CITATION: *Galton v McArthur River Mining Pty Ltd* [2013] NTMC 007

PARTIES:	RICHARD PHILIP GALTON
	V
	McARTHUR RIVER MINING PTY LTD
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	CRIMINAL
FILE NO(s):	21218768
DELIVERED ON:	8 April 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	14 January 2013
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

CRIMINAL PROCEDURE – VALID COMMENCEMENT OF CRIMINAL PROCEEDINGS – DUPLICITY – REASONABLE PARTICULARS

Mining Management Act ss 25(a) and (b), 27(3), 77(1) (a) and (b)
Justice Act ss 22A, 51, 52, 54-57 and 181
Rabcsynski v Morrison [1988] WAR 71 considered
MacCarrow v Coles Supermarkets Australia Pty Ltd (2001) 23 WAR 355 considered
Pearson v Rizos [2008] SASC 98 considered
Parisienne Basket Shoes Pty Ltd v White (1938) 59 CLR 369 applied
R v Cooling [1989] 44 A Crim R 171 applied
Bastin v Davies [1950] 2 KB 579 applied
Romeyko v Samuels (1972) SASR 529 applied
R v Serratore (1999) 48 NSWLR 101 applied
Bentley v BGP Properties Pty Ltd [2005] 139 LGERA 449 considered
Mansbridge v Nichols [2004] VSC 530 considered
Exparte Ryan; Re Johnson (1944) 44 SR (NSW) 12 applied
Bishop Criminal Procedure 2nd edition Ward Kelly Summary Justices SA

REPRESENTATION:

Counsel:

Complainant:	Ms S Brownhill
Defendant:	Mr A Crocker

Solicitors:

Complainant:	Solicitor for the Northern Territory
Defendant:	Minter Ellison

Judgment category classification:	A
Judgment ID number:	[2013] NTMC 007
Number of paragraphs:	145

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21218768

BETWEEN:

RICHARD PHILIP GALTON
Complainant

AND:

McCARTHUR RIVER MINING PTY LTD
Defendant

REASONS FOR RULING

(Delivered 8 April 2013)

Dr John Allan Lowndes SM:

PRE-TRIAL ISSUES

1. The defendant has raised a number of pre-trial issues that it seeks to have resolved by the Court prior to the commencement of the hearing of a complaint which alleges an offence contrary to s 27(3) of the *Mining Management Act*. A copy of the complaint (marked "A") is annexed to these reasons for decision.

2. The defendant seeks the following orders:

    1. That the complaint be dismissed because the proceeding for the alleged offence has not been commenced pursuant to s 77 of the *Mining Management Act* (as it was on 17 May 2012).

    2. That the complainant be directed to elect between the two alternatives currently pleaded in paragraphs 11(a) and 11(b) of the complaint, thereby particularising the defendant's behaviour which is said to constitute the relevant conduct for the purposes of s 27(3) of the Act.

3. That the defendant be directed to elect between the three alternatives currently pleaded in paragraph 2 of the complaint, thereby particularising which of these three obligations is the obligation relied upon by the complainant for the purpose of undertaking the assessment required by s 27(3) (a) of the Act.

4. That the complainant be directed to particularise whether the prosecution relies upon s 25(a) or 25(b) of the Act in attempting to prove s 27(3)(b) of the Act and if so, which sub-section? If the complainant relies upon s 25(b), a direction is sought that the prosecution particularise "the other factors".

5. That the complainant be directed to particularise who is the natural person (s) whose:

    (i) act or failure to act is said to be the relevant act or failure to act of the defendant; and

    (ii) state of mind is said to be that of the defendant;

6. That the complainant not be permitted to tender as evidence:

    (i) any material provided by, or on behalf of, the Department of Resources at any time after 10 June 2011; and

    (ii) any opinion evidence based upon any of the material in the preceding paragraph.

3. On 14 January 2013 the Court heard the parties' submissions (both written and oral) in relation to the first five orders sought by the defendant. The sixth order sought by the defendant was not argued. Argument with respect to that order was deferred pending the Court's ruling in relation to the application for the first five orders.

4. After hearing the submissions I reserved my decision, with the intention of publishing written reasons for decision. These are my reasons for decision.

THE FIRST ISSUE: WHETHER THE PROCEEDINGS HAVE BEEN VALIDLY COMMENCED

5. As at 17 May 2012 (the date of the making of the complaint) s 77(1) of the *Mining Management Act* provided that a proceeding for an offence against the Act may be commenced:

> (a) only by, or with the written approval of, the Chief Executive Officer; and
>
> (b) within 12 months after the day on which the Chief Executive Officer first became aware of the commission of the alleged offence.

6. Section 77 (2) provides that a certificate of the Chief Executive Officer as to the day on which he or she first became aware of the commission of an alleged offence is, in the absence of evidence to the contrary, evidence of that fact.

7. In support of the first order sought by the defendant, it was argued that while the complaint, on its face, satisfies s 77(1)(a) of the *Mining Management Act*[1] it does not satisfy s 77(1)(b). The defendant submitted that satisfaction of both essential prescriptions must be apparent on the face of the complaint:

> Unless the written document [the complaint] records the apparent satisfaction of (a) and (b), the reader of the document will be unable to discern whether, on its face, the complaint satisfies s 77(1) of the MMA.[2]

8. The defendant went on to make this submission:[3]

> Just as it is necessary to prove, on the face of the complaint, compliance with s 77(1)(a) of the MMA, so too it is necessary to prove, on the face of the complaint, compliance with s 77(1)(b) of the MMA. Provision is made within s 77(2) of the MMA for an aid to evidential proof of this essential procedural prescription.

[1] See [7] of the defendant's written submissions dated 10 December 2012.
[2] See [5] of the submissions.
[3] See [10] – [14] of the submissions.

> In relation to the essential procedural prescription in s 77(1)(b) of the MMA, the complaint is silent. There is no assertion by the complainant that the proceeding is being commenced within 12 months after the day on which the Chief Executive Officer first became aware of the commission of the alleged offence, nor is there any reference to a certificate which he could have completed pursuant to subsection (2).
>
> The recipient of a proceeding such as the current complaint must be able to read the document and see that all essential prescriptions have been satisfied. This is so particularly when the opening date of the alleged offending is several years prior to the commencement of the proceeding. The terms of the complaint leave open the possibility that the complainant first became aware of the commission of the alleged offence shortly after the opening date of the charge. There is nothing to suggest the contrary. If so, the proceeding would not have been validly commenced. The terms of s 77(1)(b) of the MMA make it imperative that one is able to identify such a date on the face of the complaint. An inability to, or a failure to, make findings that the proceedings have been commenced within the statutory limitation period is fatal to any prosecution.
>
> Section 77 of the MMA is an unusual method of fixing a limitation period. The usual method is to nominate a period of time after the commission of the alleged offence within which the proceedings must be commenced. In such a case, compliance or otherwise with any limitation period is easily discerned. The capacity of a reader to discern from the face of a document whether a proceeding has been commenced within time does not depend on the manner of calculating the limitation period.
>
> If the complaint alleged offending wholly within a period of 12 months from the date of the complaint, it must be that the proceeding has been commenced within time. Absent any assertion as to when the Chief Executive officer became aware of the commission of the offence, it is impossible to make any assessment as to whether the proceeding has been commenced within time.

9. It was submitted on behalf of the defendant that s 86 of the Act, which is an aid to proof, cannot convert "a bad complaint into a good complaint".[4] Nor does s 86 obviate the need for the two essential prescriptions in s77 of the Act to be satisfied before a proceeding can validly commence; and nor does it remove the requirement that the existence of both facts be asserted on the face of the complaint.[5]

[4] See [15] – [16] of the submissions.
[5] See [16] of the submissions.

10. Finally, the defendant submitted that the defective complaint could not be amended to cure the invalidity:

> If the proceeding against the defendant has not been validly commenced, the complaint cannot be amended in an attempt to save the proceeding. On the material disclosed by the prosecution, Mr Trier, the person acting in the position of the Chief Executive Officer, knew by 14 July 2011 of the commission of the alleged offence. The 12 month limitation period within which to commence a proceeding for an offence expired on 14 July 2012. It is not permissible to amend if the effect of the amendment is to lay a charge which is now beyond any statutory limitation period.[6]

11. In reply to the defendant's submissions, the complainant relied upon the following arguments: [7]

(a) Neither the provisions of the *Justices Act* regarding the form of a complaint or summons (ss 2, 22A, 51, 52, 54-57, 181), nor any provision of the *Mining Management Act*, expressly require the complaint to allege that the complaint was made within the limitation period. A complaint which 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, is sufficient (s 22 A *Justices Act*).

(b) The limitation period in s 77(1)(b) of the *Mining Management Act* is procedural. It is not an element of the offence; nor does it go to the jurisdiction of the Court – it simply provides a defendant with a good defence to a charge that is out of time.[8]

(c) While it is accepted that there is a burden on the complainant to prove the complaint was made within the limitation period, at least where the matter is put in issue by the defendant or arises upon the evidence,[9] none of the authorities cited by the defendant [10] hold that a complaint is

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[6] See [17] of the submissions.
[7] See [3] – [8] of the complainant's written submissions dated 21 December 2012.
[8] In that regard, the complainant relies upon *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 385 per Starke J at 388-389; 392 per Dixon J (Evatt and McTiernan JJ agreeing); *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 553 per Latham CJ; *R V Danier; Ex parte Tonge* (1984) 14 A Crim R 327 at 338 per Gallop J citing these decisions.
[9] Here the complainant referred to *Rabczynski v Morrison* [1988] WAR 71 at 73-74 per Pidgeon J; *Environment Protection Authority v Bathurst City Council* (1995) 89 LGERA 79 at 80, fn 2, citing *R v Lewis* {1979} 1 WLR 970 at 972. Furthermore, the complainant pointed out that the defendant may carry the burden of proof that the complaint was made outside a limitation period which commences upon discovery or awareness of the offence: *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163 at 175 per Knox CJ and Dixon J, at 179-180 per Isaacs J.
[10] See [7]-[14] of the defendant's written submissions dated 10 December 2012.

> defective in the absence of a specific allegation as to the commencement of the limitation period.

12. The complainant made the following further submission:

> The complaint was commenced, as appears on its face, on 17 May 2012. It refers, in the charge, to a period in which the offence occurred which ended on 19 May 2011 and, in the particulars, to the escape of diesel fuel on 18-19 May (para 12). It is clear, on the face of the complaint, that the alleged offence was complete upon the escape of the diesel fuel ending on 19 May 2012,[11] and consequently that the complaint was commenced within 12 months after the alleged offence was complete.

