimate issues.

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[15] *Boral Gas (NSW) Pty Ltd v Magill* (1995) 37 NSWLR 150 at 157-8
[16] *Boral Gas v Magill* at 210
[17] [1999] 3 VR 834
[18] *R v Australian Char Pty Ltd* at 842-3

63 But it must also be said that the contrary arguments, that also found favour in many of the judgments that were cited, are also not without merit. Often a number of factors contribute to a state of affairs that has caused or could cause an industrial accident. There are sound practical reasons for thinking that it is that state of affairs, not the factors that contributed to it, that is "the gist of the offence" created by provisions such as s 19 of the *Occupational Health, Safety and Welfare Act 1986*. Moreover it does seem unfair to expose an employer to multiple charges and hence multiple penalties out of what in practical terms is essentially the one transgression.

64 And, as counsel for the Crown pointed out, issues arising on sentencing where a jury verdict is involved are not limited to prosecutions under s 59 of the *Occupational Health, Safety and Welfare Act 1986*. As in other cases the sentencing judge will no doubt form his or her own conclusions about the factual basis upon which sentence is to be imposed.

65 We also take note that in *Johnson v Miller*[19] Dixon J mentioned that one means by which a defendant might be fully appraised of the precise set of facts, which is the subject of the charge, is through the provision of particulars. It has routinely been this Court's practice to make orders that adequate particulars are provided in connection with prosecutions under the *Occupational Health, Safety and Welfare Act 1986*.

66 *BHAS v Stevenson* has been the law that has guided prosecutions made pursuant to the *Occupational Health, Safety and Welfare Act 1986* in this State for many years. In determining the circumstances in which it is appropriate for this Court to depart from a long standing construction of an Act adopted in a previous decision we respectfully adopt the approach taken by the Full Court of the Western Australian Industrial Appeal Court in *Federated Miscellaneous Workers Union of Australia (WA Branch) v Nappy Happy Hire Pty Ltd trading as Nappy Happy Service*.[20] In that case Franklyn J spoke of the need to have certainty in the law and of the need to protect the integrity of acts and transactions that had taken place and reliance upon it. He noted after referring to various decisions "that the power to overrule is to be used sparingly and ***will rarely be used*** to reconsider the construction of a statute" (emphasis ours). He also made reference to the judgment of Gibbs J in *Western Australia v The Commonwealth*[21] where Gibbs J spoke of the caution with which a court should disturb a settled decision. Dawson, Toohey and McHugh JJ expressed similar sentiments in *Nguyen and Others v Nguyen*.[22]

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[19] *Johnson v Miller* at 490
[20] (1994) 56 IR 62 at 63-4
[21] (1975) 134 CLR 201
[22] (1990) 169 CLR 245

67 The question at issue here concerns the preference of one statutory construction over another. Sometimes the nature of the statutory provision and its wording points clearly in one direction. But sometimes the position is not so clear and there can be different but equally reasonable suggested outcomes. This reflects the nature of statutory construction. It is not an exact science. In *Victorian WorkCover Authority And Another v Esso Australia Ltd*[23] Kirby J at p 551 remarked:-

> "From time to time different judges, looking at the same legislative provisions, reach different conclusions on such questions. They do so because they see the scheme of the legislation differently. Just as one person may see the glass as half full and another see it as half empty." (footnotes omitted)

68 There have been many instances where judges faced with the question of characterising the nature of a statutory offence have reached contrary views. It is sufficient to refer to one raised by counsel in this case concerning the correct classification of charges laid under s 120 of the *Workers Rehabilitation and Compensation Act 1986*. That section makes it an offence for a person to obtain benefits under that Act by dishonest means.

69 In *Weinel v Fedcheshen*[24] Perry J rejected a submission that a complaint that included a single charge that alleged a course of conduct that embraced each individual occasion identified in 59 other counts that had also been laid, was bad for duplicity. Perry J concluded that the section permitted the laying of a compendious count enabling a successful prosecution if it could be proved that the defendant embarked upon a course of conduct involving the obtaining of benefits by dishonest means. Prior J expressly approved of this approach in *Walsh v Tattersall*, [25] a case that also concerned a compendious charge laid under the same section. Doyle CJ and Williams J concurred with Prior J's decision. On appeal to the High Court[26] so too did Dawson and Toohey JJ. However Gaudron and Gummow JJ concluded that the offence created by the section was a "discrete offence…completed upon the receipt of any one payment or benefit".[27] Kirby J in a separate judgment reached the same conclusion as Gaudron and Gummow JJ.

70 Having carefully considered the arguments that were put to us by counsel for Diemould and Santos, in our view the best that can be said is that the correct characterisation of the nature of the offence created by s 19 of the *Occupational Health, Safety and Welfare Act 1986* is one in respect of which reasonable minds might differ.

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[23] (2001) 207 CLR 520
[24] (1995) 65 SASR 156
[25] SA Supreme Court unreported S 5323 delivered 2 November 1995
[26] (1996) 188 CLR 77
[27] (1996) 188 CLR 77 at 91

71 In the circumstances we are not persuaded that it would be appropriate to overrule the majority decision of *BHAS v Stevenson*.

72 In reaching this conclusion we are mindful that there have been amendments to the *Occupational Health, Safety and Welfare Act 1986* since *BHAS v Stevenson* was decided. However those amendments do not undermine the reasoning that underpinned the majority approach.

73 The wording of s 22(2) of the *Occupational Health, Safety and Welfare Act 1986* is not materially different to s 19. In our view *BHAS v Stevenson* should apply to its construction. It follows that the gist of the offence is the failure by employers or self-employed persons to maintain a work environment that ensures, so far as is reasonably practicable, that while at a workplace that is under their control a person who is not employed or engaged by them is safe from injury and risks to his or her health.

74 Although the wording of s 12(2)(a) of the *Dangerous Substances Act 1979* is slightly different we see no warrant to adopt a different approach in determining the gist of the relevant offence. Like the others just mentioned, it is the failure of a person in charge of a plant, used or reasonably expected to be used in connection with any dangerous substance, by taking precautions and exercising such care as is reasonable in the circumstances, to ensure that the plant is in a safe condition.

75 In all of these cases that failure can occur simultaneously in a variety of ways. Because the focus of the charge is directed towards a state of affairs, ie a safe work environment or a safe plant, it is appropriate to lay a single charge. Because the existence of that state of affairs can arise as a result of multiple failures it is permissible to support the charge with allegations of multiple particulars. The charges laid against Diemould and Santos pursuant to the provision conform with *BHAS v Stevenson*. They are not bad for duplicity.

76 In the case of Santos there are multiple charges that arise out of the same or substantially the same facts. In our view nothing that was said by the majority in *BHAS v Stevenson* is inconsistent with the laying of multiple charges under s 19 and s 22 of the *Occupational Health, Safety and Welfare Act 1986* where it is alleged that breach has compromised the safety of multiple persons. However we accept that it is a fundamental tenet of our system of law that a person should not be punished twice for the same wrong[28] and we acknowledge that there is the potential for that to occur here.

77 Depending upon the fate of those charges and the evidence sought to be led in respect of them, the pleas of *autrefois acquit* or *autrefois convict* may be available in respect of some of them. Even if those pleas are not

[28] See for example *Pearce v The Queen* (1998) 194 CLR 610 at 636-7 per Kirby J

available, the Court might be persuaded that to permit the continued prosecution of some of these charges would be an abuse of process and in the exercise of its discretion it might be persuaded to dismiss them. Alternatively it might regard these matters as being of relevance in determining the penalties to be imposed in respect of charges proved. The materials placed before us in respect of these questions of law do not permit us to express a concluded view as to what would be the appropriate course.

78 In light of our conclusion that the complaint and information are not bad for duplicity it is not necessary for us to deal with the submissions directed towards the Crown's capacity to now amend them.

79 We now turn to consider the various questions that have been posed for our consideration.

Diemould

1 Does s 19(1) of the *Occupational Health, Safety and Welfare Act 1986* ("the Act") impose two distinct and separate duties upon an employer, namely:-

1.1 a duty to ensure so far as is reasonably practicable that the employee is, while at work, safe from injury; and

1.2 a duty to ensure so far as is reasonably practicable that the employee is, while at work, safe from risks to health?

No.

2 Is there is a patent duplicity in the charge in that the allegation that the defendant "failed to ensure … that its employee … was … safe from injury and risks to health"(emphasis added) in fact alleges two breaches of s 19(1) of the Act, namely:

2.1 a failure to ensure the employee was safe from injury; and

2.2 a failure to ensure the employee was safe from risks to health?

No.

3 If the answer to Q2 is "yes";

3.1 subject to the answer to Q5, should the complainant be put to an election, before the defendant is required to plead, as to which one of the two alleged breaches is to be the subject of the prosecution?

3.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the complaint to allege each such breach as a separate count, having regard to s 58(6)(b) of the *Occupational Health, Safety and Welfare Act 1986* and without recourse to s 58(6a) of that Act?

Not applicable.

4 Is the charge patently duplicitous in that the inclusion of the introductory words to particulars 3, 4 and 5 (as set out below at paragraphs 4.1, 4.2 and 4.3) in law alleges three breaches of s 19(1) of the Act, namely:

4.1 a failure to provide and maintain so far as was reasonably practicable plant (namely the horizontal borer) in a safe condition; and

4.2 a failure to provide and maintain so far as was reasonably practicable a safe system of work for employees using the horizontal borer; and

4.3 a failure to provide such information, instruction, training and supervision as was reasonably necessary to ensure that Daniel Madeley was, while using the horizontal borer at work, safe from injury and risks to health?

No.

5 If the answer to Q4 is “yes”:

5.1 subject to the answer to Q7, should the complainant be put to an election, before the defendant is required to plead, as to which of the three alleged breaches (as articulated in paragraphs 4.1, 4.2 and 4.3 above) is to be the subject of the prosecution?

5.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the complaint to allege each such breach as a separate count, having regard to s 58(6)(b) of the *Occupational Health, Safety and Welfare Act 1986* and without recourse to s 58(6a) of that Act?

Not applicable.

6 Is each sub-paragraph of particulars 3, 4 and 5 an allegation of a distinct and separate breach of s 19(1) of the Act?

No.

7 If the answer to Q6 is "yes":

7.1 should the complainant be put to an election, before the defendant is required to plead, as to which of the alleged breaches (as contained in the sub-paragraphs of particulars 3, 4 and 5) is to be the subject of the prosecution?

7.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the complaint to allege each such breach as a separate count, having regard to s 58(6)(b) of the *Occupational Health, Safety and Welfare Act 1986* and without recourse to s 58(6a) of that Act?

Not applicable

8 Is the complaint defective by reason of the inclusion of the phrase "and was fatally injured while operating a horizontal borer" within particular 2 of the charge?

No.

8.1 If the complaint is defective, does s 181(2)(a) of the *Summary Procedure Act 1921* permit amendment of the complaint, having regard to s 58(6)(b) of the *Occupational Health, Safety and Welfare Act 1986* and without recourse to s 58(6a) of that Act?

No need to answer.

9 If the answer to Q8.1 is "no", should the complaint be dismissed?

Not applicable.

Santos

1 Does s 19(1) of the *Occupational Health, Safety and Welfare Act 1986* ("the Act") impose two distinct and separate duties upon an employer, namely:-

1.1 a duty to ensure so far as is reasonably practicable that the employee is, while at work, safe from injury; and

1.2 a duty to ensure so far as is reasonably practicable that the employee is, while at work, safe from risks to health?

No.

2 Is there is a patent duplicity in counts 2 to 9 in that the allegations that the defendant "failed to ensure … that its employee … was … safe from injury <u>and</u> risks to health"(emphasis added) in fact alleges two breaches of s19(1) of the Act, namely:-

2.1 a failure to ensure the employee was safe from injury; and

2.2 a failure to ensure the employee was safe from risks to health?

No.

3 If the answer to Q2 is "yes":-

3.1 subject to the answer to Q5, should the informant be put to an election, before the defendant is required to plead, as to which of the two alleged breaches is to be the subject of each such count?

3.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the information to allege each such breach as a separate count, having regard to s 58(6)(b) of the Act and without recourse to s 58(6a) of that Act?

Not applicable.

4 Are counts 2 to 9 patently duplicitous in that they each allege two separate breaches of s 19(1) of the Act, namely:-

4.1 a failure to provide and maintain so far as was reasonably practicable plant in a safe condition (as alleged in particular 2.5 of count 2 and repeated in counts 3 to 9); and

4.2 a failure to provide and maintain so far as was reasonably practicable safe systems of work (as alleged in particular 2.6 of count 2 and repeated in counts 3 to 9)?

No.

5 If the answer to Q4 is "yes":-

5.1 subject to the answers to Q6 and Q7, should the informant be put to an election, before the defendant is required to plead, in relation to each of count 2 to 9, as to which of the two alleged breaches (as articulated in paragraphs 4.1 and 4.2 above) is to be the subject of each such count?

5.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the information to allege each such breach as a separate count, having regard to s 58(6)(b) of the Act and without recourse to s 58(6a) of that Act?

Not applicable.

6 Is each sub-paragraph of particulars 2.5 and 2.6 an allegation of a distinct and separate breach of s 19(1) of the Act?

No.

7 Is each allegation of failure in sub-paragraph (a) of particular 2.5 an allegation of a distinct and separate breach of s 19(1) of the Act?

No.

8 If the answer to Q6 and/or Q7 is "yes":-

8.1 should the informant be put to an election, before the defendant is required to plead, in relation to each of counts 2 to 9, as to which of the alleged breaches (as contained in the sub-paragraphs of particulars 2.5 and 2.6) is to be the subject of each such count?

8.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the information to allege each such breach as a separate count, having regard to s 58(6)(b) of the Act and without recourse to s 58(6a) of that Act?