13. The complainant submitted that the complaint was neither invalid nor defective by reason of its failure to allege the date on which the Chief Executive Officer first became aware of the commission of the alleged offence.[12] However, if the complaint were defective for this reason, the complainant maintained that the defect could be cured by amendment. The failure to allege the material date is not a fundamental defect which cannot be cured by amendment.[13] Finally, if the complaint were amended, the amendment would not have the effect of commencing a new proceeding out of time.[14]

14. The requirement in s 77(1) (a) that a proceeding for an offence against the Act may be commenced only by, or with the approval of, the Chief Executive Officer, only creates a procedural bar – that is to say it only prohibits a proceeding being commenced without the requisite authority or approval; and a proceeding commenced in contravention of s 77(1)(a) is liable to be dismissed. However, where a proceeding is commenced in

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[11] In that regard the complainant pointed out the offence of causing serious environmental harm under s 27(3) of the *Mining Management Act* is " a result offence" ie an offence which is not complete until the particular consequence (environmental harm) occurred: see *Environment Protection Authority v Bathurst City Council* (1995) 89 LGERA 79 at 81-83 per Hunt CJ, citing *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78 at 83; considered and applied in *Cohen v Macefield Pty Ltd* [2010] QCA 95 at [39]-[40].

[12] See [7] of the complainant's written submissions dated 21 December 2012.

[13] See [8] of the submissions. The complainant pointed out the defect was not one of failing to disclose an offence or omitting an essential element of the offence charged: see *Bedi v The Queen* (1993) 61 SASR 269; *Taylor V Environment Protection Authority* (2000) 50 NSWLR 48; *McConnell Dowell Constructors (Aust) Pty Ltd v Environment Protection Authority (No 2)* (2002) 54 NSWLR 39.

[14] See [8] of the submissions: see for example *Gilmour v Midways Springwood Pty Ltd* (1980) 3 A Crim R 196; *Chaudhary v Ducret* (1986) 11 FCR 163.

contravention of the provision and is dismissed on the basis of that non-compliance there is no prohibition on the proceeding being re-commenced – with the necessary authority or approval – provided it is commenced within 12 months after the day on which the Chief Executive Officer first became aware of the commission of the alleged offence (s 77(1)(b).

15. It is noteworthy that in *Rabcsynski v Morrison* [1988] WAR 71 at 75 Pidgeon J did not consider the absence of a reference – or proper reference - in the complaint to the fact that the complainant was a person authorised to bring the prosecution under s 26(3) of the *Wildlife Conservation Act* 1950 as a sufficient basis for concluding that the complainant was not authorised to bring the prosecution, and that the proceeding had not been validly commenced. Rather, His Honour considered evidence extraneous to the complaint, and on the basis of that evidence concluded that there was insufficient evidence of authorisation. The approach taken by His Honour is a tacit recognition that a failure to refer to the fact of a statutory authorisation in a complaint is not a fundamental defect leading to the dismissal of the complaint. Whether or not the proceeding has been commenced with the requisite authorisation is ultimately a matter for evidence; and the onus lies upon the complainant to establish beyond reasonable doubt that he or she has the authority to take proceedings in respect of the offence.

16. In *Quin v Lim* (2005) 193 FLR 313; [2005] NTSC 43 the Court considered a provision of the *Dangerous Goods Act* NT which stipulated:

> A person shall not institute proceedings in respect of an offence against this Act without the written consent of the Chief Inspector.

17. The Court held that the mere fact of consent to the prosecution in that case was all that mattered; the identity of the police officer to whom the consent was given, who was not the police officer in whose name the complaint was laid, was immaterial.

18. A number of authorities hold that proof of authority (or consent) is required to be strict: *Schultz v Virgin* [1966] SASR 94; *Rabczynski v Morrison* [1988] WAR 71 at 75; *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355 at 365-367; *Pearson v Rizos* [2008] SASC 98 at [15] –[25].[15] These cases show that proof of authority (or consent) is not a matter of form – but a matter of evidence.

19. *Dever v Creevey; Ex parte Creevey* [1993] 1 Qd R 232 also accords with this position. According to that authority, a court may allow the prosecution to be reopened where proof of authority (or consent) has been overlooked. This case is also authority for the following proposition:

> Failure on the part of the prosecution to lead [evidence of consent] as part of its proof will not per se render the prosecution ineffective. If the point is not taken by the defence the necessary consent may be presumed in the way that regularity of proceedings may be generally presumed…[16]

20. However, as is apparent from the defendant's submissions, the form of the complaint is not challenged on the basis that it does not, on its face, satisfy the requirement of s 77(1)(a) of the Act.[17]

21. Turning now to s 77(1)(b) of the Act, this provision is in the nature of a statutory time limitation on the commencement of a prosecution under the Act. Although the limitation period imposed by s 77(1)(b) is somewhat unusual,[18] it shares the characteristics of all statutory limitation periods:

> The limitation of time for laying an information is not a limitation upon the jurisdiction of the court or tribunal before whom the charge comes for hearing. The time bar, like any other statutory limitation, makes the proceedings no longer maintainable, but it is not a restriction upon the power of a court to hear and determine them. It is not true that because an

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[15] See Ward Kelly *Summary Jurisdiction in South Australia* at [2.250].
[16] See Ward Kelly n 15 at [2.250]. See also: *Palos Verdes Estates Pty Ltd v Carbon* (1992) 6 WAR 223 at 227; *Harding v Auctioneers and Agents Committee* (1998) 2 Qd R 4; *R v Morrison* (2010) 206 A Crim R 477; *R v Ratcliff, Stanfield and Utting* (2007) 250 LSJS 226; [2007] SASC 297; *R v A* [2003] QCA 445.
[17] See [7] of the defendant's written submissions dated 10 December 2012.
[18] The likely rationale for the time limitation period is that environmental offences, by their very nature, may not be immediately apparent and may not be reported immediately – and indeed their commission may not become known until the completion of necessary investigations by a prosecution authority or other relevant authority.

> information is in fact laid out of time, the Court of Petty Sessions is powerless to deal with it. Whether or not an information was laid too late is a question committed to their decision; it is not a matter of jurisdiction.[19]

22. The current state of the law as to the allocation of the burden of proof appears to be as follows:

    1. The burden of proving that an offence occurred within a fixed period of limitation is on the informant or complainant, but only where the defence raises the issue by evidence: see *Rabczynski v Morrison* [1988] WAR 71 at 73-74 per Pidgeon J; *Lewis* [1979] 1 WLR 970 at 973.

    2. The onus of proof is on the defendant where the period of liability is not fixed: see *Morgan v Babcock and Wilcox Ltd* (1929) 43 CLR 163 at 174-5 per Knox CJ, Dixon J.

23. In *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 393 Dixon J said that a Magistrates Court must decide a contention that its criminal process was time barred before it proceeds to merits of the charge.

24. Ward and Kelly *Summary Justice SA* at [2.270], referring to s 52 of the *Summary Procedure Act* 1921 SA[20] states:

> Section 52 of the *Summary Procedure Act* 1921 is procedural. It does not go to the jurisdiction of the court; it simply provides a defendant with a good defence to a charge that is out of time: *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545; *R v Danier; Ex parte Tange* (1984) 14 A Crim R 327. Nevertheless, although commencement of the prosecution in time is not to be considered as if it were an element of the offence, there is authority for the proposition that the complainant must prove that the charge was laid within the period specified if the question is raised: *Rabczynski v Morrison* [1988] WAR 71.

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[19] See *Parisienne Basket Shoes Pty Ltd v Whyte* (1937) 59 CLR 369 at 389 per Dixon J. See also *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 553 per Latham CJ and at 559 per Starke J.

[20] Section 52 provides that proceedings for the prosecution of summary offences must be commenced within a fixed period of time. In the case of an expiable offence, if an expiable notice was given to the accused person, proceedings must be commenced within 6 months of expiry of the expiation period specified in the notice. If no expiation notice were given, then the proceedings must be commenced within six months of the date on which the offence is alleged to have been committed. In the case of an offence that is not expiable, the proceedings must be commenced within 2 years of the date on which the offence is alleged to have been committed.

> A judge sitting with a jury may put a "time limits" defence to the jury in a case where it had not been raised: indeed, even if the defence had been disclaimed: *R v Cooling* [1990] 1 QD R 376…Similarly, a magistrates court should instruct itself on the defence if it becomes necessary during the course of proceedings. The significance of the words in s 52 – "the proceedings must be commenced" – is that a late prosecution is "required to fail": compare *R v Pople* [1924] SASR 448 at 459, which was disapproved of by Toohey, Gaudron and McHugh JJ (Deane and Dawson JJ dissenting) in *Sraswati v The Queen* (1991) 172 CLR 1….

25. In *R v Cooling* [1989] 44 A Crim R 171 at 172 Thomas J stated:

> Commencement of the prosecution within the prescribed time limit is not an element of the offence, and there is no requirement that the indictment show compliance with such requirement on the face of the indictment. R F Carter's work, *Criminal Law of Queensland* contains a perplexing statement, the first part of which may seem in conflict with the second. The indictment must show the commission of an offence within six months before prosecution, but need not state the date of the commencement of the prosecution: *Jack* (1984) 6 QLJ 60. (Carter, notes to s 212, p 4097). Of course an indictment could not show the commission of an offence within six months before prosecution unless it specified both dates, but the first part of the sentence should not be read as implying that an indictment must show anything on its face as to the commencement date of the prosecution. It is not and should not be the practice that special averments of compliance be part of such an indictment. The quoted passage must be taken as meaning that if information is placed before the court concerning the date of commencement of the prosecution then it will be necessary that the indictment show the date of the offence to have been within six months before that date.
>
> In a practical sense such a point is not likely to arise unless the accused or the Crown raises the matter for consideration. Once such a point is raised it is the duty of the court to give effect to it….

26. In my opinion the decision in *R v Cooling* equally applies to the present case where the commencement date of the time limit for the prosecution is expressed somewhat differently. As a matter of principle, the differently worded time limit is of no moment. There is no requirement that the complaint show compliance with the prescribed time limit on the face of the complaint.

27. The following considerations compel that conclusion:

1. Commencement of the prosecution within the prescribed time limit is not an element of the offence – nor a particular of the offence. Therefore, compliance with the time limit is not required to be stated in the complaint.

2. Whether or not the complaint, in the present case, was laid within the prescribed time limit – that is within 12 months after the day on which the Chief Executive Officer first became aware of the commission of the alleged offence - is a matter to be raised by the defence or the prosecution, or by the Court (constituted by either a judge or magistrate), when the circumstances render that necessary, on the basis of information or evidence placed before the Court concerning the date of the commencement of the prosecution relative to the prescribed time limit.

3. As observed earlier, once the time limit has been raised the allocation of the burden of proving that the complaint was laid within the prescribed time limit shifts depending upon the nature of the limitation period: the onus falls upon either the prosecution or the defence.