Not applicable.

9 Does s 22(2) of the Act impose two distinct and separate duties upon an employer, namely:-

9.1 a duty to take reasonable care to avoid adversely affecting the health of any other person (not being an employee employed or engaged by the employer) through an act or omission at work; and

9.2 a duty to take reasonable care to avoid adversely affecting the safety of any other person (not being an employee employed or engaged by the employer) through an act or omission at work?

No.

10 Is there is a patent duplicity in counts 10 to 14 in that the allegations that the defendant "failed to take reasonable care to avoid adversely affecting the health or safety of any other person (not being an employee employed or engaged by the defendant) through an act or omission at work" in fact alleges two breaches of s 22(2) of the Act, namely:-

10.1 a failure to take reasonable care to avoid adversely affecting the health of any other person; and

10.2 a failure to take reasonable care to avoid adversely affecting the safety of any other person?

No.

11 If the answer to Q10 is "yes":-

11.1 subject to the answer to Q12, should the informant be put to an election, before the defendant is required to plead, as to which of the two alleged breaches is to be the subject of each such count?

11.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the information to allege each such breach as a separate count, having regard to s 58(6)(b) of the Act and without recourse to s 58(6a) of that Act?

Not applicable.

12 Is each allegation of failure in the sub-paragraphs of particular 10.5 of count 10 (as repeated in counts 11 to 14) an allegation of a distinct and separate breach of s 22(2) of the Act?

No.

13 If the answer to Q12 is "yes":-

13.1 should the informant be put to an election, before the defendant is required to plead, in relation to each of counts 10 to 14, as to which of the alleged breaches (as contained in the sub-paragraphs of particular 10.5) is to be the subject of each such count?

13.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the information to allege each such breach as a separate count, having regard to s 58(6)(b) of the Act and without recourse to s 58(6a) of that Act?

Not applicable.

14 Is the information defective in that counts 2 to 9 allege separate offences under s 19(1) of the Act with respect to individual employees allegedly put at risk by the same omissions of the defendant?

No, however for the reasons explained the continued prosecution of those counts might not be appropriate

15 If the answer to Q14 is "yes":

15.1 should the informant be put to an election, before the defendant is required to plead, as to which of counts 2 to 9 is to be the subject of the prosecution?

15.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the information to include within count 2, as employees put at risk, each of the employees named in counts 3 to 9 of the information (with counts 3 to 9 being deleted), having regard to s 58(6)(b) of the Act and without recourse to s 58(6a) of that Act?

Not applicable.

16 Is the information defective in that counts 10 to 14 allege separate offences under s 22(2) of the Act with respect to individual persons allegedly put at risk by the same omissions of the defendant?

No, however for the reasons explained the continued prosecution of those counts might not be appropriate.

17 If the answer to Q16 is "yes":-

17.1 should the informant be put to an election, before the defendant is required to plead, as to which of counts 10 to 14 is to be the subject of the prosecution?

17.2 alternatively, does s 181(2)(a) of the *Summary Procedure Act 1921* permit the foreshadowed amendment of the information to include within count 10, as persons put at risk, each of the persons named in counts 11 to 14 of the information (with counts 11 to 14 being deleted), having regard to s 58(6)(b) of the Act and without recourse to s 58(6a) of that Act?

Not applicable.

McCusker J, Hannon J, Farrell J:

Introduction

80 This matter has been referred to this Court under s 43(2)(a) of the *Magistrates Court Act 1991*. The Court constituted of five Judges is principally asked to review the decision of this Court constituted of three Judges in *Broken Hill Associated Smelters Pty Ltd v Stevenson*[29]. There the Court ruled, by majority, that s 19 of the *Occupational Health, Safety and Welfare Act 1986* ("the Act") created a single offence, namely a failure to ensure the safety and health of each employee. However this Court has also been requested to take the occasion to hear argument regarding the statutory construction of s 22(2) of the Act and, if the Crown's contention that there is only a single offence fails, what the consequences are for the current proceedings with regard to amendment, election and the time limitation.[30]

The Terms of the Prosecution

81 To give the context of the various contentions we set out the precise terms of the prosecutions of both Diemould and Santos. They are in the following terms:-

(a) Diemould Tooling Services Pty Ltd:-

"Offence details

As against the first defendant

1. On 5 June 2004 at Edwardstown in the State of South Australia, the first defendant, being an employer, failed to ensure so far as reasonably practicable that its employee Daniel Madeley was while at work safe from injury and risks to health.

(Contrary to section 19 *Occupational Health Safety and Welfare Act* 1986)

This is a summary offence.

Particulars:

1. The first defendant was, at all material times, an employer of Daniel Madeley.

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[29] (1991) 42 IR 130

[30] Santos was also charged with a breach of s12(2)(a) of the *Dangerous Substances Act 1979* but that was not the subject of submission: Santos Outline para [2], tr 58

2. On 5 June 2004 Daniel Madeley was while at work exposed to risk of injury, and was fatally injured while operating a horizontal borer.

3. **Plant:** The first defendant failed to provide and maintain so far as was reasonably practicable plant (namely the horizontal borer) in a safe condition in that:

   (1) it failed to guard or fence the machine so as to prevent employees from coming into contact with its dangerous moving parts during continuous-run drilling operations;

   (2) it failed to equip the machine with interlock devices to prevent employees from coming into contact with its dangerous moving parts during continuous-run drilling operations;

   (3) it failed to relocate or shroud the machine's continuous-run button, or otherwise prevent any possibility of accidental use of that button when attempting to use the machine in hold-to-run mode;

   (4) it failed to equip the machine with sufficient or adequate emergency stop devices.

4. **Safe systems of work:** The first defendant failed to provide and maintain so far as was reasonably practicable a safe system of work for employees using the horizontal borer in that:

   (1) it failed to carry out an adequate hazard identification and risk assessment in order to develop appropriate risk control measures and in particular safe operating procedures;

   (2) it failed to provide written safe operating procedures to employees using the horizontal borer -

      (a) in the form of a sign displayed prominently by the machine; or

      (b) in the form of documents supplied to employees using the horizontal borer;

   (3) it failed to prescribe a safe distance from which the horizontal borer should be operated -

      (a) during continuous-run drilling operations; or

      (b) during set up operations;

(4) it failed to provide a system to ensure that employees' operation of the horizontal borer at close proximity was restricted to hold-to-run mode;

(5) it failed to prohibit the wearing of loose-fitting dust coats by employees using the horizontal borer.

5. **Information, Instruction, Training and Supervision:** The first defendant failed to provide such information, instruction, training and supervision as was reasonably necessary to ensure that Daniel Madeley was, while using the horizontal borer at work, safe from injury and risks to health in that:

(1) **training:** the first defendant failed to ensure that any training given by the first defendant to its apprentice employee Daniel Madeley was delivered by a qualified tradesperson experienced in the use of the horizontal borer.

(2) **training:** the first defendant failed to ensure that Daniel Madeley had received adequate formal off site training prior to commencing duties on the horizontal borer, and in particular failed to ensure that Daniel Madeley had received formal training in the unit of competency entitled MEM7.13A – *Perform machining operations using horizontal borer and/or vertical boring machines*.

(3) **training:** the first defendant failed to ensure that adequate assessment was provided in respect of Daniel Madeley's use of the horizontal borer in that:

(a) it failed to ensure that Daniel Madeley's work on the horizontal borer was assessed by a qualified workplace assessor;

(b) Daniel Madeley's safety practices were not assessed by the first defendant by reference to his knowledge of or compliance with published safe operating procedures.

(4) **training:** the first defendant failed to provide adequate training in health and safety matters to its safety officer Mitchell;

(5) **supervision:** the first defendant failed to ensure that any employee (and in particular Daniel Madeley) who was inexperienced in the performance of work of a hazardous nature, namely the use of the

horizontal borer, received such supervision as was reasonably necessary to ensure his safety;

(6) **supervision:** the first defendant failed to ensure that any supervisor of Daniel Madeley was provided with such information, instruction and training as was necessary to ensure that Daniel Madeley was, while at work, so far as was reasonably practicable, safe from injury and risks to health.

…

3/5/06 (signed)

Date Complainant"

(b) Santos Ltd:-

"On the 1st day of January 2004 at Moomba in the said State, the defendant, being an employer, failed to ensure so far as was reasonably practicable that its employee, namely **Anton Otto Regner**, was, whilst at work, safe from injury and risks to health.

Contrary to section 19(1) of the *Occupational Health, Safety and Welfare Act 1986.*

This is a summary offence.

Particulars

2.1 At all material times, the defendant operated a processing facility at Moomba in the said State ("the facility").

2.2 At all material times, Anton Otto Regner ("the employee") was employed by defendant as an Instrument/Electrical Technician.

2.3 As part of its operations, the defendant was in charge of plant comprising the Liquids Recovery Plant ("the plant"), which included:

(a) heat exchangers known as Cold Box A and Cold Box B; and

(b) all components, fittings, pipes, valves and nozzles used in or in connection with the plant.

2.4 The employee was exposed to a risk of injury whilst at work when an inlet valve in the said plant ruptured causing the release of mercury and various flammable gases which subsequently ignited.

2.5 The defendant failed to provide and maintain, so far as was reasonably practicable, plant in a safe condition in that it:

(a) failed to address or adequately address factors which affected the integrity of the plant, namely it failed to install a mercury removal system and/or it failed to take any or any adequate steps to control conditions and/or factors within the plant to minimise or avoid the risks associated with the presence of mercury; and/or

(b) failed to take any or any adequate steps to minimise any release of the gases or other substances in the event of a failure of the plant.

2.6 The defendant failed to provide and maintain so far as was reasonably practicable safe systems of work in that it:

(a) failed to undertake any or any adequate hazard identification and risk assessment of the plant; and/or

(b) failed to address or failed to adequately address the extent of the risks associated with the operation of the plant given the presence of the mercury; and/or

(c) failed to develop and/or implement any or any adequate system for inspection of the plant; and/or

(d) failed to develop and/or implement any system to adequately assess the results of any inspection and/or

(e) failed to develop and/or implement any adequate system for maintenance of the plant."

(The same charges were laid in respect to other employees, namely Hans Vogelpoel, Henry Szalacki, Michael Jones, Paul Karpluk, Arnis Luks, Russell Pertot, and Bruce McLeod. In each case the particulars state that, "the particulars … at paragraphs 2.3 to 2.6 are repeated".)

(c) Santos Ltd:-

"On the 1st day of January 2004 at Moomba in the said State, the defendant, being an employer, failed to take reasonable care to avoid adversely affecting the health or safety of another person, namely **Tony Allan Ballinger,** (not being an employee or engaged by the defendant) through an act or omission at work.

Contrary to section 22(2) of the *Occupational Health, Safety and Welfare Act 1986.*

This is a summary offence.

Particulars

10.1 At all material times, the defendant operated a processing facility at Moomba in the said State ("the facility").

10.2 As operator of the facility, the defendant operated plant comprising the Liquids Recovery Plant ("the plant"), which included:

(a) heat exchangers known as Cold Box A and Cold Box B; and

(b) all components, fittings, pipes, valves and nozzles used in or in connection with the plant.

10.3 On 1 January 2004, Tony Allan Ballinger ("the person") was performing work as an Electrician for an employer trading as Instrument Installation Services at the defendant's facility.

10.4 The person was exposed to a risk of injury or death at the facility when an inlet valve in the plant ruptured causing the release of mercury and various flammable gases which subsequently ignited.

10.5 The defendant failed to take reasonable care to avoid adversely affecting the health or safety of the person in that it:

(a) failed to provide and maintain, so far as was reasonably practicable, plant in a safe condition in that it:

(i) failed to address or adequately address factors which affected the integrity of the plant, namely it failed to install a mercury removal system and/or it failed to take any or any

adequate steps to control conditions and/or factors within the plant to minimise or avoid the risks associated with the presence of mercury; and

(ii) failed to take any or any adequate steps to minimise any release of gases or other substances that may occur as a result of the failure of the plant; and

(b) failed to provide and maintain so far as was reasonably practicable safe systems of work in that it:

(i) failed to undertake any or any adequate hazard identification and risk assessment of the plant; and/or

(ii) failed to address or failed to adequately address the extent of the risks associated with operation of the plant given the presence of the mercury; and/or

(iii) failed to develop and/or implement any or any adequate system for inspection of the plant; and/or

(iv) failed to develop and/or implement any system to adequately assess the results of any inspection.”

(The same charges were laid in respect to others not being employees employed or engaged by the defendant, namely Robert Cornelius, Stuart Giles, Douglas Gray and Kevin McCarthy. In each case the particulars state that, “the particulars … at paragraphs 10.4 and 10.5 are repeated”.)

The BHAS Decision

82 We commence with a summary of the decision in *BHAS v Stevenson* as that is the focus of this referral. There the company was charged with four counts of breaching s 19(1) of the Act. The circumstances concerned a worker employed as a drossman at the Copper Drossing Plant in Port Pirie. While he was liming a ladle, some of the lime solution splashed into his eye. In the result he lost much of the sight of his left eye. The company was found guilty on three counts arising from that one set of circumstances. It appealed arguing that s 19 created only one offence.

83 The terms of s 19(1) for present purposes are as follows:-

> "(1) An employer must, in respect of each employee employed or engaged by the employer, ensure so far as is reasonably practicable that the employee is, while at work, safe from injury and risks to health and, in particular-
>
> (a) must provide and maintain so far as is reasonably practicable-
>
> (a) a safe working environment;
>
> (ii) safe systems of work;
>
> (iii) plant and substances in a safe condition; and
>
> (b) must provide adequate facilities of a prescribed kind for the welfare of employees at any workplace that is under the control and management of the employer; and
>
> (c) must provide such information, instruction, training and supervision as are reasonably necessary to ensure that each employee is safe from injury and risks to health.
>
> Maximum penalty:
>
> (a) for a first offence – division 2 fine;
>
> (b) for a subsequent offence – division 1 fine."