4. The absence of any special averment provisions facilitating proof of compliance with the prescribed time limit serves to show that whether or not a prosecution is out of time is matter that is to be considered outside the four corners of the originating process – for example a complaint – and a matter to be dealt squarely on the information or evidence before the Court. Compliance with a prescribed time limit is not a matter of form – but a matter for evidence.

5. Once compliance with the prescribed time limit has been raised, the Court has a duty to determine whether the complaint was laid within the prescribed time limit – and if it was not so laid, then the prosecution, being a late prosecution, is not maintainable and must fail. However, the prosecution is not required to fail because the complaint is defective or invalid – it is because a proper and valid complaint has been laid out of time.

28. For the foregoing reasons I decline to dismiss the complaint at this stage of the proceedings.

THE SECOND ISSUE: IS THE COMPLAINT DUPLICITOUS AND MUST THE PROSECUTION ELECT

29. The second issue raised by the defendant is that the complaint offends the rule against duplicity.

30. The defendant contends that, by reason of the rule against duplicity, the complainant should be directed to elect between the two alternatives currently pleaded in paragraphs 11(a) and 11(b) of the complaint, which particularise the defendant's conduct that is said to be constitute the relevant conduct for the purposes of s 27(3) of the *Mining Management Act*.

31. The current charge reads:

> Between 30 November 2008 and 19 May 2011, at the McArthur River Mine Site, located approximately 45 km south-west of the township of Borroloola, in the Gulf Region of the Northern Territory of Australia (NT), did an act, or alternatively failed to do an act, which was in breach of an obligation imposed by Part 3, Division 1 of the *Mining Management Act*, and in so doing, caused serious environmental harm, contrary to section 27(3) of the *Mining Management Act*.

32. Paragraph 11 of the complaint reads as follows:

> The defendant's act or failure to act consisted of:
>
> (a) a failure to establish any written procedure which required the steps identified in paragraph 10 above to have been taken in respect of the branch pipeline at the time of the disconnection work or subsequently; or
>
> (b) alternatively, if there was such a written procedure, a failure to comply with that procedure and ensure that the steps identified in paragraph 10 above were taken in respect of the branch pipeline at the time of its disconnection or subsequently.

33. Paragraph 10 of the complaint reads:

> From the time the branch pipeline was disconnected in or about December 2008 until May 2011:
>
> (a) the branch pipeline was not blanked off (permanently capped or blocked) at the point of disconnection;

(b) the valve was not locked or otherwise isolated, nor was the valve handle removed or permanently disabled, such as to prevent the opening of the valve.

34. By way of introducing its argument, the defendant identified the following elements of the alleged offence, which are required to be proved by the prosecution:

1. the defendant did an act or failed to do an act;
2. which was in breach of an imposed obligation upon it;
3. and by acting or failing to act caused;
4. serious environmental harm on a mining site;
5. knowing or in circumstances where it would reasonably be expected to know that its act or failure to act;
6. would or might cause serious environmental harm or material environmental harm.[21]

35. The defendant says that some of these elements have been particularised in the complaint:

> The "act or failure to act" has been particularised to be either:
>
> (a) a failure to establish any written procedure which required
>
> (i) the branch pipeline to be blanked off (permanently capped or blocked) at the point of disconnection; and
>
> (ii) the valve to be locked or otherwise isolated or the valve handle removed or permanently disabled such as to prevent the opening of the valve when the pipeline was disconnected; **or**
>
> (b) alternatively, if there was such a written procedure, a failure to comply with that procedure and ensure that the steps identified above were taken in respect of the branch pipeline at the time of its disconnection or subsequently (emphasis added).[22]

[21] See [24] of the defendant's written submissions dated 10 December 2012.
[22] See [25] of the submissions.

36. The defendant relied upon a letter of request for further and better particulars dated 4 October 2012.[23] The request was in the following terms:

> **"The act or failure to act"**
>
> This is currently particularised in paragraph 11 of the complaint and presently leaves open a number of possibilities as to the conduct said to constitute the offence, namely:-
>
> (i) may have occurred any time prior to 30 November 2008 (when the branch pipeline was disconnected) by failing to have in place any written procedure (as particularised in 11.1 of the complaint), or
>
> (ii) may have occurred on 30 November 2008, at the time the branch pipeline was disconnected by failing to comply with any procedure in place, or
>
> (iii) may have occurred any time after 30 November 2008 and prior to 19 May 2011.[24]

37. The prosecution responded to that request in the following terms:

> Paragraph 11 of the complaint is not duplicitous. It alleges that the defendant's breach of an obligation imposed by Division 1, Part 3 of the Act (being the element in s 27(3)(a)) consisted of alternative conduct, namely either the failure to have a specified written procedure (paragraph 11(a)), or the failure to comply with such procedure (paragraph 11(b)).
>
> In either alternative, the defendant's breach of an obligation imposed by Division 1 occurred over the entirety of the period of time from 30 November 2008 to 19 May 2011.
>
> It is open to the Crown to allege that an element of a single offence was committed by alternative acts or omissions of the defendant, and it is a matter for the trier of fact to determine whether the element is proved in one or more of the alternative ways put by the Crown. Doing so does not charge the defendant with having committed two or more distinct offences. Given that the alternative acts or omissions alleged are mutually exclusive (there was a procedure or there was no procedure), nor can it be said the one set of alleged facts amounts to multiple offences.

[23] See [26] of the submissions.
[24] See [26] of the submissions.

> In the absence of duplicity in the charge, the complainant declines to make an election between the two alternatives.[25]

38. The defendant contends that the current complaint is patently duplicitous in that it contains one count, but two separate and distinct offences are alleged:[26]

> The defendant has purportedly been charged with one alleged offence under s27(3) of the MMA. In fact and law it has been charged with two separate and distinct offences. The proper construction of s 27(3) of the MMA is that it defines as a criminal offence each of two different types of conduct, namely, the doing of an act or the failure to do an act.
>
> The concept of imposing criminal liability by reason of an act of commission is distinct from imposing such liability because of an act of omission. The presence of the disjunctive word "or" is indicative of the patent duplicity. If a prosecution is commenced under a section which creates two offences, the charge must articulate one, but not both of them. The principle is well established.
>
> Bray CJ in *Romeyko v Samuels* identified the issue in these 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 possesses one or several characteristics.[27]

39. In support of the argument that the complaint as laid offends the rule against duplicity the defendant relies upon a number of other authorities: *Johnson v Miller* (1937) 59 CLR 467; *Mallon v Allon* [1964] 1 QB 385; *Benedetto v Huffa* [1967] SASR 448; *Ware v Fox* [1967] 1 WLR 379; *Ianella v French* (1967-68) 119 CLR 84; *the Queen v Warren*[1971] SASR 316; *Feiler v Steel* (1972) 2 SASR 263; *Miller v Quinn* [1977] 2 NSWLR 198; *R v Thompson* (1979) 22 SASR 12; *R v Trotter*(1982) 7 A Crim R 8; *John L*

[25] See [26] of the submissions.
[26] See [27] – [29] of the submissions.
[27] (1972) SASR 529, 552. The Queensland Court of Appeal has recently observed this statement "is commonly cited as representing a correct approach": *Cohen v Macefield Pty Ltd* [2010] QCA 95, [24], citing in support *R v Manwaring* [1983] 2 NSWLR 82; *B vR* [2008] NSWCCA 85; *R v Castles* (2007) 17 VR 329.

Proprietary Ltd v AG for NSW (1987) 163 CLR 508; *R v Traino*(1987) 45 SASR 472; *Amos v* DPP[1988] RTR 198; *R v Lapthorne* (1989) 40 ACrim R 142; *Stanton v Abernathy (No2)* (1990) 19 NSWLR 656; *Hoessinger v The Queen* (1992) (1992) 107 FLR 99; *Sandby v The Queen* (1993) 117 FLR 218; *Police v Durbridge* (1993) 61 SASR 22; Walsh *v Tattarsall* (1996) 188 CLR 77; *Carcosa Pty Ltd v Czerwaniw* (1997) 93 A Crim R 287; *S v The Queen* (1998) 168 CLR 266; *Stratis v Police* [1998} SASC 6886; *R v Khouzame* (1999) 108 A Crim R 170; *R v GNN* (200) 78 SASR 293;*Bentley v BGP Properties Pty Ltd* [2005] 139 LGERA 449; *Tyson v The Queen*(2005) 16 NTLR 161; *Haskett v Police* (2005) SASC 174; *AM v The Queen*(2006) 164 A Crim R 558; *R v Poulier* (2007) 19 NTLR 91 *Rixon v Thompson* (2009) 195 A Crim R 110; *Wakool SC v Garrison Cattle Feeders*(2010) 177 LGERA 282; *Kirk v Industrial Court* (2010) 239 CLR 231.

40. The defendant's assertion that the complaint is duplicitous is based on what it says is the proper construction of s 27(3) of the *Mining Management Act*:

> This subsection proscribes the doing of an act or the failure to do an act. The word "act" is defined in s 4 of the MMA as "includes omission". The Macquarie Dictionary defines "act" as "anything done or performed; a doing, deed". "Omission" is not defined in the legislation. The Macquarie Dictionary defines "omit" as to leave out, to forbear or fail to do, make, use, send etc". "Omission" is defined by the Macquarie Dictionary as "the act of omitting". When the statutory definition of "act" is read with s 27(3) of the MMA, the initial proscription in that subsection is that "a person must not do an act or must not omit to do an act, that is fail to do an act". The latter proscription in s 27(3) of the MMA only proscribes the failure or the omission to do something. On one reading of the subsection this second proposition may appear superfluous. However, those words must mean something in this statute.
>
> The defendant is currently charged with doing "an act". This is a concept that includes "an omission to do the act or failing to do the act". The second limb of this disjunctive phrase is incorporated, by statutory definition, within the first half of the disjunctive phrase. The elements comprising the offence articulated in the first half of the disjunctive phrase are different to the elements of the offence described by the second

half of the disjunctive phrase. Section 27(3) of the MMA describes two distinct offences.[28]

41. The defendant seeks to rely upon the importance of particularising the relevant event – as well as the relevant act or failure to act - for the purpose of the alleged offence:[29]

> As presently drawn, the complaint relies upon an event that:
>
> (a) may have occurred at any time prior to 30 November 2008[30] (when the branch pipeline was disconnected) by failing to have in place any written procedure (as particularised in 11.1 of the complaint); or
>
> (b) may have occurred on 30 November 2008 at the time the branch pipeline was disconnected by failing to comply with any procedure in place; or
>
> (c) may have occurred any time after 30 November 2008 and prior to 19 May 2011.
>
> Within the complaint are alleged three possible events, each of which could be the relevant event for the purpose of the alleged offence. Particularising which event is relied upon by the prosecution is essential because such event must be:
>
> (a) assessed to determine if it is in breach of a relevant obligation [s 27(3)(a)];
>
> (b) assessed to determine if it causes serious environmental harm on a mining site [s27(3)(b)]; and
>
> (c) accompanied by the relevant mental state ("knowing or in circumstances where it would reasonably be expected to know") that it will or might cause a particular harm.
>
> The case alleged against the defendant appears to be an allegation that on 30 November 2008 a person disconnected the branch pipeline, and left it in such a state that on or about 19 May 2011 something happened to the branch pipeline which caused the valve to open and diesel to discharge. It may be said by the prosecution that the offence is complete when the diesel begins to discharge onto the ground and allegedly commences to harm the environment.