84 On appeal the Crown contended s 19 ought to be read down by reason of placita (a), (b) and (c). It argued those placita were exhaustive of the matters that could constitute a breach of the section. Moreover each placita contemplated a separate offence. The majority of the Full Court concluded s 19 created one offence, namely the failure of an employer in respect to each of his employees to ensure so far as was reasonably practicable that the employee was whilst at work safe from injury and risk to health. The majority also held the provision was structured so that in any event an offence against s 19(1) was established by proof of a failure of one or more of those matters described in placita (a), (b) and (c). In other words the obligation to ensure safety specified in the opening lines of s 19(1) was to be understood to extend to the particular obligations described in (a), (b) and (c).

85 There have been amendments to s 19(1) since the decision in *BHAS v Stevenson*. However it is conceded these do not inform the result. These amendments included the following changes to the original words. The use of "shall" was substituted by the word "must", the conjunctive "and" was grammatically corrected, the adjective "maximum" was deleted and the words "in the case of a second or" deleted with "for a" added in the

last line[31]. While major amendments might have significance in provisions of this kind, Mr Kourakis QC of counsel for the Crown, did not rely on any amendments post the *BHAS* decision as indicative of any legislative intent to adopt the Court's reasoning.[32] The issue here is one of statutory construction. Moreover it is conceded by the Crown it is one that poses difficult dilemmas on any view.[33]

Review of Decisions of the Full Court

86 The consideration of the statutory construction of s 19(1) is complicated by the fact it involves a belated review of a decision of this Court. That decision has been accepted and operative for some sixteen years. No one could point to any example of a resulting injustice in the many decisions that have been decided assuming its correctness.[34] Mr Wells QC, of counsel for the first defendant, accepted that the principles applying in the Supreme Court would probably be applicable to this Court.[35] In that regard he referred to the remarks of Lander J in *Copping and Others v ANZ McCaughan Ltd and Others*[36] as follows:-

> "… This Court is always slow to depart from previous decisions of its own, *Devlin v Collins* (1984) 37 SASR 98; *Pooraka Holdings Pty Ltd v Participation Nominees Pty Ltd* (1989) 52 SASR 148, and would only do so if satisfied that the previous decision was plainly wrong."

87 The application of such a rule is reinforced by the fact that appeals from this Court to the Supreme Court are by leave.[37] That often makes this Court the last level of review for litigants. Not only should our approach reflect considerations of consistency and the confidence the community must have in the law as stated by an appellate court. There is also the aspect of the longevity of the rule stated in *BHAS*. In *Thompson v Byrne and Others,*[38] McHugh J made the following statement:-[39]

> "In my opinion, Dawson J and I were correct in reading down s 49(1)(f) and *Mills v Meeking* (1990) 169 CLR 214 was wrongly decided. But that is not a sufficient reason to re-examine its correctness. The decision has stood for nine years. Notwithstanding that Dawson J and I thought that the legislature had only intended that s 49(1)(f) should apply where the motorist had been involved

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[31] Amendment Act No 86 of 2000 Schedule, Amendment Act No 41 of 2005 Schedule 2.
[32] tr 91; c.f. *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* (2004) 204 ALR 487 at para [14], [15]; *Burke v Yurilla SA Pty Ltd and Others* (1991) 56 SASR 382 at 394, 395, tr 112.
[33] tr 68
[34] tr 24, 79
[35] tr 53
[36] (1997) 67 SASR 525 at 568.
[37] S 191(1)(b) *Fair Work Act 1994.*
[38] (1999) 161 ALR 632
[39] at para [53]

in an accident, the legislature has made no attempts to amend the Act to give effect to that supposed intention."

88 In *Thompson v Byrne*, the majority (Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ), cited with apparent approval *Babaniaris v Lutony Fashions Pty Ltd*[40] and *John v Commissioner of Taxation of the Commonwealth of Australia*[41] (see para [41]). In *Babaniaris,* litigants in Victoria had for over 20 years assumed the correctness of a decision of the Board in *Little v Levin Cuttings Pty Ltd.*[42] That decision ruled "outworkers" were "workers" for the purposes of the Victorian workers compensation legislation. The majority in *Babaniaris* (Mason, Wilson and Dawson JJ) held contrary to *Little* that outworkers were not within the definition of "worker". The minority, (Brennan and Deane JJ), although of the view that the decision in *Little* was probably erroneous, concluded the decision had stood for so long that it should not be departed from.

89 In his reasoning in *Babaniaris,* Mason J stated:-[43]

> "… strong authority for the view that a decision of longstanding on the basis of which many persons will have arranged their affairs should not be lightly disturbed by a superior court: (cases cited). Adherence to this approach promotes the certainty of the law and protects the integrity of acts and transactions which have taken place in the faith of the law as it has been previously declared …
>
> The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute. If an appellate court, particularly an ultimate appellate court, is convinced that a previous interpretation **is plainly erroneous** then it cannot allow previous error to stand in the way of declaring the true intent of the statute (authorities cited). …
>
> … Although the use of expressions as 'plainly' and 'manifestly' erroneous have been criticised in contexts where the question is one on which different minds might reach different conclusions (*Queensland v The Commonwealth* (1977) 139 CLR 585 at 603), this criticism does not diminish **the utility of the expressions in their application to a case in which the question on analysis is capable of but one answer**.
>
> **The matter may stand differently when the correct interpretation of the statute is highly disputable or finely balanced, involving a different choice between strongly competing contentions.** …

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[40] (1987) 163 CLR 1
[41] (1989) 166 CLR 417
[42] (1953) 3 WCBD (Vic) 71.
[43] at p 13

> (L)ack of clarity in the expression of the legislative intention makes it legitimate for the court to regard the injustice or inconvenience which would flow from overruling the earlier decision as having an influential effect on the outcome. (our emphasis)

That describes the considerations which should guide this Court in reviewing *BHAS v Stevenson.*[44]

Considerations Relevant to Statutory Construction

90 Accepting that rule, the statute must be re-examined. That requires consideration not only of the words of the provision but of its context and the purposes of Parliament in enacting it.[45] The starting point must be the language of s 19(1) itself.[46] In the case of a statute the object of which is to protect the safety of a class of persons at risk, the provision's remedial purpose should be kept in mind.[47] Indeed the argument of the first defendant that criminal legislation carries with it particular considerations for statutory interpretation[48] is not expressed as such in *Waugh v Kippen and Others,*[49] where the Court, in response to an argument that penal statutes must be construct strictly, stated its view in the following passage:-

> "… (T)he court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended that he should have
>
> … In such a context the strict construction rule is indeed one of last resort. Furthermore, the process of construction must yield for all purposes to a definitive statement of the incidence of an obligation imposed on the employer. The legislature cannot speak with forked tongue. Although the standard of proof applicable to criminal proceedings for a breach of the obligation will differ from that applicable to civil proceedings and the law may provide specific defences by way of answer to a prosecution which have no relevance to civil proceedings
>
> … (T)he elements that make up the obligation will be the same in each case."

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[44] c.f. *Federal Commissioner of Taxation v Energy Resources of Australia Ltd* (2004) 204 ALR 487 at paras [16], [17], [18]; *Burke v Yurilla SA Pty Ltd* (1991) 56 SASR 382 at 395, 396.
[45] *Thomson* (above cited) para [13].
[46] *Thomson* at para [45] per Gaudron J, *Dairy Farmers Co-operative Ltd v Azar* (1990) 95 ALR 1 at 4.
[47] *Caltex Oil (Australia) Pty Ltd v Best* (1990) 97 ALR 217 at 224.
[48] tr 49, Outline para [9].
[49] (1986) 160 CLR 156 at 164 – 165.

91 A general approach to be taken is described by McHugh J in *Saraswati v The Queen*[50] in the following terms:-

> "… Section 33 of the *Interpretation Act 1987* (NSW) directs a court in interpreting a provision in an Act to give preference to a construction 'that would promote the purpose or object underlying the Act' over a construction 'that would not promote that purpose or object': cf. *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at pp 261-262. Moreover, the terms of s 34 of that Act, which provides for the use of extrinsic material, make it plain that 'the ordinary meaning conveyed by the text of the provision is the meaning conveyed by that provision after 'taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule'. Hence, it is always necessary in determining 'the ordinary meaning' of a provision such as s 61E(2) to have regard to the purpose of the legislation and the context of the provision as well as the literal meaning of the provision. **Sometimes the purpose of the legislation is expressly stated; sometimes it can be discerned only by inference after an examination of the legislation as a whole; and sometimes it can be discerned only by reference to the history of the legislation and the state of the law when it was enacted**. It need hardly be said that a particular Act may have many purposes." (our emphasis)

With due adjustments for the rules applicable to South Australia, viz s 22 *Acts Interpretation Act 1915* (SA), that approach is appropriate to the construction of s 19(1).

92 It was the primary submission of Mr Kourakis QC that we identify and promote the purpose.[51] In order to ascertain the purpose of legislation it is "invariably useful to define the mischief which occasioned its enactment".[52] However use of the historical perspective to determine the purpose to be ascribed to Parliament has qualifications.[53] The duty to give effect to the purposes of Parliament as expressed in the words used must always prevail.[54]

93 Recent decisions of the High Court support the approach urged by Mr Kourakis QC. In *Stingel v Clark*[55] the issue was the construction of s 5(1)(a) of the *Limitations of Actions Act 1958* (Vic). That section provided that time ran only from the occurrence of two states of knowledge by the suitor. The respondent argued this proviso to the general time limit only applied in actions of negligence, nuisance and

[50] (1991) 172 CLR 1 at 21.
[51] tr 68, 72, Mr Wells QC to the contrary at tr 135.
[52] *James Hardy & Co Pty Ltd v Seltsam Pty Ltd* (1998) 73 ALJR 238 at para 60 per Kirby J.
[53] *Dobbie and Another v Davidson and Others* (1991) 23 NSWLR 625 per Kirby J at 634.
[54] *Re Bolton and Another; Ex parte Beane* (1987) 162 CLR 514 at 518.
[55] [2006] HCA 37.

breach of contract. He argued it did not apply to those suits framed in trespass to the person.

94 The majority, (Gleeson CJ, Callinan, Heydon and Crennan JJ), regarded the legislative history as critical in the task of construing the statute.[56] They examined various reports before Parliament at the time of the enactment, including evidence taken by the Statutory Law Revision Committee.[57] This examination produced three grounds for treating the statutory language as an amplification rather than a restriction of the causes of action the proviso applied to. The first ground was that as a matter of principle, limitation statutes concerned practical justice and an expansive approach would achieve that outcome. Secondly, the legislative history in Victoria was significant, particularly remarks made by witnesses to the Statutory Law Revision Committee. Significantly here the majority observed the provisions were, "the product of reviews of the existing law by expert committees", adopting language which at the time of the adoption had been construed judicially. Thirdly, a restrictive approach would defeat the purposes of the legislation. The majority concluded that as two constructions were reasonably open, that which produced a fair result and promoted the purpose of the legislation was to be preferred.[58]

95 The Court also dealt with whether the condition of post traumatic stress disorder fell within the meaning of "insidious disease" used in the Act. The remarks of the majority have relevance to the matter before us. They said this:-[59]

> "The nature of the subject matter of s 5(1A) is a reason for particular caution in treating expressions of subjective understanding of how the provision would operate as controlling the meaning of the statutory language. **Medical knowledge develops, sometimes rapidly. When the Victorian Parliament enacted s 5(1A) it cannot have believed that it could foresee all the circumstances in which diseases or disorders might later be found to fall within its terms**. No doubt Parliament can keep developments in science, and medical knowledge, under review. In the nature of things, however, Parliament's knowledge, in 1983, of the circumstances in which diseases or disorders may be contracted, or become known, many years after their original causes, cannot reasonably be used, in 2006, to limit the meaning of the words it adopted. **That knowledge enabled Parliament to**

[56] At para [2].
[57] Paras [3] – [5].
[58] Para [17].
[59] Para [27].

identify the problem, but not to define its metes and bounds. That, no doubt, is why Parliament chose general language."[60]

(our emphasis)

96 In *Cornwell v R*[61] the legislative history was also regarded as critical. The issue was the construction of s 128(8) of the *Evidence Act 1995* (NSW). That provision concerned a defendant's right to refuse to answer questions that might incriminate him or her. The majority[62] examined the history extensively. This included two reports of the Australian Law Reform Commission. They concluded on the basis of that examination that the Crown appeal should be allowed. We do note that in dissent, Kirby J took a strong contrary view. He criticised a "diversion" into:-

> "… an exposition of legal history to reach a conclusion different from that suggested by the statutory text, contrary to that envisaged by the ALRC and inconsistent with that derived from an intuitive reading of the provisions of the Act and the way that such legislation can be expected to be read".[63]

Kirby J stated that the interpretation of statutory provisions was to be derived from "the four walls of the statute enacted".

97 In the case of s 19(1), or rather its predecessor, s 29 of the 1972 Act where the words first appeared, the mischief facing Parliament was the ongoing toll both economic and social suffered in the community as a result of failures of the existing provisions providing for occupational health and safety. This was a matter of general concern. The matter is epitomised by the remarks of Murphy J in the High Court admittedly at a later time but encompassing the period in question.[64] He said:-

> "Industrial accidents are a very serious national problem: every working day, one Australian is killed and 1500 suffer significant personal injury, In the financial year 1974, fatalities were 300, temporary disabilities involving the loss of one or more working days or shifts, 360,000, and working time lost from disabilities of one day or longer, 1,010,000-man weeks (see Parliamentary Debates, Answers to Questions on Notice, Senate, 21 February 1979, p 151). Conservatively estimated, the annual social cost is about 2000 million dollars (see address by the Hon Ian Macphee MP, Minister for productivity, at the presentation of the CML

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[60] Hayne J agreed with the majority and acknowledged the relevant legislative history in reaching his conclusion (para 28). Gummow and Kirby JJ dissented, but each had regard to the legislative history though Kirby J regarded the matter as dependant on text, context and considerations "relevant to deriving the legislative purpose and policy of the Act". (para [89]). As to the expanding nature of the understanding of work safety, *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 760 per Lord Denning.

[61] [2007] HCA 12.

[62] Gleeson CJ, Gummow, Heydon and Crennan JJ.

[63] Para [183]

[64] *Raimondo v State of South Australia* (1979) 23 ALR 513 at 520.

> Awards for Industrial Safety in Melbourne, 3 November 1978). This is of somewhat the same order as the national defence budget. These figures do not include those for accidents travelling to and from work or for industrial disease. A substantial proportion of these accidents occur in the use of familiar equipment, such as ladders, away from a factory, as in this case, and to experienced workers. The dangers are often obvious, but are not realized because of the worker's preoccupation with his work.
>
> By international standards, Australia does not have a good record in industrial safety. It is generally accepted that the standard of care by those responsible for industrial safety should be upgraded. …"[65]

98 We turn to a consideration of the legislative history. The first legislation in South Australia addressing work safety was the *Factories Act 1894.* This was enacted along the lines of Victorian and British legislation. It formed the basis of South Australian occupational health and safety legislation until 1972.[66] The British legislation in its turn commenced with laws passed in 1802 intended to protect the physical and moral health of children and women. These laws were the first provisions specifically concerned with "health and welfare". It was not until s 21 of the *Factories Act Amendment Act 1844* (UK) that provisions concerning "safety" were introduced. Thereafter there was increasing emphasis upon the safety aspect, especially the hazards associated with work in proximity to moving parts of machinery.[67] As a generality the law developed along those two lines in the form of a mass of disparate and discrete requirements, as opposed to a general or unified approach.[68]

99 The South Australian *Factories Act 1894* created inspectors of factories with powers to enter factories and give directions for safeguarding dangerous machinery and otherwise protecting the life and health of persons engaged "in the working thereof". The inspectorate was also empowered to check compliance with the provisions of the Act and of all laws and by-laws relating to public health.[69] Specific requirements regarding cleanliness, ventilation, hours of employment and the employment of children were included.[70] There were also special provisions related to the employment of women.[71] Breaches of the Act were punishable with a penalty not exceeding £5.0.0. Matters were to be heard summarily.[72] The objects of the Act were not stated. The Governor was empowered to make regulations for the more effectual achievement

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[65] See also Creighton and Stewart, *Labour Law*, 4th Ed (2005) para [19.1].
[66] Richard Johnstone, *Occupational Health and Safety Law and Policy,Text and Materials* 2nd Ed (2004) para 290.
[67] Creighton and Stewart (supra), para 19.04.
[68] Creighton and Stewart, para 19.05.
[69] See s 8(1), (2) and (3).
[70] Ss 12, 13 and 14.
[71] Ss 17, 18 and 19.
[72] Ss 22, 23.

of "the objects and purposes of the Act".[73] That Act was subsumed by the *Industrial Code 1920.*[74] The 1920 Act remained the principal source for occupational health and safety until it was substituted by the *Industrial Code 1967.*[75] The 1967 Act was the law immediately before the *Industrial Safety, Health and Welfare Act 1972.*

100 The *Industrial Code 1967* continued the practice of enacting a long list of disparate and discrete requirements. These were contained in distinct parts of the Act. The first of these were in the "safety" provisions[76]. The second were in the "health and welfare" provisions[77]. As indicated before, the focus of the "safety" provisions was, in the main, machinery, foundry processes, protective equipment, (viz goggles), hoists and cranes. The "health and welfare" provisions concerned cleanliness, overcrowding, meals, drinking water, change rooms, sanitary ventilation and such like. There were also provisions restricting the working hours of females, minors and persons in the baking industry. Power was vested in the Governor to make regulations by prescription giving effect to the operation of the Act.[78]

101 The consequences of the 1967 Act are aptly described by text writers in the following terms[79]:-

> "The years in between saw changes in detail rather than in principle. The coverage of the legislation was increased from time to time, new processes of industries included within it, and these piecemeal and ad hoc developments were from time to time included within a more comprehensive act[80]. However, they did not constitute a general safety code for industry, and a significant proportion of the workforce was still not protected in any way. During this period the underlying structure of the legislation and the philosophy on which it was based, remained the same."

102 We move forward to the *Industrial Safety Health and Welfare Act 1972*. In s 29 of the 1972 Act we find the first "general" provision for "health and safety" at work. It was applicable to all employers. It was caste essentially in the same terms as currently used in s 19(1), namely the obligation was to take all reasonable precautions to ensure the health and safety of workers employed or engaged. The 1972 Act was repealed by

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[73] S 29.
[74] *Industrial Code (SA) 1920* s 3(1).
[75] *Industrial Code 1920* Pt 5, *Industrial Code 1967* s 4 and Pt XII.
[76] *Industrial Code 1967* Div III, Ss 171 – 179.
[77] *Industrial Code 1967* Div IV, Ss 180 – 190.
[78] Section 203 *Industrial Code 1967.*
[79] Gunningham and Creighton, *Industrial Safety Law in Social and Political Perspective,* Ch 7, *Legislation in Society in Australia* Editor Roman Tomazic (1979) at p 157.
[80] In 1971 the law was contained as observed mainly in Pt XII of the *Industrial Code 1967 – 1971.* In addition these were important provisions in the *Construction Safety Act 1967* and the *Mines and Works Inspections Act 1967 – 1971.*

s 70 of the *Occupational Health, Safety and Welfare Act 1986*[81]. It was s 19(1) of the 1986 Act that the Court ruled on in the *BHAS* case.

103 We revert to a consideration of events prior to the passing of the 1972 Act. The main documentary examination considered by the House prior to that Act was the report of the Select Committee of the House of Assembly of 1972. The first general comment made by the Committee in that report of significance to our consideration was in the following terms:-

> "10. The Committee accepted the principle that occupational **health and safety are indivisible** and should not be separated. (our emphasis.)

That comment is clearly a reference to the separation of "safety" and "health and welfare" in Division III and Division IV of the 1967 Act.

104 The Select Committee's report then proceeded to its recommendations. These included a recommendation there should be one Act which concerned the occupational safety, health and welfare of all employed persons in South Australia[82]. The legislation should concern the safety, health and welfare of all persons in employment.[83] The Act should contain power to make detailed regulations[84]. The Act should be so framed that its provisions applied also to sub-contractors.[85]

105 We turn to the use that we can make of the Select Committee Report and the Minster's Second Reading Speech to the 1972 Bill. The rule is stated by Lander J in *Burch v SA*[86] in the following terms:-

> "In relation to the use of the Minister's Second Reading Speech the common law does not make it a condition that there be an ambiguity in the text of an Act before a court can have regard to reports of law reform bodies (*CCI Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384) explanatory memorandum made before Parliament (*New South Wales City Council v GIA General Limited* (1997) 72 ALJR 97 at 104), and Second Reading Speeches. It is permissible, under the common law, to have regard to those documents at first instance as an aid to the construction of a statute."

This rule was more fully discussed by Cox J in the same decision[87]. The decision of *Burch* has been followed in later decisions[88]. That said, the

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[81] Act 125 of 1986.
[82] Cl 12.
[83] Cl 16.
[84] Cl 14, 17.
[85] Cl 25.
[86] (1998) 71 SASR 12 at 26.
[87] pp 16, 17.
[88] *Gerah Imports Pty Ltd v Duke Group Ltd (In liq)* (2004) 88 SASR 419 paras [32], [34] and [35].

Second Reading Speech must be used with due caution[89]. The fact is the words in the statute, and not the non-statutory words seeking to explain them, have the paramount significance.

106 In the Second Reading Speech[90] the then Minister of Labour and Industry[91] referred to the Select Committee Report. That Report was eventually incorporated in Hansard. He recommended its contents to the House. He also made reference to the Robens Report presented to the United Kingdom Parliament in July of the same year[92]. The Minister noted that many of the recommendations in Lord Robens' report were along the same lines as those of the South Australian House of Assembly Select Committee, "although in some respects they went further". In particular the Minister remarked the Robens' Committee had recommended that the existing statutory provisions be replaced by a comprehensive and orderly set of revised provisions of a new enabling Act. The new Act should contain a clear statement of the basic principles of safety responsibility and should be supported by regulations and codes of practice. It is clear from his remarks that the Minister drew support for his bill from these aspects of the Robens' Report[93].

107 Section 29 of the 1972 Act was in the following terms:-

> "29 Every employer in any industry, every occupier of industrial premises and every constructor in relation to any construction work shall-
>
> (a) do all things as are necessary to ensure that the provisions of this Act are complied with; and
>
> (b) take all reasonable precautions to ensure the health and safety of workers employed or engaged in that industry or in or on those premises or on or in connection with that work:
>
> Penalty: $200.00"

108 The effect of the 1972 Act was to replace the mass of disparate and discrete prohibitions with a duty of general application[94]. The Second Reading Speech's reliance upon the Select Committee Report and the Robens Committee Report supports the contentions of Mr Kourakis QC. That is not only by the unification of the separate concepts of "safety" and "health". It also aimed to tackle the mischief by way of a general

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[89] See *Nominal Defendant v GLG Australia Pty Ltd* (2006) 80 ALJR 688 at para [22].
[90] House of Assembly Hansard 8 November 1972 p 2849
[91] Hon DH McKee
[92] *Safety and Health at Work,* Report of the Committee 1970–1972, Chairman Lord Robens presented to Parliament by the Secretary of State for Employment July 1972 (two volumes).
[93] At 2851 first column
[94] Gunningham and Creighton (1979) at 60.

responsibility. The purpose is variously described in the textbooks[95]. Creighton and Stewart described the objective in the following terms:-

> "It will be recalled that Robens recommended that there should be a clear legislative statement of 'the general principles of responsibility for safety and health'. This proposal has given rise to the 'general duty' provisions which are common to all Robens-style legislation in Australia. In each case, the relevant provisions set out the responsibilities of all parties who can properly be assumed to have responsibility for the prevention of work-related injury and disease. The duties are drawn in very broad terms, and are owed to all persons whose interests are likely to be adversely affected by breach of duty."

109 It is our view that this consideration of the legislative history and the admissible materials relating to the passage of the 1972 Act favours two conclusions. Firstly that the terminology of "safe from injury and risk to health" in s 19(1) is a single concept. It does not indicate disparate considerations. Secondly the Parliamentary intent in s 19(1) was to create one offence. That is for the moment leaving aside considerations of text and context.

110 We turn to considerations of text. In doing so we emphasise the exercise is a search for Parliamentary intention. In that search some guidance is to be obtained by the observations of Bray CJ in *Romeyko v Samuels*[96] in the following terms:-

> "The true distinction, broadly speaking, it seems to me, is between a statute which penalises one or more acts, in which case two or more offences are created, and a statute which penalises one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course, there will always be borderline cases and if it is clear that Parliament intended several offences to be committed if the act in question possesses more than one of the forbidden characteristics, that result will follow."

111 There are various examples of statutes penalising one act if it possesses one or more forbidden characteristics. A well known one is s 46 of the *Road Traffic Act 1961*. In *Phillis v Coombe*[97] Cox J remarked:-

> "… The fact that the three incidents in each example were discontinuous will not matter if they are sufficiently connected in time and circumstance to identify the defendant's overall activity as a single act of dangerous driving. To hold otherwise would be to

[95] See Richard Johnston (2004) para [2.280], Creighton and Stewart (2005) para [19.17].
[96] (1972) 2 SASR 529 at 552, applied in *R v Hoang* (2002) 83 SASR 254 at paras [20] and [28].
[97] (1987) 47 SASR 416 at 422

> encourage the laying of multiple charges, quite apart from those cases in which it is the totality of the behaviour that gives the driving its dangerous character. …"[98]

112 In examining the defendants' submissions regarding construction of s 19(1), we note the points made by Mr Wells QC were adopted by Mr Edwardson QC[99]. Mr Wells QC contended the Crown's interpretation involved the concept of a "state of affairs" offence[100]. He contended this was erroneous. Rather the provision contemplated an offence for each act or omission that amounted to a failure of the responsibility dictated or described in the words, "all reasonable precautions to ensure the health and safety of workers employed"[101]. He also argued there was more than one duty in the opening words of s 19(1). These were to keep safe from injury and to keep safe from risks to health. That is tantamount to the "safety" and "health" division. There was an offence constituted by a failure in respect to "safety". There was a different offence constituted in a failure of "health"[102]. The gist of the offence was each and every separate and distinct breach of the duty in respect to safety or in respect to health, as opposed to maintaining a safe environment[103]. We note Mr Kourakis QC complained about the description given to his submission[104]. To the contrary, he said, there was a breach of the provision every time an employer failed to **ensure** health and safety whether due to one or a number of the "forbidden characteristics".

113 We note no submission was put that the Parliament when passing the 1986 Act sought to narrow or truncate the effect of s 29(b) of the 1972 Act. That it was not the Parliament's intent was concluded by the decision in *BHAS*[105]. Before us no-one criticised that conclusion. It was also conceded before us that the particular subparagraphs (a), (b) and (c) are not restrictive of the general requirement preceding them in s 19(1). Rather the three placita constitute a form of adjunctive guidance with respect to the general duty. If the complainant proved a failure of the requirements specified in one of those placita then a failure of the general duty *ipso facto* was made out[106].