[28] See [56]-[57] of the defendant's written submissions dated 10 December 2012.
[29] See [58] – [63] of the submissions.
[30] The defendant says that although this is the opening date of the complaint, the alleged failure to establish a written procedure must be referring to a period of time before 30 November 2008 when such failure is alleged to have occurred.

The definition of "environmental harm" means, inter alia, "any potential harm (including the risk of harm and future harm) to or potential adverse effect on the environment". The introductory words in the definition of "serious environmental harm", having regard to the definition of "environmental harm" can be read as meaning:

> Environmental harm that is more serious than material environmental harm and includes any potential harm (including the risk of harm and future harm) to or potential adverse effect on the environment that satisfies sub paragraph (a) or (b) or (c) or (d).

However, the act or failure to act which must cause serious environmental harm, in order to be an act or failure to act that can constitute a s 27(3) of the MMA offence does not have to be an act or failure to act that produces an actual harm or adverse effect. It is sufficient if such act or failure to act produces a potential harm or potential adverse effect on the environment. Thus, on the prosecution case, the alleged s 27(3) of the MMA offence is capable of being complete on 30 November 2008.

If the behaviour of the person who disconnected the branch pipeline on 30 November 2008 possesses the quality of being "in breach of an obligation imposed by Division 1" upon the defendant, s 27(3)(a) of the MMA will be satisfied. It is the quality of the act or the failure to act which must be assessed. Particularising the act or failure to act is essential to undertake the assessment required by s 27(3) of the MMA, namely:

(a) Is it in breach of an obligation?

(b) Does it cause the requisite harm?

(c) Is it accompanied by the requisite state of mind?

42. After referring to recent emphasis placed on the importance of identifying the relevant act or omission constituting an alleged offence by the High Court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 557[26], the defendant submitted that the current charge amounted to a "rolled up charge":

> The effect of the current charge is that the defendant is defending a "rolled up charge". It is a fundamental principle of criminal law that a count may only charge one offence. The prosecution should be put to an election as what it alleges is the defendant's "act or failure to act". Once duplicity is found, there is no question of any discretion. The Victorian Court of Appeal has noted: "The rule against duplicity is a rule of law, and does not involve the exercise of a discretion". This requires an election between the conduct pleaded in paragraph 11(a) and (b) of the

complaint. As noted above, it presently pleads three possibilities, each at quite a different time from the others. At the moment, the complaint is patently duplicitous. The defendant is entitled to know the case it must meet because:

(a) If the impugned conduct of the defendant is that alleged in paragraph 11 (a) of the complaint, namely a failure to establish a written procedure, the alleged offence will have occurred either before the branch pipeline was disconnected (and had been occurring since the alleged omission had occurred within the documentation) or at the time "the branch pipeline was disconnected"; or

(b) If the impugned conduct of the defendant is that alleged in paragraph 11(b) of the complaint, namely a failure to comply with the procedure, the alleged offence will have occurred either at the time of disconnection, or "subsequently" to the disconnection.[31]

43. In concluding its submissions, the defendant submitted:

- In the present case there is both patent and latent duplicity. The charge is patently duplicitous because it alleges the defendant did an act or alternatively failed to do an act. The provision of further particulars by the prosecution has revealed the latent duplicity;[32]

- The present complaint breaches the rule against duplicity. The conduct said to constitute the alleged offence is expressed in alternatives that are so temporally distant that they cannot be treated as the one count. The alternative conduct of the defendant cannot be said to have "occurred within a few minutes of time and in close proximity (such that they could) be regarded as components of the one activity (and hence) susceptible to treatment as a single count. The current complaint does not allege a continuing offence and accordingly does not fall within that narrow qualification to the rules prohibiting duplicity;[33]

- If the complaint remains as currently pleaded, the prosecution will be able to call evidence said to disclose the commission of at least two offences during the period of 30 months alleged in the complaint.[34]

[31] See [65] of the defendant's written submissions dated 10 December 2012.
[32] See [66] of the submissions.
[33] See [68] of the submissions.
[34] See [70] of the submissions.

44. In summation, the defendant submitted that s 27 of the Act creates two separate and distinct offences, and the complaint is duplicitous because it charges two offences.[35]

45. The complainant's response to the defendant's submissions is simply that the complaint is not duplicitous.

46. The complainant points out that disjunctive language in a charge does not necessarily render the complaint bad for duplicity.[36] The complainant says that "whether it does so depends upon whether the statute creates separate and distinct offences, or a single offence which may possess one or more forbidden characteristics".[37] This is a matter of statutory construction.[38]

47. The complainant says that "a critical matter is whether the elements of the offending conduct proscribed by the statutory provision are different".[39] The complainant submitted that in the various authorities cited and relied upon by the defendant as examples of patent duplicity "the elements of the various alternatives were patently different".[40]

48. Embarking upon an analysis of s 27(3) of the *Mining Management Act*, the complainant made the following submission:[41]

> Section 27(3) of the MMA provides that a person must not do an act or fail to do an act that has three prescribed characteristics. Whether the person does an act or fails to do an act, the elements of the offending are the same, namely the matters set out in sub paragraphs (a), (b) and (c). It is immaterial for conduct having the specified characteristics whether what is done is a positive action or an omission, and no distinction is drawn in s27 or elsewhere between acts and omissions.[42] The section cannot have thereby created separate and distinct offences. There is only the one offence, which can be committed either by doing a positive act or by failing to act.

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[35] See [39] of the submissions.
[36] See [12] of the complainant's written submissions dated 21 December 2012.
[37] See [12] of the submissions.
[38] See [12] of the submissions.
[39] See [13] of the submissions.
[40] See [13] of the submissions.
[41] See [14] – [15] of the submissions.
[42] Cf *Miller v Quinn* [1977] 2 NSWLR 198 at 203 per Street CJ.

> Consequently, the charge, which pleads that a single offence was committed (breach of s 27(3)) by either doing a positive act or alternatively by failing to act, does not charge two separate offences in the one count, and is not duplicitous.[43]
>
> If, as the defendant contends, the term "act" in the phrase in s27(3) "must not do an act or fail to do an act" includes "omission" such that "must not do an act" means "must not do an act or omit to do an act",[44] then the charge that the defendant "did and act, or alternatively failed to do an act" is no more duplicitous than would be a charge that the defendant "did an act", which would include "or omitted to do an act". The complaint is not defective on the basis of the word "act" in s 4 of the MMA.

49. The complainant went on to make detailed submissions with a view to demonstrating that there was no duplicity in the particulars of the charge.[45]

50. As is self evident, the parties' submissions are diametrically opposed on the issue of duplicity.

51. The rule against duplicity is a rule that a charge (whether on information or complaint) must only allege one offence. The rationale of the rule is to avoid confusion and unfairness by ensuring that the accused knows the charge that has to be answered.[46]

52. The rule against duplicity was explained by Lord Goddard in *Bastin v Davies* [1950] 2 KB 579 at 581:

> Duplicity consists in charging two or more separate offences in one information or count conjunctively; uncertainty arises when two or more offences are so charged in the alternative or disjunctively, for obviously such a procedure leaves it quite uncertain with which of those offences the defendant is charged, and the conviction, which must follow the

[43] By way of footnote the complainant says:
" To the extent that Williams J held to the contrary in *Mansbridge v Nichols* [2004] VSC 530 at [60] his decision is distinguishable as it involved a differently worded statutory provision, and should not be followed by this Court".
[44] By way of footnote the complainant says:
" The definition of the terms in s4 are subject to a contrary intention, and insertion of the word "omission" in the phrase 'must not do an act' in s27(3) would render the words "or fail to do an act" otiose and meaningless (since the latter would become 'or fail to do an act or omission'). Consequently the definition of "act" does not operate in the manner contended by the defendant".
[45] See [17] – [24] of the complainant's written submissions dated 21 December 2012.
[46] See Bishop *Criminal Procedure* 2nd edition p 281.

> information, would also leave it in doubt of which offence the defendant had been found guilty.[47]

53. As pointed out by the defendant, in its submissions, duplicity may be patent or latent.[48] Patent duplicity is apparent on the face of the charging document- that is the wording of the charge reveals that more than one offence has been alleged.[49] Latent duplicity –sometimes described as uncertainty- is revealed as further particulars are provided or the evidence unfolds.[50]

54. Although the rule against duplicity and related concepts is simple to state, it is sometimes difficult to apply.[51] The starting point is how is duplicity to be determined? The answer is perhaps best summed up as follows:

> Duplicity is not necessarily established by the use of conjunctive or disjunctive words in a charge. In each case it is necessary to construe the statutory provision creating the offence in light of its subject matter and language to divine the legislative intention…
>
> A similar approach is taken to charges that are expressed disjunctively. The word "or" separating alternatives in a statutory provision creating an offence does not of itself indicate an intention to create two offences; the intention may be to create only one offence and to provide one or more instances of that offence. Bray CJ observed in *Romeyko v Samuels* that where a section contains a series of alternatives separated in each case by the word "or" the critical question is whether the intention of the legislation is to render illegal two or more acts, in which case two or more offences are created, or to render illegal one act if it possesses one or more prohibited characteristics, in which case there is only offence, whether the subject act possesses one or several of these characteristics. [52]

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[47] This analysis is taken up by Bishop n 46, p 281 where the author says:
"A statement of an offence may be defective in two ways: it may be stated conjunctively, in which case it may be bad for duplicity; or it may be stated disjunctively, in which case it may be bad for uncertainty. This distinction is not always drawn, and charges that are defective because they are expressed disjunctively are often described as bad for duplicity, the point being that more than one offence is charged in the statement of the offence: see *Iannella v French* (1968) 119 CLR 84 at 91.

[48] See [18] of the defendant's written submissions dated 10 December 2012.

[49] See [18] of the submissions.

[50] See [18] of the submissions. In those circumstances, although the count only charges one offence, the provision of the further particulars or the evidence reveals that a number of alternative transactions or acts are alleged as the foundation of the charge: see *Johnson v Miller* (1937) 59 CLR 467, 489 per Dixon J.