114 Therein in our view lies the first problem with the opening contention of Mr Wells QC that the general duty contemplates two offences. If a failure of one of the particularised circumstances in (a) – (c) is proved, does that

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[98] See also *Daly v Medwell* (1986) 40 SASR 281 at 286-287, *James v Prider* [1999] SASC 136 paras [37], [38].
[99] tr 58
[100] Outline para [8], complainant's Outline para [27].
[101] Outline para [20], tr 12.
[102] tr 69
[103] tr 12
[104] tr 50, complainant's Outline para [16] and reliance on Bray CJ in *Romeyko v Samuels* at 552
[105] *BHAS* at 154
[106] tr 20, 70, 79 and withdrawal of suggestion to the contrary by the second defendant at tr 61.

constitute a failure of the "safety" command or does it constitute a failure of the "health" command? Which of the purported two offences is breached? That obstacle can only be resolved if the opening words are given a fused or unified meaning. Such fits with what Mr Kourakis QC contends is the gist of the offence. That is the words are indicative of a single command and indeed a single offence[107]. The key to the correct construction is in the word "**ensure**", i.e. to ensure health and safety. The argument that there are two offences in these words based on the text is rejected.[108]

115 It is appropriate to deal here with a related argument though it may be as much a matter of legislative history as one of text. Mr Kourakis QC submits, rightly we think, that if the provisions in s 19(1) stopped at the word "health", first appearing, there would be no question but that one offence was created[109]. That is assuming the fused concept of "health and safety". That was for all relevant purposes the situation in s 29(b) of the 1972 Act. Yet the necessary effect of the defendants' argument is that Parliament intended to change the penalization of one act to a disseminated or multiple offence situation in s 19(1) of the 1986 Act. It is difficult to impute that intention from the words so added. The usage "in particular" was acknowledged by all counsel as in no way compromising the preceding command[110]. The comments in *BHAS* to that extent are also not challenged[111]. Moreover Mr Kourakis QC argued the defendants' contention that (a), (b) and (c) are not exhaustive must be logically to the same effect. That is that there is still only one offence. That would appear fatal to their argument[112].

116 The next argument is the context argument and is reliant on other provisions which the defendants argued refute the conclusion that Parliament meant s 19(1) to be concerned with one offence. The provisions relied on are as follows:-

> **"58-Offences**
>
> (1) A person who contravenes or fails to comply with a provision of this Act is guilty of an offence.
>
> (2) A person who is guilty of an offence against this Act for which no penalty is specifically provided is liable to a Division 5 fine.

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[107] tr 69. See also *Benedetto v Huffa* (1969) SASR 448 at 450.

[108] tr 83. The example of Mr Kourakis QC of a primary wound from an accident and a secondary septicaemia due to lack of hygiene in the workplace being only one offence is persuasive in this regard.

[109] tr 82. That would appear to conform with the majority reasoning in *Boral Gas (NSW) Pty Ltd v Magill* (1995) 58 IR 363 and with respect to s 16 of the *Occupational Health and Safety Act (NSW) 1985* per Hill J at 395, Hungerford J at 422.

[110] Mr Edwardson QC withdrew para [31] of the Outline of Santos, tr 138.

[111] *BHAS* at 155

[112] tr 83

(3) Subject to this Act, offences against this Act are summary offences.

…

(6) Subject to subsection (6a), proceedings for a summary offence against this Act must be commenced-

(a) in the case of an expiable offence – within the time limits prescribed for expiable offences by the *Summary Procedure Act 1921*;

(b) in any other case – within 2 years of the date on which the offence is alleged to have been committed.

(7) Proceedings for an offence against this Act may only be brought-

(a) by the Minister; or

(ab) by the Director of Public Prosecutions; or

(ac) by the Director; or

(b) by an inspector; or

(c) if an employee has suffered injury as a result of an act or omission which is alleged to constitute an offence against this Act and proceedings have not been commenced by the Minister, the Director of Public Prosecutions, the Director or an inspector within 1 year of the date on which the offence is alleged to have been committed-by the employee

…

59-Aggravated offence

(1) Where a person contravenes a provision of Part 3-

(a) knowing that the contravention was likely to endanger seriously the health or safety of another; and

(b) being recklessly indifferent as to whether the health or safety of another was so endangered,

the person is guilty of an aggravated offence and liable upon conviction to a monetary penalty not exceeding double the monetary penalty that would otherwise apply under Part 3 for that offence or imprisonment for a term not exceeding 5 years or both.

(2) An offence against this section is a minor indictable offence.

60-Continuing or repeated offences

(1) Where a person is convicted of an offence against this Act and after that conviction the act or omission of that person that constituted the offence continues, that person is guilty of a further offence.

Maximum penalty: Division 3 fine.

…

(4) Where in proceedings for an offence against this Act the court is satisfied that the accused-

(a) has previously been convicted of the same offence; and

(b) has on the present occasion wilfully repeated the act or omission constituting the offence,

the court must, in addition to any penalty it may impose for the offence, impose a penalty of not more than $40 000."

Counsel also made reference to s 60A, submitting that remedial action was easier to direct where a disseminated approach was taken to s 19(1)[113].

117 The intention of Parliament in s 19(1) is said by the defendants to be discoverable in the words employed in these other sections. Firstly it is pointed out that s 19(1) does not create the offence. Failure to comply with its command is made an offence by s 58(1). More particularly it is argued that failure is not a failure to comply with a section or subsection of the Act. It is a failure to comply with a "provision" of the Act[114]. In addition it is argued that in s 58(7)(c) the words are, "act or omission". That suggests the Act proscribes each operative "deed or omission" rather than proscribing a state of affairs. We repeat that while disputed by the Crown, it was Mr Wells QC's argument that a state of affairs basis was the subtext of the Crown's approach[115].

118 In s 59, the qualifying words require a person who contravenes "a provision of" Pt 3, i.e. s 19(1). The penalty is doubled where the person has known of or alternatively has been recklessly indifferent to the endangerment. Mr Wells QC contended this necessitates the existence of an act or omission to which the knowing or reckless state of mind can attach[116]. It was also contended that as the offence is minor indictable and

[113] tr 20
[114] tr 14
[115] tr 15
[116] Outline para [10(d)], tr 17.

the accused is entitled to be tried by jury, the jury decision would be incapable of being understood[117] if s 19(1) was construed as a single offence. Finally s 60A provides that conviction will be for an "act or omission" and makes provision for an act or omission "wilfully repeated"[118]. The submission was that those provisions are linked to a concept wherein each act or omission constitutes an offence rather than a state of affairs or single offence[119].

119 Mr Kourakis QC argued that nothing was indicated in the usage of the word "provision" appearing in either s 58 or s 59. In fact the former was a section intended to meet a variety of circumstances contemplated by the Act and had a "fits all" role[120]. At most one could say it was protean. The defendants' arguments were essentially semantics. And while Mr Kourakis QC accepted that s 58 makes it an offence to fail to comply with the duty in s 19(1), that did not inform the issue of whether s 19(1) was a single offence.

120 As to s 59, it was an offence separate from s 19(1)[121]. It was s 19(1) with *mens rea*. Regarding jury decisions, the court frequently was unable to ascertain the precise basis of the jury's finding. A common example of this was in conviction for manslaughter. As for s 60, that provision involves the persistence by the employer with the unsafe state[122]. However Mr Kourakis QC added, none of these points raised by the defendants by reference to sections other than s 19(1) helped answer the point made in *BHAS*[123] concerning the purpose of a Division 2 fine for the first offence and a Division 1 fine for the second or subsequent offences. If the defendants' construction was accepted that would defeat the legislative aim to give the employer concerned the message that next time the penalty would be more severe[124]. Any construction concluding other than there is a single offence would defeat the objective of creating increased penalties for subsequent offences. Moreover s 60 had only limited utility as each offence can be dealt with under s 19(1) and the fine applicable was in fact higher than that under s 60[125]. As such, s 60 would rarely have occasion to be used.

121 The weakness of the defendants' argument is the fact that one must examine ss 58, 59 and 60 to appreciate what s 19(1) says. That employs the context at its outer limits. The command of the legislation is to be found where you would expect it, namely in s 19(1). But when the points

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[117] tr 59, 60
[118] Outline para [10(e)], tr 19.
[119] Mr Wells QC's remarks regarding s 63 and s 63A are to like effect.
[120] tr 75, see complainant's Outline paras [20], [49], [74].
[121] tr 74
[122] tr 75
[123] at 155
[124] *BHAS* at 155
[125] tr 76, Outline para [75]

made by Mr Kourakis QC are considered, the defendants' arguments are weakened further. In passing we note Mr Wells QC also relied on the Victorian equivalent of s 58(1), (i.e. s 47), in his contention that the decision of Fullagar J in *Chugg v Pacific Dunlop Ltd*[126] should be preferred. We now turn to consider that case.

Chugg v Pacific Dunlop

122 Mr Kourakis QC submitted at the outset that the defendants' case was no more than an argument for the preference of *Chugg* over *BHAS*[127]. *Chugg* concerned s 21 of the *Occupational Health and Safety Act 1985 (Vic)*. Subsection (1) required the employer to "provide and maintain so far as is practicable for employees a working environment that is safe and without risk to health". Subsection (2) then provided five specific circumstances that if established constituted a failure for the purposes of subsection (1), "without in any way limiting the generality" of that provision. Those five circumstances were similar in nature to those provided in s 19(1)(a) to (c) of the South Australian Act. The information as laid by the prosecution in *Chugg* treated s 21(1) as providing for one offence.

123 The defendant in *Chugg* argued s 21(1) provided for multiple offences. Fullagar J agreed and stated his conclusion in the following terms[128]:-

> "However the things that matter are first that the legislature has enacted that every employer owes a legal duty to his employee and has done so for the purpose of making it a crime for the employer not to comply with that duty and secondly, and more importantly, that duty itself is in both character and scope the same as or substantially the same as the duty of care owed at common law by employer to employee in tort.
>
> The importance of these matters for the present case can be explained by adapting the words of the Full Court in *Byrne v Baker* (1964) VR 443 at 453:-
>
> > 'This concept of negligence has reference to identifiable acts or omissions not to any general characterisation of the conduct of (an employer) over a selected period.'
>
> In my opinion the offences created by sub-ss (1) and (2) of s 21 in combination with s 47 consist of identifiable acts or omissions which constitute in all the circumstance a breach of the duty stated by s 21(1). If in all the circumstances they constitute a failure falling within one or more of the paragraphs of s 21(2), one need look no further because *ipso facto* they constitute a breach of the duty owed by s 21(1)."

[126] [1988] VR 411
[127] tr 67, 68
[128] at 415 - 416

124 The other part of *Byrne v Baker*[129] which His Honour applied was in the following terms[130]:-

> "It is a construction that involves a departure from the important principle that crimes should be so defined as to enable the accused to know with precision what he is charged with; and a construction producing this result should not be adopted unless the language of the legislature requires it. Here the language, far from requiring it, points away from the construction. It may be added that the view put forward by the prosecution if adopted would give rise to grave practical difficulties which … became apparent during the course of the argument in this Court."

Mr Wells QC placed particular reliance on the last quote[131].

125 Mr Wells QC stressed the importance of s 47 of the Victorian Act in the reasoning of Fullagar J in *Chugg's* case. That created the offence for failure to comply with s 21. It was a failure to comply "with any provision of this Act". That, he said, made the Victorian legislation on all fours with the South Australian legislation. Though His Honour acknowledged the difficulty of forming a conclusion as to construction[132], Fullagar J ruled in the following terms[133]:-

> "In the present case I consider that the major issue is whether sub-ss(1) and (2) of s 21, in combination with s 47(1), create on the one hand one continuing offence of allowing to subsist a particular proscribed environment, or create on the other hand a large number of offences each consisting of some identifiable act or omission which, in all the circumstances, constitutes a failure to comply with a general duty of care laid down by s 21(1). I have come to the conclusion that the latter alternative is correct, and that the effect of s 21(2) is to ensure that, if the acts or omissions charged and proven establish one or more of the several general failures set out in the lettered paragraphs of sub-s(2), then that, without more, automatically establishes a failure to comply with the general duty laid down by sub-s(1) and thereby operates to constitute the identifiable act or omission as a criminal offence by force of s 47. But it is each particular relevant act or omission itself that quantifies and constitutes the offence, not the failure to maintain either the continuing state of affairs indicated b s 21(1) or a continuing state of affairs indicated by a paragraph of sub-s (2)."

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[129] (1964) VR 443
[130] at 453
[131] tr 27
[132] at 414
[133] at p 415

The Subsequent Cases

126 The *Chugg* decision, as well as *BHAS*, was examined by the Industrial Court in New South Wales in *Magill v Boral Gas (Australia) Pty Ltd*[134] and on appeal in *Boral Gas (NSW) Pty Ltd v Magill*[135]. We note that those decisions go to show the extent of the controversy over the issue of whether the occupational health and welfare provisions based upon a similar modelling contemplated one offence or a disseminated situation. At the outset Mr Kourakis QC stressed this as showing, at best from the defendants' point of view, that reasonable and informed minds might well reach opposing conclusions and as such this was a case where it could never be said that the *BHAS* decision was "plainly erroneous"[136].

127 The New South Wales provision under examination in *Boral* was s 15 of the *Occupational Health and Safety Act 1985.* That provision states in subsection (1), "every employer shall ensure the health, safety and welfare at work of all his employees". In subsection (2) it provides that, "without prejudice to the generality of subsection (1) an employer contravenes that subsection if he fails". Then appears placita (a) to (f) in the nature of the sort of specifics appearing in s 19(1) placita (a) to (c). A maximum penalty is provided at the foot of the section.

128 At the first hearing of *Boral* before Marks J, his Honour considered the respective decisions of *Chugg* and *BHAS.* He noted the Victorian Act contained s 47(1) and noted that was a factor in Fullagar J concluding in favour of a disseminated construction[137]. His Honour found the absence of an equivalent to s 47(1) of the Victorian Act in the New South Wales legislation as important. This was an aspect stressed by Mr Wells QC[138]. Marks J then concluded the provision created a single offence and he stated his reasons in the following terms[139]:-

> "In my opinion s 15 creates but one offence and the manner in which a breach of the provisions of s 15(1) may, inter alia, occur is provided by way of the examples contained in s 15(2).
>
> The conclusion which I have reached accords with the conclusion of the Industrial Commission of New South Wales in Court Session in *State Rail Authority of New South Wales v Dawson* (1990) 37 IR 110, and I refer in particular to that part of the judgment reported at 113. In addition, the approach which I have adopted is consistent with the approach of the majority of the Industrial Court of South

[134] (1994) 53 IR 7
[135] (1995) 58 IR 363
[136] *Babaniaris v Lutony Fashions* (1987) 163 CLR 1 at 13 per Mason J
[137] (1994) 53 IR 7 at 16.
[138] tr 34
[139] at 16

> Australia in *Broken Hill Associated Smelters Pty Ltd v Stevenson* (1991) 42 IR 130."

129 Marks J then went on to make an empirical observation in the following terms[140]:-

> "Experience dictates that in most cases of industrial accidents there are a number of factors at play traversing most of the areas set out in s 15(2). Merely to consider each of the lettered paragraphs in that sub-section demonstrates without further comment the inter-relationship and inter-play of each of the matters described in each of the lettered paragraphs. To confine the Workcover Authority in the institution of prosecutions for a breach of s 15 to a particular identifiable allegation restricted to one lettered paragraph in s 15(2) would seriously inhibit the manner in which the Act would function. …"

The reality expressed in this obiter is probative of the statutory construction in our view. It is a similar observation to those in other judgments we refer to later in these reasons.

130 The decision of *State Rail Authority of New South Wales v Dawson*[141] relied on by Marks J was of the Commission in Court Session, (McMahon DP, Hill and Hungerford JJ). It dealt specifically with the construction of s 15 of the New South Wales Act. It construed the provisions of s 15(1) in the following terms[142]:-

> "… It is clear, however, from *Shannon v Comalco Aluminium Limited* (1986) 19 IR 358 at 359, that s 15(1) establishes a far reaching obligation upon an employer and imposes a duty in absolute (or strict) terms with s 15(2) spelling out the heads or particulars of that absolute duty but without in any way cutting down its rigour. Thus, an offence against s 15 is created under subs (1) thereof notwithstanding that an employer, in the particular case, may fail to carry out more than one of the duties referred to in subs (2); only one offence is committed by the employer, and that is pursuant to subs (1)."

131 The appeal from the decision of Marks J is reported in *Boral Gas (NSW) Pty Ltd v Magill*[143]. The majority in effect adopted the conclusion of Fullagar J in *Chugg's* case[144]. Fisher CJ, (dissenting), agreed with the conclusion of Marks J. None of the judgments regarded s 47 of the Victorian Act as determinative of whether a single or disseminated offence was intended by the legislature. The reasoning of the Chief

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[140] at 18
[141] (1990) 37 IR 110
[142] at 113
[143] (1995) 58 IR 363
[144] Hill and Hungerford J

Justice in concluding s 15(1) created a single offence is found in the following passage[145]:-

> "Most accidents have multiple causation. This case as the particulars show is typical. Some matters are breaches of safe working practice, safe working codes and regulations under other statutes. The device of bringing the central allegations together under one count, under s 15, is inherent in the structure of the Act itself and a long tradition of industrial litigation. Every dangerous machinery count can be presented as a breach of legislative standards (s 27 of the *Factories and Shops Act*), a failure to employ a safe system of work, a failure to supply safe plant and machinery, a failure adequately to train an employee in safe work practices, a failure to warn and advise, to name but a few. …
>
> Lastly, the central concept of this statute is to raise the standard of the duty of care to *ensure* the safety of employees and others. It could have been possible to deploy s 15 to lay out a series of separately itemised industrial offences each one standing separately. That is not what had been done. Each itemised failure is referred back as a failure under s 15(1) and the list is not exhaustive. Other allegations can enter the umbra of s 15(1)."

132 In his decision, Hill J, having made reference to salient parts of the decision of Fullagar J in *Chugg*, and briefly alluding to *BHAS*, stated his conclusion as follows[146]:-

> "The gist of the offence created by s 15 is not, in my opinion, the single act or omission of failing to observe a general duty to maintain at all times a safe working environment for employees which may possess one or more of a number of characteristics or features, but each particular act or omission which amounts to a failure to maintain that environment. Each act or omission which constitutes a failure specified in s 15(2) or otherwise amounts to a breach of the duty under s 15(1) is, in my opinion, a separate offence under the section. …"

His Honour *inter alia* regarded himself as not bound by *Dawson's* case[147].

133 Hungerford J concluded that because placita (a) to (f) in s 15(2) constituted separate and discrete means by which an employer committed an offence against subsection (1), this gave the provision a disseminated effect. Therefore a separate charge would be needed in respect to each placita to avoid duplicity[148]. His Honour said such a construction was to be preferred. Otherwise there would be uncertainty in:-

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[145] at 367, 368
[146] at 389
[147] at 390
[148] at 416

> "… (A)n employer's explicit duty at any one time by prescribing some amorphous concept to prevent a detriment to the safety of employees. As such, an employer allegedly failing to comply could, and would, be faced with a charge so broad and wide ranging as to offend a fundamental principle of the criminal law of certainty and proper definition of that with which he is charged".

134 Hungerford J continued[149]:-

> "The prime reason, however, for my view is in the very nature of the matters contained in the paragraphs in subs (2); they each represent significant and separate categories of conduct by an employer to ensure the stipulated condition of a safe workplace. Of course, a failure to observe any one of them will be a breach, but a multiple failure must surely lead to multiple breaches. If that were not so and only one breach was regarded as having occurred then, I think, the importance of one or other of the requirements would be negated. It would be a fortiori where each failure occurred at a different location at a workplace or, even at the same location, arose out of different circumstances. …
>
> … In a real sense, it may be said subs (2) is superfluous because the offence created by subs (1) may be made out according to a particular act or omission by an employer amounting to a relevant failure to ensure safety; seen in that way, each category specified in subs (2) represents direct assistance by the legislature, in the achievement of a safe working environment, of precise and distinct conduct by an employer as attracting the statutory penalty – viewed collectively rather than separately, the impact of that approach would be at least minimised and I cannot feel that that could have been the legislature's intent."

135 His Honour then explained *Dawson's* decision in the following terms[150]:-

> "… all the Court Session was saying was that subs (a) created but one offence, with which I continue to agree, and that subs (2) indicated how and in what circumstances that single offence may be committed by the employer as an offence against subs (1) but not against subs (2)."

His Honour then concluded in any event the reasoning in *Chugg* was persuasive and directly applicable, whereas *BHAS* related to different legislation and for that reason was distinguishable[151].

136 A second aspect dealt with by the Full Court in *Boral* was the construction of s 16 of the New South Wales Act. That provision provided an obligation to ensure health and safety of persons other than

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[149] at 416, 417
[150] at 417
[151] at 421

employees at places of work. It was an obligation imposed on employers and on every self-employed person. It did not include a placita or list of particular circumstances that would constitute a breach of the provision. The majority, in contrast to their conclusion in respect to s 15, ruled that s 16 created only one offence[152]. Hill J stated his view as follows[153]:-

> "The provisions of s 16(1) are, on their face, in marked contrast to those of s 15(1) and (2). In my opinion, s 16(1) creates only one offence where, on a particular occasion, an employer fails to ensure that persons not in his employment are not exposed to risks arising from the conduct of his undertaking or operations while they are at the employer's place of work notwithstanding that the conduct of the undertaking or operations at that point exposes different persons to different risks which arise in a variety of ways. In my opinion, the gist of the offence created by s 16(1) is that of the employer exposing persons not in his employment to risks to their health or safety while at his place of work. The act or omission resulting in the exposure of persons to risks to their health or safety may arise in one or more of a number of ways. In other words, the prohibited act or omission may possess one or more characteristics and proof of the existence, at any particular time, of several risks and several causes of risks, each to different persons or groups of persons, will establish only one contravention of the section."[154]

137 Mr Kourakis QC argued that the reasoning in *Boral* displayed a number of shortcomings. Firstly the failure to follow *Dawson* was not justified. Secondly the reasoning is not satisfactory[155]. Thirdly the decision was reversed legislatively[156]. Next its mainstay, from an analytical point of view, is its reliance on Fullagar J in *Chugg*. That in turn is marred by Fullagar J's dependence upon the reasoning in *Byrne* and the stark differences between the facts and the context of *Byrne* and *Chugg*. *Byrne* concerned particulars of the offence originally contained in 61 paragraphs, involving acts and omissions over a period of years, whereas in *Chugg* the particulars of the offence clearly indicated a specific incident comprising two omissions and were directed at the condition of

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[152] per Hill J at 395, per Hungerford J at 422.

[153] at 395

[154] Section 15(1) "every employer shall ensure the health, safety and welfare at work of all his employees"; (2) without prejudice to the generality of subsection (1) an employer contravenes that subsection if he fails … (a) to (f). Section 16 "every employer shall ensure that persons not in his employment are not exposed to risks to their health or safety arising from the conduct of his undertaking while they are at his place of work" (2) every self-employed person shall ensure that persons not in his employment are not exposed to risks to their health or safety arising from the conduct of his undertaking while they are at his place of work.

[155] For example Hill and Hungerford JJ conclude s 16(1) created a single offence and s 15(1) diverse offences. The latter should be so construed because otherwise the legislation, "prescribed some amorphous concept to prevent a deterrent to the safety of employees" (per Hungerford J at 416). If this is said of s 15(1) it must equally be said of s 16(1).

[156] see *Coombs v Patrick Stevedores Holdings Pty Ltd (*2002) 118 IR 401.

the machine and the system of work at the time of the incident[157]. Finally the approach taken by *Chugg* and the majority in *Boral* had been rejected by later high authority[158].

138 Mr Wells QC cited decisions following *Chugg*. He referred to *R v Australian Char Pty Ltd*[159]. There an employer was prosecuted under s 21(1) of the Victorian Act in respect to a particularly shocking work injury. The employer appealed against its conviction contending the presentment was bad for duplicity because the section created only a single offence in respect to any single safety accident[160]. The Court considered a number of decisions, some which in general terms formed the same conclusion as *BHAS*[161]. It also considered the *Boral* decision. The Court then ruled[162]:-

> "Counsel for the applicant eventually accepted during argument that the construction of s 21 for which he contended was that the offence to be charged was essentially a failure to keep in continuous existence the stipulated environment. A like construction was advanced as to the then s 107(1) of the Companies Act 1958 in *Byrne v Baker* (1964) VR 443 and its shortcomings were described as involving, 'a departure from the important principle that crimes should be so defined as to enable the accused to know with precision what he is charged with': at 453. We agree with the observation of Fullagar J. in *Chugg* 'that a substantial portion of the reasoning of that Court (the Full Court in *Byrne v Baker*), upon the proper construction and effect of s 107(1) ... reads almost directly on to s 21 of the Occupational Health and Safety Act 1985'. We also note that the lettered sub-paragraphs of subs2 of s 21 contain different ingredients or elements which would need to proved in any successful prosecution. Paras (a), (b) and (c) require the employer to 'provide and maintain', 'make arrangements for' and 'maintain' certain specified matters 'so far as is practicable'. On the other hand para (d) requires the employer 'to provide adequate facilities' of a stated type and para (e) requires the provision of matters 'as are necessary' to accord with a prescribed standard. This variation, in our opinion, lends support to the view of the section reached by Fullagar J. in *Chugg*."

139 Mr Wells QC also referred to the decision of *Vrisakis v Australian Securities Commission*[163]. That concerned s 22(2) of the *Companies (Western Australia) Code* which imposed a duty on an officer of a

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[157] see Johnston (2004) para [4.235], tr 100
[158] *Meiklejohn v Central Norseman Gold Corporation Ltd* (1998) 19 WAR 298 per Anderson J at 311.
[159] (1999) 3 VR 834.
[160] at 837
[161] See *Interstruct Pty Ltd v Wakelam* (1990) 3 WAR 100, *State Rail Authority of New South Wales v Dawson* (1990) 37 IR 110, *Shannon v Comalco Aluminium Ltd* (1986) 19 IR 358.
[162] para [37]
[163] (1993) 9 WAR 395

corporation to exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties. The nature of the allegations extended over a wide range of deeds and periods[164]. The Court applied *Byrne v Baker*. In the reasons of Malcolm CJ, his Honour indicated the answer depended on the language of the relevant statute or, "the nature of the precise offence charged". He agreed with Ipp J that the performance of the duty to take reasonable steps required separate "appropriate action" by the appellant with respect to each of the subjects listed. These constituted discrete matters requiring different things to be done at different times. A count charging a single breach of the duty, namely a failure to take reasonable steps to give effect to the business plan was in his opinion misconceived[165].