[51] See *Walsh v Tattersall* (1996) 188 CLR 77 at 84.

[52] See Bishop n 46 pp 282 and 283.

55. The proper construction of the offence creating provision determines whether there is duplicity.

56. Section 27(3) of the *Mining Management Act*, which creates the offence with which the defendant has been charged, provides that a person must not to an act or fail to do an act that:

> (a) is in breach of an obligation imposed by Division 1;
>
> (b) causes serious environmental harm on a mining site; and
>
> (c) the person knows, or ought reasonably be expected to know, will or might cause serious environmental harm or material environmental harm.

57. The presence of the word "or" in the phrase "a person must not do an act or fail to do an act" does not of itself evince an intention to create two offences. However, in my opinion, when regard is had to the subject matter of s 27(3) and the language used in the section, the clear legislative intent is to create two separate and distinct offences: one by the doing of an act and the other by a failure to do an act.

58. The proscribed conduct, which is the foundation of the offence, consists of two different types of conduct - the commission of an act and the failure to do an act. The difference between these two forms of conduct is one that the criminal law has traditionally recognised. Traditionally, the criminal law has been reluctant to impose criminal sanctions for omissions – that is failures to do an act. Furthermore, a failure to do an act is the antithesis of an act. Conversely an act is the antithesis of a failure to do an act.

59. It is immediately apparent that there are a number of elements to a s 27(3) offence. The prosecution must prove:

> 1. the defendant did an act or failed to do an act;
>
> 2. which was in breach of an obligation imposed upon it;
>
> 3. and by acting or failing to act caused;

4. serious environmental harm on a mining site;

5. knowing or in circumstances where it would reasonably be expected to know that its act or failure to act;

6. would or might cause serious environmental harm or material environmental harm.[53]

60. Notwithstanding the complainant's submissions, I would not regard offence elements 2 - 6 above as being forbidden characteristics of the proscribed conduct (either in terms of doing an act or failing to do an act) in the sense articulated in *Romeyko v Samuels*. Rather, the elements in question are separate and discrete elements of the offence in that they relate to the creation of a state of affairs (breach of an obligation), a casual relationship between the proscribed conduct and the proscribed harm and the existence of an accompanying culpable mental state.

61. The present case is very different to the situation in *Romeyko v Samuels*. Section 27(3) of the *Mining Management Act* does not create only one offence and provide one or more instances of that offence. The section does not render illegal one act if it possesses one or more prohibited characteristics – in which case it would only create one offence. Section 27(3) does not seek to proscribe conduct solely in terms of positive activity – namely the doing of an act. The section establishes an act/omission[54] dichotomy, which automatically removes it from the *Romeyko v Samuels* approach to resolving issues of duplicity.

62. The decision of the NSW Court of Appeal in *Bentley v BGP Properties Pty Ltd* [2005] 139 LGERA 449 is instructive in that it supports the construction of s27(3) as a provision that creates two distinct and separate offences –

[53] See the defendant's written submissions dated 10 December 2012.
[54] Omission in the sense of a failure to do an act.

one that relates to the commission of an act while the other concerns the failure to do an act.[55]

63. In that case a prosecution was brought pursuant to s 118D(1) of the *National Parks and Wildlife Act* 1974 (NSW) which relevantly provided:

> A person must not by an act or an omission do anything that causes damage to any habitat….

64. In permitting an amendment to the charge as laid the learned trial judge reasoned as follows:

> It is the resultant damage by the offender which creates the offence, as distinct from the conduct which causes the damage. It follows that if more than one activity resulted in damage, it is unnecessary that separate charges be formulated for each different activity.

65. On appeal, the defendants submitted that the words in the offence creating provision – "by an act or an omission" – meant that "the particular act or omission which caused the damage to the habitat was made an ingredient of the offence so that (for example) causing damage to the habitat by slashing vegetation was a separate offence from causing damage to the habitat by constructing access tracks". Although the prosecution accepted that the act or omission was an ingredient of the offence, it submitted that "the rule against duplicity had to be applied in a practical manner, and that where the culmination of separate acts caused damage to the habitat the acts could be particularised as set out in the amended summons". That submission was rejected.

66. Giles JA held that if the prosecution's "case was that the damage to the habitat was caused by some act or omission or alternatively another act or omission, the separate acts or omissions would mean separate offences"[56]

[55] This decision is referred to in the defendant's written submissions at [45]-[49].
[56] [2005] 139 LGERA 449 at 454. Buddin J agreed with Giles JA.

67. The decision in *Mansbridge v Nichols* [2004] VSC 530 lends even greater support to the construction of s 27(3) as a provision that creates two different offences.

68. In that case the defendant was charged with an offence contrary to s 9(1) (c) of the *Prevention of Cruelty to Animals Act*. The defendant was charged with knowingly or negligently doing or omitting to do an act which duplicated the words of the offence creating provision. Williams J considered that the charge should have specified what offence the defendant had committed, whether by her act or by a failure to act. His Honour went on to say:

> On its face, the charge might arguably be defective as patently duplicitous by referring to two offences: by the commission of an act or by omission with the proscribed characteristics. It might also be open to challenge as lacking sufficient particulars to identify the crime alleged against Mrs Mansbridge.

69. It is noted that the new equivalent of the s 27(3) offence – s 26A of the new Act – is worded very differently. Amongst other things, the physical element of the offence is expressed in terms of "engaging in conduct". Conduct is a generic concept which in its ordinary sense embraces an act, or omission (failure) to act or a state of affairs. It is arguable that, by describing the physical element in terms of engaging in conduct, the legislature intended only one offence to be created by s 26A, thereby overcoming arguments about duplicity arising out of charges laid in respect of the now repealed s27(3).

70. A question that arises is what effect, if any, does the definition of "act" in s 4 of the *Mining Management Act* have on the proper construction of s 27(3).

71. The definition of "act" as including an "omission" is perplexing. Both the prosecution and the defence have attempted to divine the purpose and effect of the definition; however, their analyses have failed to yield a satisfactory explanation of the definition.

72. "Omission" is not defined in the Act. Therefore, the word "omission" is to be accorded its ordinary meaning. According to the Macquarie Dictionary, the noun "omission" means 1. the act of omitting 2. the state of omitting 3. something omitted. The meaning of "omission" is amplified by the meaning of the verb "omit": 1. to leave out 2. to forbear or fail to do, make, use, send.

73. If "omission" were to be accorded the meaning of "failing to do an act", then it becomes immediately apparent that the second limb of s 27(3) – which proscribes a failure to do an act – is otiose: the first limb, proscribing the doing of an act, would encompass the second limb. Moreover, applying the definition of "act" to the second limb of the section would result in a nonsense – namely the section would proscribe a failure to do an act or omission.[57] The only way this nonsense could be avoided would be to read the word "act" in the second half of the disjunctive phrase as not including "omission" by reason of the "unless the contrary intention" proviso in s 4 of the Act. However, such an approach would not save the second half of the disjunctive phrase from being superfluous.

74. In the final analysis, it must be seriously doubted that the intention of the legislative was to equate an omission with a failure to do an act. Confronted with the inherent difficulties posed by the definition, I have come to the conclusion that the word "omission", as appears in the definition of "act", must mean something other than a failure to do an act.

75. However, as pointed out on behalf of the defendant, the word "omission" must mean something: the legislature must have intended the definition to do some work within the statutory framework.

76. Although the word "omission" usually connotes a failure to do an act, the word has other meanings in a legal context. For example, an "omission" can

[57] This is the point made by the complainant in its submissions.

consist of a failure to comply with a statutory or legal obligation or duty[58] or comprise a failure to achieve or maintain a state of affairs (which does not depend upon a failure to perform a single identifiable act). Perhaps the legislature had these alternate meanings of "omission" in mind when choosing to define "act" as including an "omission"; although it is not easy to see how these concepts might operate, in practical terms, in relation to the offence creating provision.

77. In my opinion, whatever is meant by "omission", the presence of that word in the definition of "act" does not detract from the fact that s 27(3) creates two separate and distinct offences – one by the commission of an act and the other by a failure to do an act.

78. As drawn, the complaint encompasses more than one offence. It is not clear whether an act or a failure to do an act is the subject of the charge laid against the defendant. The complaint is duplicitous because it fails to specify what offence has been committed, whether by an act or a failure to do an act: *Mansbridge v Nichols*. Consequently, the court should require the complainant to elect on which offence the complainant wishes to proceed.

79. The complaint as laid suffers from a further defect. Having charged an act as constituting the offence under s 27(3) of the Act, there are no relevant particulars of the alleged act. The only particulars provided are those relating to the alternative offence – namely that of failing to do an act. Therefore insofar as the complaint alleges the doing of an act the complaint is open to challenge as lacking sufficient particulars of the offence charged.

80. If the prosecution elects to rely upon a failure to do an act as constituting the alleged offence I see no difficulty in – nor procedural impediment to - the prosecution relying upon the alternative particulars of that failure to do

[58] See for example Schloenhardt *Queensland Criminal Law* at [4.2.1.2:
"In the Code jurisdictions and under common law, persons can only be held responsible for an omission to act if the law imposes special duties on them to act and establishes liability for failure to observe these duties. Without a special duty to act, there can be no liability for an omission:.

an act as currently provided in paragraphs 11(a) and (b) of the complaint. It does not offend the rule against duplicity to provide alternative particulars of a single offence, such as failing to do an act.[59] Relevantly, the offence creating provision neither proscribes the commission of specific acts nor the failure to do specific acts. On that footing, the particulars which have been provided squarely – and fairly - put the defendant on notice of a charge (based solely on a failure to do an act) that it needs to answer, leaving it for the trier of fact to decide on the evidence which (if any) of the alternative hypothesis put forward by the prosecution have been proved beyond reasonable doubt to establish the guilt of the defendant in relation to the s 27(3) offence.

THE THIRD ISSUE: PARTICULARISATION OF THE PART 3 DIVISION 1 OBLIGATION

81. The defendant alleges that the complaint is bad in law for latent duplicity because it particularises the defendant's obligation under Part 3 Division 1 of the *Mining Management Act* by reference to s 16(2) (c), (d) and (e). As pointed out by the defendant,[60] paragraph 2 of the complaint states:

> As operator for a mining site, the defendant is and was at all material times obliged by section 16(2)(c), (d) and (e) of the *Mining Management Act* to:
>
> 1. establish, implement and maintain an appropriate environment protection management system for the site;[61]
>
> 2. provide adequate resources for the implementation and maintenance of the management system;[62] and
>
> 3. ensure, by regular assessment, that the management system operates effectively.[63]

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[59] See for example *R v Serratore* (1999) 48 NSWLR 101; [1999] NSWCCA 377 (NSW Ct of Cr App) where the Crown case was put on an alternative basis.
[60] See [71] of the defendant's written submissions dated 10 December 2012.
[61] Section 16(2) (c).
[62] Section 16(2) (d).
[63] Section 16(2)(e).