140 Ipp J added the following[166]:-

> "The finding that there was a failure to give substantial effect to the business plan as a whole is tantamount to a finding of a failure, constituted by several omissions, to give adequate attention to a substantial part of the business and general administration of Rothwells. That in my view misconceives the nature of the offence with which the appellant was charged. It is not to the point that the business plan was a single, specifically identified document. It contained a wide ranging agenda, covering many different aspects of Rothwells' business. An allegation of a contravention of several terms of the business plan is, in effect, an allegation of conduct constituted by several acts or omissions, relating to a broad aspect of Rothwells' affairs, each amounting to a lack of reasonable diligence."[167]

141 The next decision referred to by Mr Wells QC was *Peterson; Ex parte Brick & Pipe Industries Ltd t/as Nubrick*[168]. This appeal concerned the construction of s 27(1) of the *Occupational Health and Safety Act 1989 (ACT)*. The relevant parts from the reasoning of Gallop J are in the following terms[169]:-

> "I turn to the argument that the information was bad for duplicity. The magistrate dealt with a submission to that effect in the following terms:
>
> > 'During the submissions of counsel an issue was raised as to the nature of the offence created by s 27 of the *Occupational Health and Safety Act*. There seems to be no issue that s 27(1) of the Act creates a single offence. It is not possible, in my

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[164] See pp 401-402
[165] at 414
[166] at 443 -444
[167] Rowland J dissented apparently on the basis that the Act contemplated one offence
[168] (1994) 76 A Crim R 291
[169] at 300

> view, to suggest that more than one offence is created by that particular section.'

Counsel for the prosecutor relied upon the decision of Fullagar J in *Chugg v Pacific Dunlop Pty Ltd* [1988] VR 411. In that case Fullagar J considered the provisions of the *Occupational Health and Safety Act* 1985 (Vic). Section 21 is in terms different to s 27(1) of the Australian Capital Territory Act. Section 47(1) of the Victorian Act was in terms:

> 'any person who contravenes or fails to comply with any provision of this Act or the Regulations shall be guilty of an offence against this Act.'

Fullagar J held that subs (2) of s 21 (which is in similar terms to s 27(2)), when read in combination with s 47(1) created 'a large number of offences, each consisting of some identifiable act or omission which in all the circumstances constitutes a failure to comply with a general duty of care laid down by s 21(1)'.

In my opinion, the Victorian legislation is distinguishable from s 27 in that s 47(1) creates an offence for failing to comply with any provision of the Act or Regulations. Section 27 creates only a single offence of failing to take all reasonable practicable steps to protect the health, safety and welfare at work of the employer's employees.

In my opinion, the magistrate correctly construed s 27(1) as creating a single offence and was correct in holding that the information charged only one offence."

Mr Wells QC stressed the reference by Gallop J to s 47(1) of the Victorian Act.

142 Finally counsel referred to *Meiklejohn v Central Norseman Gold Corporation Ltd*[170]. The provision there was s 30B(1) of the *Mines Regulation Act 1946* (WA). It provided, "an employer at a mine shall, so far as is practicable, provide and maintain a working environment in which his employees are not exposed to hazards". The section then adopted the same formula as s 19(1) with placita (a) to (e) specifying particular aspects employers were to observe in respect to mining operations. Central Norseman Gold Corporation Ltd was charged with one count under s 30B(1) placita (a) and a second citing placita (b). The Full Court ruled s 30B(1) created a single offence. Non compliance with one or more of the lettered placita could not be treated as constituting distinct breaches. In the reasons of Anderson J[171], the authorities debated

[170] (1998) 19 WAR 298
[171] Walsh and Owen JJ concurred with the decision of Anderson J.

before us are examined and thus it is a particularly helpful review of the cases dealing with the issue.

143 Anderson J said it was to be noted that in s 19(1) of the South Australian Act, the statement of particular duties following the statement of general duty was not contained in a separate subsection. As in the *Western Australian Mines Regulation Act,* the particular duties were contained in the same subsection preceded by the words, "and in particular"[172]. Also his Honour noted that an examination of the cases produced results difficult to reconcile[173]. He thought two strands were to be found in the cases. These two strands were at odds. The strands were the principle that in criminal statutes there should be certainty and proper definition of offences. The other was that the court should be slow to conclude Parliament intended to proscribe conduct at any given time or on any one occasion that might constitute several distinct offences separately punishable thus creating the potential for double jeopardy.

144 Anderson J ultimately thought limited assistance was to be derived from a consideration of the cases decided on the legislation in other States, none of which was sufficiently similar to s 30B(1). That was particularly so in regard to the legislation in New South Wales and Victoria. He stated his opinion as follows[174]:-

> "Section 30B(1) is differently framed. The particular matters stipulated in the lettered pars (a)-(e) are not in a separate subsection, but are in the subsection which states the general duty. The entire description of what must be provided by the employer is in the one subsection. Whilst the subsection is divided into separate lettered paragraphs, those paragraphs are introduced by the words 'and in particular' as well as by the words 'but without limiting the generality of the foregoing', thus to my mind plainly indicating that the matters set out in the lettered paragraphs are intended to be no more that expatiations on or exemplifications of how the general duty may be breached. Furthermore, whereas in the New South Wales and Victorian legislation it is stated in subs (2) that 'an employer contravenes' subs (1) 'if he fails' to do any of the things in the lettered subparagraphs, there is no such statement in s 30B(1). The equivalent provision is to be found in s 30B(7) and it simply refers back to subs (1) as a whole. This is another reason to think that Parliament intended to created only one offence in s 30B. There is the further point that in none of the comparable legislation in other States is there a paragraph such as par (c) of s 30B(1)[175]. It is quite impossible to regard par (c) as of itself defining an offence. It would meant that even if, by any objective standards, the

[172] at 305
[173] at 310
[174] at 311
[175] This provides that the employer shall "consult and co-operate with health and safety representatives … and other employees" regarding health and safety matters at the mine.

> employees at a mine were not unreasonably exposed to any identifiable hazard, there could be a conviction for an offence against the section upon proof that there had been a failure to 'consult and co-operate with health and safety representative … regarding … welfare at the mine'. I am not persuaded that could have been intended. The presence of par (c) strongly reinforces the view that these lettered paragraphs are intended as no more than expressions of some of the content of the single duty.
>
> In my respectful opinion, Scott J was correct to conclude that s 30B(1) and (7) created a single offence."

Mr Kourakis QC placed reliance on this decision[176]. Mr Wells QC submitted that it was distinguishable[177].

Conclusion on Section 19(1)

145 In our opinion the summation of all of the materials that cast light on the intent of the Parliament with regard to s 19(1) discloses the following. The issue is one in which on the reported decisions there is a strong division of opinion. What is germane, and is the most that can be said of the defendants' argument, is that each view has been given distinguished judicial endorsement. Those opinions have approached the task of determining the legislative intent from both the text and the context. None have sought to consider the matter in the way urged on us here by Mr Kourakis QC. That is to look at policy and purpose and consider the matter in terms of the history and the mischief being addressed. Clearly the language of s 19(1) is ambiguous and doubtful so that reference to history and the mischief is appropriate[178]. We are of the opinion that when the construction of s 19(1) is approached in this manner there is a strong indication Parliament contemplated a single offence. It is our view therefore that *BHAS* reached the correct conclusion. In any event the *BHAS* decision could not be said to be plainly erroneous or manifestly incorrect. The defendants fail in their contention that this Court should overturn the result in *BHAS*.

Section 22(2)

146 We now turn to the submissions in respect to s 22(2). The provisions at the relevant time read as follows:-

> "(2) An employer or self-employed person must take reasonable care to avoid adversely affecting the health or safety of any other person (not being an employee employed or engaged by

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[176] tr 71
[177] tr 42
[178] *Saraswati v The Queen* (1991) 172 CLR 1 at 21.

the employer or the self-employed person) through an act or omission at work.

Maximum penalty:

For a first offence – Division 2 fine;

For a subsequent offence – Division 1 fine."

147 These provisions were the operative provisions as at 1 January 2004. The provisions in subsection (2) have been substantially changed[179]. The new provision bears a closer resemblance to s 19(1). We observe, despite that amendment, the usage remains one of adverse affect through "an act or omission"[180]. Counsel informs us there are no authorities examining the section[181]. Mr Kourakis QC contends the submissions relative to s 19(1) apply with even greater force to s 22(1)[182]. In his contention not even the favours sought by the defendants from *Boral* can be relied on. To the contrary the views of the majority in *Boral* were that s 16 in the New South Wales legislation creates only one offence[183]. In particular Hungerford J commented as follows:-

> "Section 16(1), in my reading of it, penalises the act or omission of an employer in failing to ensure the non-exposure of persons not in his employment to relevant risks at the workplace. The subsection penalises the proscribed conduct even though it may arise from one or more characteristics. It is, therefore, a subsection creating but one offence. …"[184]

148 The first submission of Mr Edwardson QC was that the usage of the language, "an act or omission", indicates the disseminated operation of the provision[185]. While he acknowledged there was a challenge in drawing a distinction between the construction of s 19(1) on the one hand and s 22(2) on the other[186] he pointed out that the fact there was a different result for s 15(1) as opposed to s 16(1) in *Boral* had not troubled the majority there. He contended there were important distinctions between the provisions in s 22(2) and s 16(1) of the New South Wales Act. Firstly the New South Wales section expressed the duty in a negative way. In contrast s 22(2) penalises one or more acts constituting a failure. It was an important difference of grammar. He also submitted the words intended one offence in respect to a class of persons at risk rather than separate

[179] See Amending Act No 41 of 2005 s 7.
[180] tr 88
[181] tr 61
[182] tr 89
[183] Hill J at 395, Hungerford J at 421, 422.
[184] at 422
[185] tr 61, 63, Outline para [53].
[186] tr 61

offences with respect to each individual member of the class[187]. Thus the counts charged for breach of s 22(2) were bad for duplicity.

149 The Crown in response to the defendants' submissions contends the legislative command and its structure is the same in s 19(1) as in s 22(2). The former dictates a duty to ensure each employee is while at work safe from injury and risk to health. The latter dictates a duty to avoid adversely affecting the health or safety of any other person[188]. There is no actual difference. Moreover the use of the word "or" between "health" and "safety" in s 22(2) is not indicative of an intent to create two offences[189]. Thus s 19(1) imposes an obligation to ensure safety and s 22(2) imposes an obligation to avoid adverse affects on health and safety[190]. Next the matters of policy and purpose applicable to s 19(1) are equally applicable to s 22(2). Finally a separate offence is committed in respect to each individual employee affected. That is because of the use of the word "person"[191]. That is consistent with the approach taken in *Johnson v Miller*[192] to the word "person"[193]. Section 19(1) clearly creates a separate offence for "each employee" and it would create an anomaly if s 22(2) did not create an offence in respect to each non-employee.

150 In our conclusion the same matters attend the interpretation of s 22(2) that as a generality attend s 19(1). There are features referred to by some of the Judges of empiricism when dealing with occupational health and safety that suggest a single offence. That it is an unsafe condition is often the result of a complex of failings which take their character from their juxtaposition[194]. Further, and perhaps more importantly, we agree with Mr Kourakis QC's argument in respect to the text of the section. Again for the reasons that persuaded us in regard to s 19(1) there is no duality in the usage of the words "health or safety" and the fact that the penalty contemplates a more severe punishment for the second offence fits more happily with the view of one offence as opposed to a disseminated approach.

151 The second aspect raised by Mr Edwardson QC namely the offence is not with respect to each person but to a class, should in our view be considered together with the contention made by Mr Wells QC that it was inappropriate to include in Particular 2 of the Diemould complaint

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[187] Outline para [6].
[188] Informant's Outline para [5].
[189] *Ex parte Polley; Re McLennan* (1947) 47 SR (NSW) 391 at 392 per Jordan CJ.
[190] Informant's Outline para [7], tr 89.
[191] tr 86
[192] (1937) 59 CLR 467.
[193] tr 87, Informant's Outline para [21].
[194] The facts in *Australian Oil Refining Pty Ltd v Bourne* (1980) 28 ALR 529 is we think a case in point. Also the "concatenation of circumstances" spoken of in *Softwood Holdings Ltd v Stevenson* (1986) 188 LSJS 487 and quoted from *Liability of Employers,* 2nd Edition, Glass McHugh and Douglas at 28.

reference to the fact that the worker was fatally injured while operating the horizontal borer[195]. Mr Kourakis QC was equally insistent to the contrary[196]. He contended the risk of injury must be identified precisely so as to enable a judgment to be made as to whether everything reasonably practicable had been done. The view that has been adopted in this Court is that expressed by Bauer J in *WorkCover Authority of NSW (Inspector Twynam-Perkins) v Maine Lighting Pty Ltd*[197]. Her Honour said:-

> "Whilst in the tragic circumstances where a person was killed in an accident it was natural to concentrate on the events giving rise to the actual cause of the death, such a concentration exhibits an error in law as was pointed out by the Full Court in the passage from *Hayne v CI&D Engineering* [(1994) 60 IR 149] previously quoted. The actual event of the accident and injury is relevant; **but it goes to satisfy the evidentiary burden that failure gave rise to a risk to health, safety or welfare**." (The emphasis is ours.)

This is the rule that has been followed in this jurisdiction[198]. It conforms with the notion that the offence is committed in relation to a person. It is the risk to a person that is at stake[199]. It is almost invariable that the unifying feature which forms the connecting factor in these cases is the occurrence of an injury to a person.

152 However as stated, Mr Edwardson QC argued that the section should not be construed so that an offence occurred in respect to every affected person separately[200]. He referred to practices in other jurisdictions that suggested the contrary approach[201]. The approach in other jurisdictions indicated the practice of charging one count, irrespective of the number of employees at risk. Mr Edwardson QC contended no other jurisdiction but South Australia chose to do otherwise[202].

153 In our view the offence is created in respect to each employee or non-employee when a charge is made under s 22(2). The wording indicates that. Moreover it would seem unlikely to be Parliament's intention that where, for example, an accident occurred resulting in serious injury to a number of workers, only one charge could be laid. Rather the intent would be to charge in respect to each person. That said, we note that difficulties may arise in relation to the "other person not being an employee employed or engaged by the employer or the self-employed

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[195] Outline para [24], tr 58.
[196] tr 86, 106
[197] (1995) 100 IR 248 at 258.
[198] *Fielders Steel Roofing Pty Ltd v Moore* [2004] SAIRC 62 at para [10].
[199] Examples of abstractions were given in argument tr 106.
[200] tr 138
[201] *Hudson v Australia Food Group Pty Ltd* [2006] TASSC 48, Defendant's (Santos) Reply paras [22], [23].
[202] tr 140

person" by reason of s 58(7)(c). However that consideration is not sufficient to dislodge our conclusion.

154 These reasons provide our answer to the questions of law reserved numbered one to four, six and eight of the questions referred in the matter of *Oaten v Diemould*. These reasons also answer the questions reserved in questions one, two, four, six, seven, nine, ten, twelve, fourteen and sixteen of the proceedings in the matter of *Markos v Santos Ltd*.

Election, Amendment and Time Limits

155 The matters that remain concern consequences that flow if we construed the legislation in the way urged upon us by the defendants. Strictly speaking that makes the questions of amendment, election and time not matters that, "arise in proceedings", for the purposes of s 43(2)(a). That is we face a question over our jurisdiction on this reservation in the circumstances. Indeed there is another aspect that concerns us in this regard. There are matters involved of not only patent, but also latent, duplicity. The latter cannot always be decided in advance. We are however prepared to make some limited observations in deference to the comprehensive submissions made and the fact that it was appropriate to hear these arguments given that we did not know what the outcome of our deliberations would be. On that basis we make the following remarks.

156 The rule at the centre of the argument of the defendants, once the statutory construction point is put aside, is the rule against duplicity. That dictates that no one count in an indictment should charge a defendant with having committed two or more separate offences[203]. This rule is a rule of fairness. It upholds a person's right to know the case he or she has to meet and that the case be prosecuted in an orderly manner. That allows the accused to consider his or her plea, to consider what defences may be raised and to provide the ability to adjudge the relevance and admissibility of evidence[204]. The rule is referred to by Gaudron and McHugh JJ in *S v The Queen* in the following terms[205]:-

> "…a court must know what charge it is entertaining in order to ensure that evidence is properly admitted, and in order to instruct the jury properly as to the law to be applied; in the event of conviction, a court must know the offence for which the defendant is to be punished; and the record must show of what offence a person has been acquitted or convicted in order for that person to avail himself or herself, if the need should arise, of a plea of autrefois acquit or autrefois convict. …"

[203] Complainant's Outline para [1].
[204] See *Police v Caldwell & Wright* [2007] SASC 266 at para [18].
[205] (1989) 168 CLR 266 at 284.

Further in *John L Pty Ltd v The Attorney-General for the State of New South Wales*[206] the majority stated the common law required of a valid information that it "must at least identify the essential factual ingredients of the actual offence"[207]. Besides those principles there are various statutory provisions. These have been referred to by counsel and are as follows.

157 Section 22A *Summary Procedure Act 1921*:-

> "(1) Every information, complaint, summons, warrant or other document under this Act in which it is necessary to state the matter charged against any person shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as are necessary for giving reasonable information as to the nature of the charge.
>
> (2) The statement of the offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by statute, shall contain a reference to the section of the statute creating the offence.
>
> (3) After the statement of the offence, necessary particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be required."

Section 51 *Summary Procedure Act 1921*:-

> "(1) A person may be charged with any number of summary offences in the same complaint (either cumulatively or in the alternative) if the charges arise from the same set of circumstances or from a series of circumstances of the same or a similar character.
>
> (2) The Court may direct that-
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> (a) charges contained in a single complaint be dealt with in separate proceedings; or
>
> (b) charges contained in separate complaints be dealt with together in the same proceedings."

Section 70A *Summary Procedure Act 1921*:-

> "(1) Where charges for more than one offence have been joined in the same complaint, pursuant to this Act, the Court may-

[206] (1987) 163 CLR 508.
[207] Mason CJ, Deane and Dawson JJ at 520.

(a) convict the defendant of such one or more of those offences as it finds proved;

(b) include any number of offences in a minute or memorandum of conviction or in any formal conviction."[208]

Section 181 *Summary Procedure Act 1921*:-

"(1) An information or complaint is not invalid because of a defect of substance or of form.

(2) The Court may-

(a) amend an information or complaint to cure a defect of substance or form (but if the defendant has been substantially prejudiced by the defect, no amendment may be made); or

(b) dismiss an information or complaint if the defect cannot appropriately be cured by amendment."

158 Each side made reference to *Walsh v Tattersall*[209]. That case is, in our opinion, distinguishable from the matter before us. It concerned a worker suffering a non-compensable disability. Despite knowing this, he claimed compensation. He took his weekly compensation payments. He was charged with the single count of dishonestly obtaining payments or benefits under s 120 of the *Workers Rehabilitation and Compensation Act 1986* as if s 120 was a provision penalising one act. The main judgment ruled the offence occurred when he accepted payment in any given week[210]. So by being charged with dishonestly obtaining payments for the whole period between October 1992 and October 1993 he was charged in effect with a non-existent offence. Only Kirby J decided to allow the appeal on the grounds of the rule against duplicity[211]. His Honour stated as follows[212]:-

"… If a precise understanding of the charge laid, although evidenced by multiple acts, is that it represents a single crime, then a single count is permissible: *Montgomery v Stewart* (1967) 116 CLR 220. …"

[208] Complaints have to comply with Form 1 of the Magistrates Court Rules 1992.
[209] (1996) 188 CLR 77
[210] Gaudron and Gummow JJ at 87.
[211] At 92, 101
[212] At 107

And further[213]:-

> "… Ultimately, what is presented is a question of fact and degree for decision in each case: *R v Eades* (1991) 57 A Crim R 151 at 156. … it must be accepted as correct that 'the courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide … as to whether the common law rule [against duplicity] has been infringed': *Stanton v Abernathy* (1990) 19 NSWLR 656 at 666 per Gleeson CJ."

159 Kirby J then completed his analysis of the issue in the following terms[214]:-

> "A finding that the rule against duplicitous charges has been breached does not oblige the court, coming to that conclusion, to dismiss the charge. Where the defect is one of patent duplicity, the proper course is to put the complainant to an election to remove the embarrassment: *Iannella v French* (1968) 119 CLR 84 at 102, applying *R v Molloy* [1921] 2 KB 364; *R v Disney* [1933] 2 KB 138. Where the defect is latent and the particulars do not remove it, the court may direct further particulars; require the complainant to elect and to identify the alleged offences; and/or exercise the power to permit an amendment: *Johnson v Miller* (1937) 59 CLR 467 at 490 per Dixon J, discussed in *Stanton v Abernathy* (1990) 19 NSWLR 656 at 670. See also *R v Hamzy* (1994) 74 A Crim R 341."

160 Mr Kourakis QC informs us that s 51 of the *Summary Procedure Act 1921* was inserted in response to the High Court's decision in *Johnson v Miller*[215]. His submission is that if the defendants are right and there were separate offences arising in each case, then given the contents of the complaints it can be said that the factual matters have been pleaded and there is no new factual material or information to add[216]. Thus there could be no objection to the complaints on the basis that a complaint must have only one charge in it because s 51 enabled charging many counts within the same complaint. To achieve a just outcome, assuming there was no prejudice, all that was required was an exercise in renumbering. It would not involve any new allegations[217]. Indeed, it was argued, the presence of s 51 provided an outcome not available to Fullagar J in *Chugg's* case. Further the power to amend in s 181 was of extreme width[218]. That said, Mr Kourakis QC conceded that for s 51 to be used to facilitate the situation depended on charges for two or more offences being joined in the same complaint only where they arose out of the same set of

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[213] At 108
[214] At 110
[215] (1937) 59 CLR 467.
[216] tr 93
[217] tr 94
[218] *Crafter v McKeough* (1943) SASR 371, tr 104.

circumstances[219]. He contended the current facts were precisely of that type.

161 Mr Kourakis QC contended this was the approach of Cox J in *Schultz v Pettitt*[220] as revealed in the following passage from the judgment:-

> "… The general policy of the *Justices Act* is to eschew technicalities that have no prejudicial effect – see, for instance, ss 22a, 182 and 186 – and there is every good reason for giving s 183 a liberal construction in this respect."[221]

162 In response, Mr Wells QC accepted s 51 allowed separate charges to be joined in the one complaint[222]. But nothing changed the need for separate charges where there were separate offences. He contended that any suggestion by Cox J in *Pettitt* to the contrary was wrong and contrary to *Walsh v Tattersall*[223]. Moreover the powers in s 51 were to be exercised in accordance with *Johnson v Miller*[224]. The defendants' position was that there was one charge in a complaint which alleged more than one offence. *Walsh v Tattersall* was clear authority that there can be only one offence charged in a count. If the procedure suggested by the Crown were to be adopted, it would constitute the laying of new charges[225]. Those charges would be out of time[226]. The Crown's argument failed to recognise there was no provision, whether in ss 22A, 51, 181 or otherwise that could skirt around the necessity for the charge to be explicitly laid and laid within time.

163 Mr Edwardson QC agreed with those submissions and added if the defendants' submission as to s 19(1) or s 22(2) were to be accepted the defects were fundamental. It was that which moved Fullagar J in *Chugg* rather than any absence of the equivalent of s 51. Fullagar J stated in the following terms[227]:-

> "... Although the power to amend given by s 157 of the *Magistrates (Summary Proceedings) Act* 1975 appears in unrestricted terms, the common law principles which required, in circumstances like the present, either an election or a total dismissal are based upon such fundamental liberties of the subject that the relevant common law rights should not be deemed to be taken away by the statute except by some express statutory words."

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[219] *The Queen v Elliott; Ex parte Elliott* (1974) 8 SASR 329 per Bray CJ at 333.
[220] (1980) 25 SASR 427.
[221] At p 432. The *Justices Act* was the precursor of the *Summary Procedure Act*.
[222] tr 114
[223] tr 114
[224] tr 115
[225] tr 119, 120
[226] tr 121
[227] At 417

164 Mr Edwardson QC contended Hill and Hungerford JJ in *Boral* were to like effect[228]. To the extent that *Pettitt's* case was authority to the contrary then it was wrong. Indeed this amendment would be sought outside the statutory limit and Cox J accepted that the power to amend in s 183 of the *Justices Act* could not convert a bad complaint into a good one. The complaints were bad in that circumstance for all time. His Honour stated that view in the following passage[229]:-

> "… Certainty of the effect of an amendment or a variance would be to take the offence outside the relevant limitation period that would provide a compelling reason why an amendment to the complaint should not be made or a variance disregarded."

165 The thrust of Mr Kourakis QC's argument was that a rule, the purpose of which is to facilitate the objects of justice, generally ought to prevail over one which depends on a technicality. That would appear in line with recent authority. In *Brinkworth & Anor v Dendy*[230] the Full Supreme Court examined a question of whether counts laid under the *Native Vegetation Act 1991* were duplicitous. Each complaint charged the defendant with having between specified dates cleared native vegetation from certain land. The duplicity was said to arise from the fact each such count stated by way of particulars that native vegetation had been cleared from a number of separate areas on the land in question. The Magistrate required counsel to select or identify one only of the areas referred to in the relevant counts and to limit each of the relevant counts to a single area. The defendant's argument rested on the fact that the third particular alleged native vegetation was cleared from 27 separate areas and it was contended separate charges could be laid in respect to each of the areas.

166 Doyle CJ with whom the other judges agreed concluded the count in question was not duplicitous on its face[231]. His Honour noted the nature of the activity with which s 26 of the *Native Vegetation Act* deals suggests often it would not be possible to identify individually the plants that had been cleared. Practical considerations suggest that while the prohibited act is the clearance of plants, it should be possible to charge an offence that consists of the clearance of an unspecified number of plants and it should be possible to lay the charge in a form that identifies the place or area where the plants were before they were cleared. Otherwise the provision would not be workable[232]. In like manner Debelle J pointed to the fact that the rule was to be applied "in a practical rather than a strictly analytical way" and adopted the approach to that extend by Lord Diplock in *Director of Public Prosecutions v Merriman*[233].

[228] tr 141
[229] (1980) 25 SASR 427 at 433
[230] [2007] SASC 120
[231] Para [48]
[232] Para [35]
[233] [1973] AC 584 at 607.

167 Thus Mr Kourakis QC contended election was not the only remedy in the circumstance of patent duplicity[234]. He contended that fairness to the defendants was in the circumstances met by amendment under s 181[235]. That was especially true given it was the defendants' case that they had been charged with multiple offences if one accepted their view of the statute. What they had complained of was that the charge had been laid within one count. In reality amendment would do no more than formalise this. It would not reveal a new offence. It would restructure the complaint such that the multiple offences already charged were properly designated as counts. There was nothing adverse or prejudicial in this for the defendant[236]. That in our opinion is a difficult proposition and overlooks the profound importance that should attend or is involved in the laying of a charge[237]. We would not regard *R v Jiri Fiala*[238] relied on by Mr Kourakis QC as supporting his contention. We reiterate however that given our view in respect to the proper way to construe s 19(1) and s 22(1) these matters are unnecessary to answer.

168 We would therefore agree with the answers given in para [79] of the reasons for decision of Senior Judge Jennings and Judge Gilchrist. It is not necessary for us to repeat those details.

[234] Complainant's Outline para [84].
[235] Complainant's Outline para [85]; *R v Jiri Fiala; Ex parte GJ Coles & Co Ltd* (1986) 46 SASR 47 at 59-60.
[236] Complainant's Outline paras [99], [100].
[237] See the Defendant's (Santos) Reply Outline paras [9], [10], [15], [16], [17], [19], *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 per Dixon J at 388-9.
[238] (1986) 46 SASR 47.