82. The defendant made the following submission:[64]

> The complaint alleges the defendant "did an act or alternatively failed to do an act, which was in breach of an obligation imposed by Part 3 Division 1". A breach of an obligation imposed by Division 1 does not of itself constitute an offence,[65] it is the doing of an act, or, alternatively, the failure to do an act, that constitutes the offence. The defendant is entitled to know which obligation it is said to have breached by its act or failure to act. As currently pleaded in paragraph 2 of the complaint, the allegation against the defendant is that it could have:
>
> 1. breached its obligation to establish, implement and maintain an appropriate environment protection management system for the site; or
>
> 2. breached its obligation to provide adequate resources for the implementation and maintenance of that system; or
>
> 3. breached its obligation to undertake regular assessment to ensure that system operated effectively.

83. By way of letter dated 4 October 2012, the solicitors for the defendant had sought further and better particulars, requesting the prosecution to particularise which of the three statutory obligations pleaded in paragraph 2 of the complaint is the obligation relied upon for the purposes of s 27(3)(a) of the Act.[66]

84. The prosecution responded by letter dated 17 October 2012 in the following terms:

> The element in s 27(3)(a) is a breach of an obligation imposed by Division1. Section 16(2) particularises the manner in which the obligation contained in s16(1) is to be fulfilled. It is neither duplicitous nor prejudicial or embarrassing to the defendant for the complaint to similarly particularise (although with more particularity) the obligation imposed by Division 1 which the defendant's act or failure to act is alleged to have been in breach of.
>
> Furthermore, whichever of the obligations in s16(2) referred to in paragraph 2 of the complaint has been breached will depend on which of the alternatives in paragraph 11 the trier of fact accepts as proved. For the

[64] See [72] of the defendant's written submissions dated 10 December 2012.
[65] Section 21(1) of the *Mining Management Act*.
[66] See [73] of the defendant's written submissions dated 10 December 2012.

reasons set out above, there is no duplicity in those alternatives, and so, none in paragraph 2.

The complainant declines to make an election between the particulars in paragraph 2.

85. The defendant made the following submissions as to the proper construction of s 16 and the latent duplicity of paragraph 2 of the complaint:[67]

> The prosecution response asserts that s16(1) of the MMA imposes only one obligation upon an operator and that s16(2) particularises the various ways in which that one obligation can be breached. This is not the correct construction of s 16.
>
> The word "obligation" does not appear in s 16 of the MMA. The heading to s 16 is "Obligations of operator" (emphasis added). The duty cast by s16(1) upon an operator is to limit the environmental impact of mining activities at three discrete times during the life of the mining site to what is necessary. As a matter of fact, what is necessary when establishing a mining site will be different to what is necessary when operating a mining site and will be different to what is necessary when closing a mining site.
>
> Section 16(2) of the MMA imposes five specific duties upon the operator. Each specific duty is different. Section 27(3)(a) refers to a "breach of an obligation imposed by Division 1" not the obligation imposed by Division 1. If s 16 imposes only one obligation (as asserted by the prosecution), s27(3) would not be in its current form. Rather, the offence would be described as "a person must not do an act or fail to do an act that is in breach of the obligation imposed upon that person by Division 1".
>
> In order to be an environmental offence under s 27(3) of the MMA, the impugned conduct, that is the act or the failure to do an act, must possess two essential qualities. The first is that it must be in breach of an environmental obligation imposed upon the defendant. The second is that it must cause serious environmental harm on a mining site.
>
> A determination as to whether the fist quality is satisfied requires the act or failure to act to be assessed against the content of a particular obligation. A charge may allege an offence by reference to a "state of affairs"[68] but this is not such a case. It is the doing of a specific act or the failure to do a specific act which has the potential to be an offence under s 27(3) of the MMA. A breach of an obligation does not of itself constitute an offence.[69] What must be established by the prosecution is that the act or the failure to act had a particular quality, namely, that such an act or failure to act was a breach of an environmental obligation.

[67] See [74] – [78] of the submissions.
[68] *Diemould Tooling Sevices Pty Ltd v Oaten* (2008) 101 SASR 339.
[69] Section 21(1).

86. In support of its submissions – and the legal principle upon which those submissions are based - the defendant relied upon the following authorities: *Byrne v Baker* [1964] VR 443; *Chugg v Pacific Dunlop Limited* [1988] VR 411; *Boral Gas (NSW) v McGill* (1995) 37 NSWLR 150; *R v Australian Char Pty Ltd* (1995) 79 A Crim R 427; *Meiklejohn v Central Norseman Gold Corporation Limited* (1998) 100 A Crim R 527; *EPA v Truegain Pty Ltd* (2012) 196 LGERA 412.[70]

87. The defendant concluded its submissions thus:[71]

> The prosecution should be put to an election as to the obligation it alleges the defendant has breached. Each of the sub-paragraphs in s 16(2) of the MMA impose a specific obligation directed to achieving a particular outcome on a given mining site. The three specific obligations particularised in paragraph 2 of the complaint are separate and discrete. A failure to comply with the obligation in sub-paragraph (2) (c) would be sufficient to constitute a breach of an obligation imposed by Division 1 of the Part 3 of the Act. Similarly, a failure to comply with the obligation in sub –paragraph (2)(d) or (e) would also constitute a breach of an obligation imposed by the Division.[72]
>
> The prosecution's refusal to make an election between the particulars in paragraph 2 of the complaint is analogous to the response of the prosecution in *Wakool Shire Council v Garrison Cattle Feeders Pty Ltd*.[73] The relevant section proscribed that "the person who is the owner or occupier of any land and who uses the land, or causes or permits the land to be used, as a waste facility without lawful authority is guilty of an offence". Sheahan J of the Land and Environment Court of NSW held that this section created three separate offences. The defendant was initially charged with an allegation that it "did use the land or cause or permit use of the land for the purpose of a waste facility.. "Before the trial the prosecution applied to amend the charge so as to allege "did use the land or cause or permit the use of the land" (proposed additional words emphasised). Sheahan J allowed the amendment and ordered the prosecution to elect from among the three formulations available in the section creating the offences and that if more than one such formulation was chosen by the prosecution, each separate formulation was to be charged as a separate offence:

[70] See [79] – [93] of the defendant's written submissions dated 10 December 2012.
[71] See [94] – [96] of the submissions.
[72] Section 21(1) provides that a person who breaches an obligation by this Division may be found guilty of an offence under Division 3 but the breach does not of itself constitute an offence.
[73] (2010) 177 LGERA 282.

> The charge as framed, and the particulars provided… express the offence in the alternative, despite the assertion to the contrary [in the correspondence providing the particulars], and do not distinguish between the three "activities" charged as offences (namely using, causing, or permitting), even asserting [in the correspondence providing particulars] that they were/are" indistinguishable".[74]

The directions sought in orders 2 and 3 are both necessary in order to inform the defendant as to how it is alleged to have breached s 27(3) of the MMA. A direction in terms of order 2 will identify the relevant conduct of the defendant. A direction in terms of order 3 will identify the obligation allegedly breached by the said conduct.

88. The complainant's response to the defendant's argument is as follows:[75]

> Breach of an obligation under Division 1 is one of the elements of the s 27(3) offence: it is not itself an offence (s 21(1), MMA). Division 1 is headed "Environmental obligations" and sets out various obligations which apply to persons on a mining site (ss13, 14); owners of a mining site (s15); operators of a mining site (s16); workers (s17) and contractors (s18). Hence the words "an obligation" in s 27(3)(a), which apply to all of the obligations on the various classes of persons.
>
> For operators, there are two obligations: ensure the environmental impact of mining activities is limited to what is necessary for the establishment, operation and closure of the site (s16(1)); and display on the site, and make available on request, all written instructions of a mining officer relating to the site (s16(3)). The matters in s16(2) are expressly directed to the "purpose" of the obligation in s 16(1), and are therefore subsidiary requirements of the over-arching obligation in s 16(1).
>
> In any event, particular conduct which causes serious environmental harm within s 27(3) could be in breach of more than one of the requirements of s 16(2). The element of the offence is established if the charged conduct breaches any one or more of those requirements.
>
> This is not a case in which a number of separate acts or omissions are alleged, each of which could constitute a charged offence comprising a failure to observe a general duty or maintain a continuing state of affairs.[76] First, breach of the general obligation in s 16(1), or one of its requirements in s16(2), is not the offence, the offence is an act or failure to act which has that characteristic, and which causes serious environmental harm, with the requisite mental element. Secondly, the conduct which is said to be in breach is that particularised by paragraph 11 which culminated in the environmental harm consequent upon the leak.

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[74] *Wakool Shire Council v Garrison Cattle Feeders Pty Ltd* (2010) 177 LGERA 282, 294[55].
[75] See [26] –[30] of the complainant's written submissions dated 21 December 2012.
[76] Eg *Byrne v Baker* [1964] VR 443; *Chugg v Pacific Dunlop Ltd* [1988] VR 411; *R v Australian Char Pty Ltd* (1995) 79 A Crim R 427; *Boral Gas(NSW) Pty Ltd v McGill*(1995) 37 NSWLR 150; *R v Meiklejohn*(1998) 100 A Crim R 521; *EPA v Truegain Pty Ltd* (2012) 186 LGERA 412.

That conduct does not comprise multiple acts or omissions; it consists of a single act or omission, albeit in the alternative.[77] The lack of duplicity in that particularisation has been addressed above.

89. In my opinion, the complaint is bad in law for duplicity.

90. Although s 16(1) purports to impose a general obligation on the operator of a mining site, this general duty is elaborated upon in s16(2), which, in effect, lists a number of specific obligations relating to the general obligation.

91. As it is an element of an offence against s 27(3) that the proscribed conduct be in breach of an obligation imposed by Part 3 Division 1 of the Act the general obligation and specific obligations imposed by ss16(1) and (2) respectively are relevant elements of the offence.

92. Consistent with the need for the complaint to specify what offence the defendant had committed – whether by the commission of an act or by the failure to do an act – the defendant is entitled to know which obligation or obligations it is said to have breached by its alleged conduct. If the alleged conduct is the doing of an act, then the obligation or obligations said to have been breached by that conduct should be sufficiently particularised. Similarly, if the conduct is said to consist of failing to do an act, then the obligation or obligations said to have been breached by that conduct should be sufficiently particularised.

93. The complaint as currently formulated does not make it clear whether an act or failure to do an act is the subject of the charge laid against the defendant. The prosecution should be put to an election.

[77] See, for example, *Cohen v Macefiled Pty Ltd* [2010] QCA 95 at [28] per Holmes JJA (Chesterman JA and Daubney J agreeing), citing *Romeyko v Samuels* and concluding that a charge which did not specify whether the offence of damaging native vegetation was committed by destruction of the vegetation or interference with its natural growth was not latently duplicitous because either event would be a characteristic of a single offence of damaging.

94. The complaint is also open to challenge on the basis of uncertainty because it does not make it clear which of the specific statutory obligations were breached by the doing of an act as opposed to the failure to do an act.

95. Once an election is made by the prosecution as to the offence it proposes to allege – whether that comprises an act or a failure to do an act – the prosecution should specify which of the statutory obligations (by reference to ss16(1) and (2)) the defendant is said to have breached by the alleged conduct.

96. In the interests of clarity, I do not consider that s 27(3) creates more than two offences. Section 27(3) only creates two offences namely: the doing of an act that is in breach of an obligation imposed by Part 3 Division 1 and the failure to do an act that is in breach of such an obligation. It is immaterial whether the alleged breach comprises a breach of more than one of the specific obligations set out in s 16(2) of the Act. A breach of more than one of the statutory obligations specified in s16(2) does not give rise to separate and distinct offences. It does not offend the rule against duplicity for the prosecution – in a single count - to rely upon a breach of more than one of those specific obligations in order to prove the element contained in s 27(3)(a).

THE FOURTH ISSUE: PARTICULARISATION OF THE ELEMENT OF CAUSATION

97. The defendant contends it is entitled to further and better particulars on the issue of causation, namely:

    1. Does the prosecution rely on either 25(a) or (b) of the *Mining Management Act*?

    2. If so, which subsection?

3. If s 25(b), what are "the other factors"?[78]

98. By way of answer to the request for further and better particulars, the prosecution responded as follows by way of letter dated 17 October 2012:

> Section 25 is an interpretative provision informing as to the construction of the concept of causation of environmental harm under Division 3 Part 3. It is not a provision on which a complainant must necessarily rely, nor does it establish the only means by which causation may be proved. Its effect is to make clear that, in the case of s 25(a), an indirect cause or result will fulfil the element of causation, and, in the case of s 25(b), the presence of other factors which contribute to environmental harm will not deny causation.
>
> The complainant declines to provide further and better particulars as to s 25.

99. The defendant made the following submission as regards the prosecution's refusal to provide the further and better particulars:

> The request by the defendant for these further and better particulars is reasonable and appropriate. The defendant is entitled to know which of the alternate bases as to the proof of causation it must meet. The response from the prosecution leaves open the possibility that it will seek to establish criminal liability by asking the court to rely upon s25 of the MMA. The defendant is entitled to know if it must meet that possibility.[79]

100. In response the complainant made the following submissions:

> Section 25 defines the term "cause" and its derivatives when used in Part 3, division 3 of the MMA. It provides that environmental harm may be caused whether: (a) directly or indirectly; and (b) solely or in combination with other factors. It is not a question of reliance on s 25. Section 25 will apply and operate in respect of all prosecutions under Division 3 of the MMA, including those where the alleged conduct directly or solely caused the environmental harm. The complainant is no more required to particularise reliance on the definition of "cause" in s25 than on the definitions of "mining site" or "operator" or "environment" in s 4, which are obviously concepts relevant to prosecutions under, and to be read as part of, the provisions of the MMA.
>
> Further, whether and if so what "other factors" combined with the charged conduct to cause the harm is not a matter for particulars. The effect of

[78] The defendant's solicitors had requested these further and better particulars by way of letter dated 4 October 2012. See also [99] of the complainant's written submissions dated 10 December 2012.
[79] See [101] of the defendant's written submissions dated 10 December 2012.

> s25(b) is that if the evidence reveals that other factors combined with the charged conduct to cause the harm, causation is nonetheless proven. In other words, the existence of any such factors is irrelevant to the commission of the offence.[80]

101. The line of dispute between the prosecution and the defence is clearly drawn. The defence asserts that it is reasonable for it to be provided with particulars on the issue of causation, whereas the prosecution contends that the provision of such particulars goes beyond reasonable particulars.

102. The starting point is what, if any, statutory provisions govern the giving of particulars in relation to criminal proceedings.

103. Section 55 of the *Justices Act* provides that in any complaint and in any proceedings thereon the description of any offence in the words of the Special Act or other document creating the offence, or in similar words, shall be sufficient in law.

104. Section 22A of the Act provides as follows:

> 1. Any 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 any law of the Territory, shall contain a reference to the section of the law of the Territory 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.

105. In addition, s 181 of the *Justices Act* provides that it shall be sufficient in any information or complaint if the information or complaint gives the

[80] See [33] –[34] of the complainant's written submissions dated 21 December 2012.

defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged.[81]

106. The relevant authorities state that, where appropriate, "an informant or complainant should not merely state the offence in the language of the relevant legislation but should also add reasonable particulars".[82]

107. This requirement is set out in *Ex parte Ryan; Re Johnson* (1944) 44 SR(NSW) 12 (FC):[83]

> …it is quite clear that the accused is entitled to have sufficient particulars of what is charged against him to enable him to prepare his defence, and if these be not supplied by the information and are not otherwise communicated to him, the magistrate may and should direct him to be supplied with particulars, and grant any adjournment necessary to enable him to meet them. Hence, whether or not it be now legally necessary, it is at least proper for the prosecutor, when stating the offence in the course of laying an information, not merely to state it in the language of the statute but to add all such particulars of the circumstances as are reasonably necessary to enable the accused to know what he is being charged with.[84]

108. The following commentary on the provision of "reasonable particulars" appears in Bishop *Criminal Procedure* 2nd edition, p 287:

> No hard and fast rule can be laid down that stipulates the degree of particularity appropriate to any given information or complaint. In general terms it may be said that that there should be such particularity as is reasonable, having regard to the nature of the charge and the means by which the prosecution is entitled to discharge its burden of proof. [85] In appropriate cases the accused may be entitled to particulars of inter alia: the date and place of the offence, the specific acts constituting the offence; any knowledge of the accused alleged to be material… The accused may also be entitled to know the specific acts which give rise to the charge. If the offence can be committed in various ways, the accused may be entitled to particulars of the specific act or incident relied on…

[81] See also ss 54, 56 and 186.
[82] See Bishop n 46 p 286.
[83] See Bishop n 46, p 286.
[84] See also *Davies v Ryan* (1933) 50 CLR 379 at 386 per Evatt J.
[85] See *O'Sullivan v De Young* [1949] SASR 159 at 164. See also *Hayes v Quinn* (1992) 57 SASR 6; *Cook's Hotel Ltd v Pope* (1983) 34 SASR 292; *Willing v Hollobone* (1975) 11 SASR 118; *Farquahar v Laffin* (1975) 12 SASR 363; *Lafitte v Samuels* [1972] SASR 1 at 16-17.

109. When considering the degree of particularity required the starting point is the nature of the charge and the means by which the prosecution is entitled to discharge its onus or proof.

110. The nature of the charge and its various elements have already been referred to. An essential element of a s 27(3) offence is that the proscribed act or failure to do an act causes serious environmental harm on a mining site. The complaint as currently drafted makes it either patently or implicitly clear that the causing of such harm is an element of the offence with which the defendant has been charged, and that the prosecution must prove that element. The complaint also makes it abundantly clear that in preparing its defence that is an element that the defendant must meet.

111. The question that arises is whether any greater particularity is required to enable the defendant to properly prepare its defence.

112. Section 25 of the *Mining Management Act* provides as follows:

> For the purpose of this Division, environmental harm may be caused by an act or failure to act whether the harm:
>
> (a) is caused directly or indirectly by, or is a direct or indirect result of, the act or failure to act; or
>
> (b) is caused by, or is the result of, the act or failure to act solely or the act or failure to act combined with other factors.

113. Although s 25 purports to be merely an interpretative provision, it seems to go well beyond providing an aid in construing the offence created by s27(3) and similar offences within the Division. Section 25 appears not only to stipulate a legal test of causation – akin to the various, but differing tests of causation discussed by the High Court in *Royall v R* - but also appears to provide a blueprint of the means by which the prosecution is permitted to discharge its burden of proof in relation to the element of causation. In discharging its onus the prosecution may prove either:

(a) serious environmental harm was caused directly or indirectly, or was the direct or indirect result of, the proscribed act or failure to act; or

(b) serious environmental harm was caused by, or was a result of, the act or failure to act solely or the act or failure to act combined with other factors.

114. As previously determined, the prosecution must make an election as to the two offences created by s 27(3). Once that election is made the prosecution is, in my opinion, compelled to provide the further and better particulars as requested by the defence.

115. If the prosecution elect to allege the failure to do an act, then it must let the defence know whether it seeks to rely on either 25(a) or (b) of the *Mining Management Act*; and if so which subsection – and if s 25(b) is relied upon what "other factors" are.

116. If the prosecution elect to allege the commission of an act, then the prosecution must provide the same information or particulars.

THE FIFTH ISSUE: PARTICULARISATION OF NATURAL PERSON(S) AND THE REQUISITE MENTAL ELEMENT

117. The defendant asserts that it is entitled to further and better particulars of the "actor(s)" whose acts and states of mind are imputed to it and that the particulars provided by the complainant are inadequate and demonstrate latent duplicity in the complaint.[86]

118. To put the disputed issue in context, one needs to look at paragraph 6 of the complaint, which reads:

> At all material times the defendant knew, or ought reasonably be expected to know that:
>
> (a) a failure to establish any written procedure requiring that where pipes connected to sources or stores of hazardous substances such as hydrocarbons are discontinued from use,

[86] See [35] of the complainant's written submissions dated 21 December 2012. See also [102] – [112] of the defendant's written submissions dated 10 December 2012.

they are to be blanked off, locked out or otherwise isolated so as to prevent leakage of those substances; or

(b) alternatively, a failure to follow any such written procedure,

will or might cause serious environmental harm or material environmental harm within the meaning of the *Mining Management Act*.

119. By way of background, the solicitors for the defendant by way of letter dated 4 October 2012 (and a subsequent email sent 10 October 2012) sought the following further and better particulars:

"Knew or ought reasonably be expected to know"

The alleged mental state of the corporate defendant has been particularised in paragraph 6 of the complaint. Who is the natural person(s) whose act or failure to act is said to be the relevant act or failure to act of the defendant and

Who is the natural person(s) whose state of mind is said to be that of the defendant for the purposes of s27(3) (c) of the *Mining Management Act*?

120. The prosecution's response, which is contained in a letter dated 17 October 2012, is set out in full in the defendant's written submissions dated 10 December 2012 at [106]. In relation to the alternative allegations in paragraphs 11(a) and 11(b) the prosecution identified the natural person(s) who acted or failed to act in breach of s 27(3) (c) of the Act, as well as the natural person(s) whose state of state of mind is to be relied upon to establish, pursuant to s 73 of the Act, the state of mind of the defendant for the purposes of s 27(3) (c).

121. The defendant made the following submissions in support of its request for further and better particulars:

The "actors" in relation to a particular act will vary, depending upon which act is selected as the relevant act. Such an "actor will be the person(s) said to have engaged in particular conduct and will be said to have possessed a particular state of mind.

1. If the relevant conduct relied upon by the prosecution is the act of failing to establish any written procedure, it is likely the relevant

mental state will be that possessed by a person other than the person who is alleged to have undertaken work on the branch pipeline on 30 November 2008.

2. If the relevant conduct is the act of failing to follow any such written procedure, the state of mind of the person who is alleged to have undertaken work on the branch pipeline on 30 November 2008 will be relevant.

The defendant is a body corporate. It can only act or possess a state of mind through natural persons. The defendant is entitled to know whose acts or states of mind are imputed to it.[87]

122. The defendant submitted that latent duplicity is revealed in the particulars provided by the prosecution under cover of its letter dated 17 October 2012:

> The response by the prosecution assumes that the prosecution is permitted to maintain the current alternative allegations in paragraph 11 of the complaint. Submissions have already been put as to why that is not permissible. The response reveals latent duplicity in that different persons are identified in respect of the conduct alleged in paragraph 11(a) as opposed to paragraph 11(b) of the complaint. Further duplicity is exposed when one looks at the response in respect of subparagraphs 11(a) and 11(b) individually.
>
> The response in relation to paragraph 11(a) nominates 12 potential persons as being the natural person whose conduct is relied upon by the prosecution to prove its case. These 12 potential persons occupy 6 discrete positions within the defendant's organisation.
>
> Similarly, the response in relation to paragraph 11(b) identifies 13 possible persons in 7 separate and discrete positions within the organisation of the defendant.
>
> Section 27(3) (c) of the MMA requires the prosecution to prove a particular mental state on the part of the corporate defendant. It can only do this by reference to the mental state of a natural person. The response by the prosecution reveals that it proposes to to rely upon the state of mind of <u>one</u> (and only one) of the persons already particularised in the response concerning paragraphs 11(a) and (b). There are 9 specifically identified individuals who could be the relevant person for the purposes of s 27(3)(c) as well as an equal number of unnamed persons in a specified position who could also be the relevant person.
>
> This is a very clear example of latent duplicity being revealed upon the provision of particulars. Sometimes the latent duplicity is not apparent

[87] See [104] – [105] of the defendant's written submissions dated 10 December 2012.

until the evidence has been called but that is not the situation here. The corporate defendant is entitled to know whose conduct and mental state is to be relied upon by the prosecution to prove the charge.

The prosecution is attempting to do the very thing that it is not permitted by the rule against duplicity. It cannot keep open all of these options, as the prosecutor unsuccessfully sought to do in *Johnson V Miller.*[88] The prosecution must identify "the occurrence or transaction, the subject of the charge".[89] In doing so the prosecution will identify the actor(s) whose particular mental state will be relied upon by the prosecution to prove what it must prove under s 27(3) (c) of the MMA. Without such particulars, it will be impossible for the defendant to meet any case that it had any particular mental state, because of a particular person, at any given particular time.[90]

123. The complainant's argument in reply is set out in [37] – [39] of its written submissions:

> It is sufficient to establish the state of mind of a body corporate in relation to a particular act[91]to show that the act was done by a director, employee or agent of the body corporate within the scope of their actual or apparent authority and that they had the relevant state of mind (s 73(1), MMA). An act done on behalf of a body corporate by a director, employee or agent within the scope of their actual or apparent authority is taken to have been done also by the body corporate (s73(2), MMA).
>
> The persons identified by the complainant's particulars[92] are or were all employees or agents of the defendant occupying positions during the period in which the offending is alleged, which positions had actual or apparent authority in respect of the charged conduct. The complainant's case is that one or more of the General Manager and the Health, Safety and Environmental Manager, or the position holders identified,[93] was the actor or actors whose conduct is the subject of the complaint, and who had the actual or imputed state of mind in s27(3) (c) , which are attributed to the defendant by s73.
>
> That a corporation's charged conduct is comprised of the conduct of more than one of its employees or agents (at least where the conduct is consistent) does not render a complaint about that conduct duplicitous. [94]

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[88] (1937) 59 CLR 467.
[89] Ibid 490.
[90] See [107] – [112] of the defendant's written submissions dated 10 December 2012.
[91] Which would include an omission: s4.
[92] Set out in the defendant's written submissions at [106].
[93] Cf defendant's written submissions at [110].
[94] See, for example, *Director-General Dept of Land and Water Conservation v Greentree* [2003] 140 A Crim R 25 in relation to a charge against a body corporate of clearing native vegetation through the actions of six employees or independent contractors. It was held at [34] – [36] per Sheller JA, Levine J and Smart AJ that the particularisation of their alternative status did not give rise to a bad complaint.

> In particular, it is obvious that a corporation might fail to act through one or more of its employees or agents having relevant authority to act.
>
> Of the employees or agents particularised, only two of the positions that have been included in the particulars for paragraph 11(a) are not included in the particulars for paragraph 11(b), and vice versa. The differences between the particularised employees as between paragraph 11(a) and 11(b) are insignificant. They do not support the assertion of duplicity.

124. I agree with the submission made by the complainant that a corporation might fail to act through one or more of its employees or agents having relevant authority to act, and that a corporation's charged conduct is comprised of the conduct of more than one of its employees or agents does not render a complaint concerning that conduct duplicitous.

125. However, as previously determined the complaint is duplicitous in that it alleges more than one offence. The prosecution must elect as to which of the two offences it wishes to proceed with.

126. As previously stated, in the event that the prosecution elects to rely upon an offence entailing a failure to do an act – as opposed to the doing of an act – the prosecution is entitled to rely upon the alternative allegations in paragraphs 11(a) and 11(b). To do so does not give rise to a patent duplicity. It is only if the prosecution seek to continue to rely upon both the doing of an act, or in the alternative a failure to do an act -along with the alternative allegations in paragraphs 11(a) and 11(b) - that the complaint offends the rule against duplicity.

127. In my opinion, the particulars provided by the prosecution as to the natural person(s) and the requisite mental state are only objectionable (on the basis of latent duplicity) if the prosecution continue to allege the doing of an act or in the alternative a failure to do an act. If the complaint were to be confined to an allegation of a failure to do an act (based on the alternative allegations in paragraphs 11(a) and 11(b)) then, in my opinion, the particulars provided by the prosecution as to the natural person(s) whose state of mind is to be relied upon to establish the requisite state of mind of

the defendant would be acceptable. In other words, no latent duplicity would arise from particulars of the type provided by the prosecution if they were confined to identifying the natural person(s) who failed to do an act in breach of s 27(3) [95] and whose state of mind is to be relied upon to establish the state of mind of the defendant for the purposes of that section. On that basis the particulars are more than adequate to enable the defendant to meet any case that it had any particular mental state, because of a particular person, at any given particular time.

128. However, should the prosecution elect to rely upon the doing of an act, then the prosecution may have to reconsider the particulars which have been previously provided. Any such revised particulars would, of course, have to be reasonable particulars, free of any latent duplicity.

RULINGS ON THE FIVE PRE-TRIAL ISSUES

1. Valid Commencement of the Proceedings

129. At this stage of the proceedings I do not propose to dismiss the complaint on the basis that the proceedings were not commenced within 12 months after the date on which the Chief Executive Officer first became aware of the commission of the alleged offence

2. Duplicity of the Complaint

130. The complainant is directed to elect between the two alternatives currently pleaded in the complaint – namely between the doing of an act and failing to do an act.

131. In the event the prosecution elects to rely upon the failure to do an act, there is no basis for the Court directing the complainant to elect between the two alternatives currently pleaded in paragraphs 11(a) and 11(b) of the complaint.

[95] Rather than the natural person(s) who acted or failed to act in breach of s 27(3), which is the current particularisation.

132. In the event the prosecution elects to rely upon the commission of an act the defendant is entitled to reasonable particulars of the alleged act and particulars which do not give rise to latent duplicity.

3. Particularisation of the Part 3 Division 1 Obligation

133. Again the complainant is directed to elect between the two offences created by s 27(3) – namely the commission of an act and the failure to do an act.

134. Subject to that election, the complainant is directed to specify which of the statutory obligations it alleges that the defendant breached by its alleged conduct.

4. Particularisation of the Element of Causation

135. After making the relevant election, the complainant is directed to particularise whether the prosecution relies upon s25(a) or s 25(b) of the Act in attempting to prove s27(3)(b) of the Act; and if so, which sub-section? In the event the complainant relies upon s25(b), the prosecution is directed to particularise "the other factors".

5. Particularisation of Natural Person(s) and the Requisite Mental State

136. Again the prosecution is directed to elect between the two offences created by s 27(3) – namely the commission of an act and the failure to do an act.

137. The current particulars furnished by the prosecution do not offend the rule against latent duplicity provided the prosecution elects to proceed with an offence entailing the failure to do an act.

138. In the event the prosecution elect to proceed with an offence entailing the doing of an act it must furnish sufficient particulars of the natural person(s) and the requisite mental state in a manner that does not give rise to latent duplicity.

THE QUESTION OF COSTS

139. In the event that the defendant is successful in relation to any of the pre-trial issues, it seeks an order for costs.

140. The defendant did not make any submissions as to the power of the Court of Summary Jurisdiction to order costs in relation to pre-trial issues of the type ventilated in the current proceedings.

141. The complainant, on the other hand, made concise submissions in that regard.[96]

142. In my opinion, the Court has no power to award costs in circumstances where it rules on pre-trial issues of the type presently before the Court.[97] Although the Court has the power pursuant to s 65(3) of the *Justices Act* to adjourn proceedings upon such conditions as the Court sees fit – and arguably those conditions could include an order for costs against a defaulting party – the particular circumstances under which the Court has become seized of the pre –trial issues do not fall within the parameters of s 65(3).

143. The Court declines to make any order as to costs.

FURTHER CASE MANAGEMENT OF THE PROCEEDINGS

144. The effect of the Court's rulings in relation to the various pre-trial issues is that various interlocutory steps will need to be taken before the matter is ready to be heard and determined by the Court.

[96] See [40] and [41] of the complainant's written submissions dated 21 December 2012.
[97] See ss 77 and 77A of the *Justices Act*.

145. I propose to hear the parties in relation to the time table for these proceedings, including the fixing of a hearing date as soon as practicable.

Dated this 8 day of April 2013

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE