

AUSTRALIA / JUDGMENT

Richard Crookes Constructions Pty Ltd v SafeWork NSW

[2026] NSWIC 47**COURT**

Industrial Court

DECIDED

04 September 2026

BEFORE

Paingakulam J, Acting President

CASE / FILE NUMBER

2025/196233

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Source record**Industrial Court
New South Wales****Medium Neutral Citation:** Richard Crookes Constructions Pty Ltd v SafeWork NSW [2026] NSWIC 47**Hearing dates:** 2 July 2026**Date of orders:** 4 September 2026**Decision date:** 04 September 2026**Before:** Paingakulam J, Acting President**Decision:** (1) I dismiss the application.
(2) I list the matter for directions before the Registrar on 14 September 2026.**Catchwords:** CRIMINAL PROCEDURE — Application for permanent stay of Summons — Duplicity — Section 233 of the Work Health and Safety Act 2011 (NSW) — Whether there are one or two pleaded risks — Connection between two potential manifestations of the risk — Application dismissed**Legislation Cited:** Occupational Health and Safety Act 1983 (NSW) (repealed)
Work Health and Safety Act 2011 (NSW)

Cases Cited:	Hannes v Director of Public Prosecutions (Cth) (No. 2) [2006] NSWCCA 373 Inspector Mansell v Robert Josef [2003] NSWIRComm 339 Kiangatha Holdings Pty Ltd v Water NSW (2020) 247 LGERA 1; [2020] NSWCCA 263 Newcastle Wallsend Coal Company Pty Limited & Ors v Stephen Finlay McMartin [2006] NSWIRComm 339 R v Hamzy (1994) 74 A Crim R 341 Robert Darcy Coombs v Patrick Stevedores Holdings Pty Ltd [2002] NSWIRComm 21 Romeyko v Samuels (1972) 19 FLR 322; (1972) 2 SASR 529 SafeWork NSW v Saunders Civilbuild [2021] NSWDC 526 Unity Pty Ltd v SafeWork NSW [2018] NSWCCA 266 Walsh v Tattersall (1996) 188 CLR 77; [1996] HCA 26 Western Sydney Local Health District v SafeWork NSW [2024] NSWCCA 153 WorkCover Authority of NSW (Inspector Childs) v Kirk Group Holdings Pty Limited and Anor [2004] NSWIRComm 207 WorkCover Authority of NSW (Inspector Keelty) v Crown in Right of the State of NSW (Police Service of NSW) (No 2) [2001] NSWIRComm 90; (2001) 104 IR 268
Category:	Procedural rulings
Parties:	SafeWork NSW (Prosecutor) Richard Crookes Constructions Pty Ltd (Defendant)
Representation:	
Counsel:	M Moir (Prosecutor) C Magee (Defendant)
Solicitors:	Department of Customer Service (Prosecutor) Seyfarth Shaw Australia (Defendant)
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JUDGMENT

By an application filed on 18 December 2025, Richard Crookes Constructions Pty Ltd (RCC) seeks an order that proceedings filed by SafeWork NSW on 22 May 2025, in which RCC is alleged to have contravened s 32 of the Work Health and Safety Act 2011 (NSW) (WHS Act), be permanently stayed.

In the alternative, RCC seeks an order that proceedings on the Summons be stayed until SafeWork NSW elects and particularises in relation to the Summons a single offence contrary to s 32 of the WHS Act upon which it will proceed.

RCC contends that the Summons is duplicitous because it pleads two distinct risks arising from different factual circumstances as a single charge. SafeWork NSW contends that it charges two contraventions arising out of the same factual circumstances, as permitted by s 233 of the WHS Act, arising from exposure to a single risk. Accordingly, the issues to be determined are:

Does s 233 of the WHS Act permit charging as a single offence contraventions of s 32 of the WHS Act which allege the exposure of workers to more than one risk to their health and safety?

In the instant matter, does the charge as particularised allege exposure of workers to one risk or two?

In either case, do the particulars of the alleged contravention arise out of the same factual circumstances for the purposes of s 233 of the WHS Act?

For the following reasons, I find that s 233 of the WHS Act does not permit charging as a single offence contraventions of s 32 of the WHS Act which allege the exposure of workers to more than one risk to their health and safety. I also find that the offence as particularised concerns the exposure of workers to only one risk, and that the multiple contraventions alleged arise out of the same factual circumstances. I therefore dismiss the application.

Factual background

RCC was the principal contractor for a large construction project in Redfern, New South Wales (NSW) (the Site), involving the construction of a 19-storey building for student accommodation. Transform Formwork Contractors Pty Ltd (Transform) was engaged by RCC to undertake formwork at the Site. Transform engaged High Level Form Pty Ltd (High Level) to provide labour services. High Level employed Thuy Dang Chau Doan and Si Viet Doan as formwork carpenters and placed them both with Transform to undertake work at the Site.

On the date of the incident, RCC was in the process of conducting structural works to Level 11 of the building at the Site, as well as façade and internal fit-out works to lower levels. These works included the installation of the formwork deck on Level 11. The formwork system installed was a Faresin Alufort table system which was mainly used to support the load of a concrete casting slab for each level of the building under construction.

On 25 May 2023, a section of the formwork deck on Level 11 of the Site partially collapsed while Mr Chau Doan and Mr Viet Doan were undertaking work completing the installation of the Level 11 formwork deck. When SafeWork NSW inspectors attended the Site, they found that the formwork was missing edge protection and handrails and that there were uncovered and unguarded penetrations on the formwork deck.

The Summons

By a Summons filed in this Court on 22 May 2025, SafeWork NSW charged RCC with an offence contrary to s 32 the WHS Act for failing to comply with its duty under s 19(1) of the WHS Act.

Section 32 of the WHS Act provides:

32 Failure to comply with health and safety duty—Category 2

A person commits a Category 2 offence if:

- (a) the person has a health and safety duty, and
- (b) the person fails to comply with that duty, and
- (c) the failure exposes an individual to a risk of death or serious injury or illness.

The description of the offence charged, contained in the Summons, is as follows:

“On 25 May 2023 at 90 Regent Street, Redfern in New South Wales, Richard Crookes Constructions Pty. Limited (ACN 001 375 266) (the defendant), being a person conducting a business or undertaking who had a health and safety duty under section 19(1) of the Work Health and Safety Act 2011 (the Act) to ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking, failed to comply with that duty and the failure to comply with that duty exposed workers, in particular Thuy Dang Chau Doan, Si Viet Doan, Saverio Giallombardo, Brett Lynch and at least three other formworkers, to a risk of death or serious injury contrary to section 32 of the Act.”

The particularisation of the circumstances giving rise to RCC’s duty under s 19(1) of the WHS Act in Annexure A to the Summons includes paragraphs 20 and 21 in the following terms:

“20. On 25 May 2023, Thuy Dang Chau Doan and Si Viet Doan were at work in the defendant’s business or undertaking infilling the gaps around the pillars or columns on Level 11 of the building. The Alufort formwork partially collapsed, causing Thuy Dang Chau Doan to fall approximately 2.8 metres from Level 11 to the concrete slab of Level 10 below.

- 21. On 25 May 2023, Saverio Giallombardo, Brett Lynch and the other formworkers on Level 11 were at work in the defendant’s business or undertaking in that they were accessing and working on the incomplete formwork deck on Level 11 of the building at the site, prior to the collapse of the formwork resulting in the fall of Thuy Dang Chau Doan.”

Paragraph 23 of Annexure A to the Summons particularises the risk to workers as follows:

“The risk was the risk of workers, in particular Thuy Dang Chau Doan, Si Viet Doan, Saverio Giallombardo, Brett Lynch and the other formworkers on Level 11, suffering serious injury or death as a result of falling from one level to another of the building under construction at the site, including as a result of falling from and/or through the formwork deck on Level 11 of the building.”

Paragraph 24 of Annexure A to the Summons sets out particulars of RCC’s alleged failure to comply with the duty under s 19(1) of the WHS Act, in breach of s 32 of the WHS Act:

“a. monitoring and verifying that the defendant’s formwork contractor, Transform was complying with its safety obligations to:

- i. develop, implement and enforce a safe system of work for the installation of formwork on each level of the building under construction at the site, including Level 11, that:
 - 1. required Transform’s formworkers to install the following elements of a formwork deck from the level below the formwork deck being installed:

- (a) the Alufort formwork, including the Alufort aluminium panels, prop heads, brackets and bearers;
 - (b) the conventional formwork, including the conventional props, bearers and joists, with the exception of the conventional formwork panels or boards to be installed for purpose of infilling gaps in the deck being completed; and/or
2. prior to the installation of the conventional formwork panels or boards by the formworkers on each formwork deck being installed, required an inspection to be conducted by a nominated supervisor of Transform to check that the Alufort and conventional formwork described in sub-paragraphs 24. a. i. 1. (a) and (b) had been properly installed from the deck below and was stable and safe to access immediately prior to access (the pre-installation safety inspection); and/or
 3. directed formworkers not to make any amendments or alterations to the prop heads, brackets or bearers of the formwork underneath the area upon which the conventional formwork panels or boards were to be installed, unless prior approval was obtained from a nominated supervisor of Transform; and/or
 4. directed that formworkers were only to access the incomplete formwork deck for the purpose of infilling gaps in the deck with conventional formwork panels or boards after each of the steps set out above in sub-paragraphs 24(a) i. 1. 2. and 3. had been fully implemented, in particular the pre-installation safety inspection; and/or
 5. established and maintained an exclusion zone on any formwork deck that was not completed in order to prevent access to the incomplete deck by any workers, with the exception of the access to the deck by the formworkers in the limited circumstances set out in sub-paragraph 24(a) i. 4. above (the exclusion zone); and/or
 6. required the formworkers to infill any gaps or penetrations on an incomplete deck by installing conventional formwork panels or covers that were securely fixed to the deck to prevent dislodgment, and marked to indicate their purpose as a cover; and/or
 7. required the installation of handrails, guardrails or other perimeter edge protection before any workers (other than the formworkers in the limited circumstances set out in sub-paragraph 24(a) i. 4. above) were permitted to access the formwork deck on each level of the building, including Level 11; and/or
 8. directed that workers other than the formworkers were not to access the formwork deck being installed on each level of the building, including Level 11, until the deck had been finally inspected by a competent person (such as an engineer) and the competent person had provided a certificate to Transform and the defendant confirming that the deck was completed and measures such as penetration covers, and edge protection were in place, and the deck was thereby handed over (the final safety inspection, certification and handover process).

- b. prohibiting workers other than the formworkers from accessing and working on the formwork deck on Level 11 unless and until the final safety inspection, certification and handover process was completed for the deck on Level 11; and/or
- c. not permitting the defendant's site foreman, Brett Lynch to access and work on the formwork deck on Level 11 unless and until the final safety inspection, certification and handover process was completed for the deck on Level 11; and/or
- d. monitoring and verifying that Transform was complying with its safety obligations to:
 - i. implement and enforce Transform's safe work method statement for high risk construction work at the site dated 22 July 2022 (the SWMS) that:
 - 1. required an effective exclusion zone to be put in place on any formwork deck of the building that was not complete, with signage delineating the area that formworkers were permitted to install the formwork; and/or
 - 2. required compliant handrails to be put in place on the formwork deck being installed prior to workers accessing the formwork deck; and/or
 - 3. required all penetrations on the formwork deck to have compliant, fixed covers with "penetration below" signage prior to workers accessing the formwork deck; and/or
 - 4. required the formwork deck to be excluded from all trades and persons other than formworkers until the deck was inspected and a handover of the deck occurred; and/or
 - 5. required that a pre-loading inspection and certification of the deck was undertaken by a competent person prior to loading the deck with materials and equipment.
 - e. developing, implementing, and enforcing safe work procedures or a system of work for the installation of formwork at the site that included a formwork handover process that required a check of the formwork deck to be completed by a competent person to confirm that the area was safe for workers to access; and/or
 - f. providing workers undertaking or supervising formwork and/or formwork contractors at the site with adequate instructions, information, and training in:
 - i. the safe system of work and safe work procedures for formwork installation at the site; and/or
 - ii. verifying that the workers understood the requirements of the systems of work and procedures, including through regular toolbox talks at the site."

Evidence on the Application

The parties relied on a Statement of Agreed Facts (SOAF) for the purpose of the Stay Application only. The following documents were annexed to the SOAF:

Annexure A — Application to Commence Proceedings and Summons issued by the Court, filed on 22 May 2025.

Annexure B — RCC's Notice of Appearance, filed on 29 May 2025.

Annexure C — Prosecutor's Statement of Facts (SOF).

Annexure D — Index to the Prosecution Brief of Evidence.

Annexure E — RCC's Application for a Stay of Summons, filed on 18 December 2025.

Annexure F – Affidavit of Mary Patricia Kington, solicitor employed by Seyfarth Shaw Australia (Seyfarth), sworn 18 December. After setting out the background to the proceedings, its content was primarily in the nature of submissions. It annexed most of the above material as well as correspondence between Seyfarth and the Department of Customer Service, relevant to the duplicity question.

Annexure G — Affidavit of Solveig Hu, solicitor employed by the Department of Customer Service with carriage of the matter, affirmed on 2 March 2026. That affidavit annexed the Factual Inspection Report by SafeWork NSW Inspector Kenneth Samuel dated 2 August 2023; the SafeWork NSW Code of Practice, Managing the Risks of Falls at Workplaces, August 2019; the RCC Safety Standards #002 Formwork (Revision 3: August 2022); and a series of photographs of the Site taken on the date of the incident.

Submissions on the Application

RCC's submissions

RCC contended that the charge was duplicitous in that it pleaded two distinct risks: a risk of falling through the formwork deck (First Risk), and a risk of falling from the formwork deck (Second Risk). In support of that contention, RCC pointed to the particulars of the charge provided by the prosecutor. On 25 August 2025, RCC sent a request for further and better particulars to the prosecutor which included as follows:

“Paragraph [23] particularises the alleged risk to workers, as a result of falling from one level to another of the building under construction at the site. It then particularises two different circumstances in which the risk is said to result from, namely:

- (i) as a result of falling from...the formwork deck on Level 11 of the building; and/or
- (ii) as a result of falling through...the formwork deck on Level 11 of the building;

Please confirm which of the workers named in [23] it is alleged were exposed to the risk as a result of falling from the formwork deck and which as a result of falling through the formwork deck.

Please confirm which of the alleged reasonably practicable measures contained in Paragraph [24] it is asserted would have eliminated or minimised:

- (i) the risk of falling from the formwork deck;
- (ii) the risk of falling through the formwork deck.” (Emphasis in original).

The prosecutor’s response to that request included the following:

“We respond to your questions as follows:

1. Please confirm which of the workers named in [23] it is alleged were exposed to the risk as a result of falling from the formwork deck and which as a result of falling through the formwork deck.

The following workers were exposed to the risk of suffering serious injury or death as a result of falling from the formwork deck:

- Thuy Dang Chau Doan, Si Viet Doan, Saverio Giallombardo, Brett Lynch and the other formworkers on Level 11.

On that day, each of these workers understood work on the formwork deck of Level 11 which had large gaps, penetrations and voids for potential fall of each worker for the deck to the next level below of the building. These gaps, penetrations and voids were separate from the area where the incident occurred.

In this regard, we refer you to paragraphs 38, 39, 40, 41, 42, 54, 59 and 66 of the SOF.

The following workers were exposed to the risk of suffering serious injury or death as a result of falling through the formwork deck on Level 11 of the building on 25 May 2023:

- Thuy Dang Chau Doan, Si Viet Doan and Saverio Giallombardo.

On that day, Thuy Dang Chau Doan and Si Viet Doan undertook work on the formwork deck of Level 11 in the area where the incident occurred. This area of formwork collapsed and could collapse due to inadequate bracing and unsupported structure components. The supervisor, Saverio Giallombardo had previously walked over that section of the formwork on that day.

In this regard we further refer you to paragraphs 38, 39, 40, 41, 42, 44, 45, 54 59 and 68 of the SOF.

We response to your below question:

2. Please confirm which of the alleged reasonably practicable measures contained in Paragraph [24] it is asserted would have eliminated or minimised:
 - i. the risk of falling from the formwork deck

The following reasonably practicable measures contained in paragraph [24]:

- a. i. 1
- a. i. 4
- a. i. 5

a. i. 6

a. i. 7

a. i. 8

b.

c.

d. i. 1

d. i. 2

d. i. 3

d. i. 4

e.

f. i.

f. ii.

ii. the risk of falling through the formwork deck:

The following reasonably practicable measures contained in paragraph [24]:

a. i. 1

a. i. 2

a. i. 3

a. i. 4

a. i. 5

a. i. 8

b.

c.

d. i. 1

d. i. 4

d. i. 5

e.

f. i.

f. ii.” (Emphasis in original.)

RCC pointed to the fact that the prosecutor's response to the request for particulars did not deny that there were two risks involved. Rather, it reinforced RCC's position in that it advised RCC that, while some of the pleaded measures went to the elimination or mitigation of both risks, some went to only one or the other. RCC also pointed to the fact that not all of the workers exposed to the Second Risk were exposed to the First Risk and that parts of the Prosecutor's SOF served with the Prosecution Brief of Evidence related to only one or the other risk. To emphasise the point, RCC provided a table of the pleaded measures colour coded to represent which of the measures were directed at the risk of falling through the formwork, which measures were directed at the risk of falling from the formwork and which measures were relevant to both circumstances.

RCC submitted that the factual circumstances of this case did not fall within either exception to duplicity under common law. RCC further contended that the existence of two risks demonstrated that the two alleged contraventions of s 19(1) did not arise out of the same factual circumstances, as required by s 233 of the WHS Act. RCC's position was that, in the context of s 32 of the WHS Act, the ability to charge more than one contravention as a single offence referred to the ability to charge the failure to implement a series of measures directed at mitigating the same risk as a single offence. It was said that exposure to multiple risks necessarily required there to be contraventions arising out of different factual circumstances.

Prosecutor's submissions

The prosecutor contended that there was only one risk in issue — that of falling from Level 11 of the formwork deck. In that regard, the prosecutor pointed to the risk as pleaded at paragraph 23 of Annexure A to the Summons, which was the risk of workers on Level 11 suffering serious injury or death as a result of falling from one level to another of the building under construction at the Site. What followed, being a fall from or through the formwork were said to be examples of how the pleaded risk might manifest. The prosecutor relied on the fact that each of the measures pleaded related to that same risk of falling from Level 11 to another level of the building.

The prosecutor contended that s 233 of the WHS Act expressly provided for the charging of multiple contraventions of a single WHS duty where those contraventions arise from the same factual circumstances. In that regard, the prosecutor relied on *Walsh v Tattersall* (1996) 188 CLR 77; [1996] HCA 26 ("Walsh"), a case which dealt with determining whether activity over time could be charged as a single ongoing offence, to point to indicia that the Court should consider whether the circumstances of this case were capable of being charged as a single offence. Those indicia included the connection of the events at a point in time, the similarity of the acts, the physical proximity of the place where the events happened and the intention of the accused throughout the conduct. In the instant matter, the prosecutor's position was that, in each case, the relevant work was the installation and completion of the formwork deck on Level 11. The prosecutor also contended that, if the risk pleaded was considered to be the single risk of falling from one level to another of the building at the Site, the same workers were involved.

The prosecutor contended that it is plain from the form of the Summons that it relates to events which occurred on a single morning at the same place and a series of steps which RCC could have but did not take at that time and location. The prosecutor pointed to a series of photographs including a photograph which showed both the penetration through which the injured worker fell and the lack of adequate fall protection measures by way of guardrails, handrails and floor covers. The prosecutor reiterated that the risk pleaded was the risk of falling from one level of the building to another, and that the Summons identified that there was more than one way for the risk to manifest. This was said not to make the Summons duplicitous as the risk was the same. Relying on *Newcastle Wallsend Coal Company Pty Limited & Ors v Stephen Finlay McMartin* [2006] NSWIRComm 339 (“Newcastle Wallsend”) at [390], the prosecutor contended that the risk should not be interpreted like a constitutional provision.

The prosecutor further contended that there is no prejudice to RCC, now that it understands how the prosecutor puts its case. It can make forensic decisions about admitting to certain particulars or objecting to certain evidence accordingly. The prosecutor also contended that it is important to consider the prospective nature of the duty under s 19(1) of the WHS Act. In the subject matter, RCC was therefore required to consider how workers could safely work on the formwork deck, by reference to the risk of falling from one level to another. The prosecutor pointed to *Western Sydney Local Health District v SafeWork NSW* [2024] NSWCCA 153 at [5]-[6] as providing an example of where an offence charged comprised measures for addressing a single risk that was capable of manifesting in different ways. That case concerned the exposure of a specific female nurse at Blacktown Hospital to physical or psychological injury over a three day period due to the behaviour of a specified male patient.

Finally, the prosecutor contended that RCC’s characterisation of the circumstances as embodying two risks invited the Court to rewrite the pleaded risk and was erroneous. The prosecutor alleged that RCC’s recasting of the pleaded risk as two separate risks effectively omitted the words “as a result of falling from one level to another of the building at the site, including...”. The prosecutor submitted that it was this erroneous delineation of the First Risk and Second Risk, contrary to the form of the Summons itself, which underpinned RCC’s argument that the Summons was duplicitous.

Consideration

Duplicity

Duplicity arises where a single charge alleges more than one offence: *R v Hamzy* (1994) 74 A Crim R 341. The rule against duplicity is a fundamental principle of fairness, designed to ensure that an accused person knows what case they must meet, by preventing uncertainty or confusion about the charge: *Romeyko v Samuels* (1972) 19 FLR 322; (1972) 2 SASR 529. Similarly, Dawson and Toohey JJ explained in *Walsh* at [84] that:

“The rule has been described as one of elementary fairness, to enable the defendant to know what it is of which he has been charged or found guilty and say that he has the opportunity of making a no-case submission or a sensible plea in mitigation.” (Citation omitted.)

The principle was reaffirmed in *Kiangatha Holdings Pty Ltd v Water NSW* (2020) 247 LGERA 1; [2020] NSWCCA 263 (“Kiangatha”). At [34], Fagan J (with whom Hoeben CJ at CL and Rothman J agreed) stated:

“[T]he general rule of our legal system is still this: that a prosecutor may not ordinarily charge in one count of an indictment, information or complaint two or more separate offences provided by law”: Walsh v Tattersall (1996) 188 CLR 77; [1996] HCA 26 at p 107 (Kirby J).”

At [36], his Honour cited with approval the decision of Kirby J at p 112:

“This Court should adhere to its longstanding insistence that, save for statutory warrant and for the exceptional cases of continuing offences or facts so closely related that they amount to the one activity, separate offences should be the subject of separate charges.”

The prosecutor eschewed reliance on the common law and relied wholly on s 233 of the WHS Act. That section provides as follows:

233 Multiple contraventions of health and safety duty provision

- (1) 2 or more contraventions of a health and safety duty provision by a person that arise out of the same factual circumstances may be charged as a single offence or as separate offences.
- (2) This section does not authorise contraventions of 2 or more health and safety duty provisions to be charged as a single offence.
- (3) A single penalty only may be imposed in relation to 2 or more contraventions of a health and safety duty provision that are charged as a single offence.
- (4) In this section health and safety duty provision means a provision of Division 2, 3 or 4 of Part 2.

In *Hannes v Director of Public Prosecutions (Cth)* (No. 2) [2006] NSWCCA 373, Basten J said at [9]:

*“There are two steps in the process of identifying duplicity or uncertainty. The first is to consider the statutory description of the offence in order to identify what is the act or conduct prohibited. The second is to identify the act or conduct set out in the pleading as constituting the offence in the particular case. Where a particular act is prohibited if it has one of a number of qualities, it is likely that only one offence is committed in relation to each act, even if such act has more than one of the proscribed qualities. There are many cases which illustrate this proposition. One referred to in argument in the present case was *Montgomery v Stewart* (1967) 116 CLR 220, which involved the issue of a company prospectus containing a number of untrue or misleading statements. Each such statement would have been sufficient to give rise to the offence, the prohibited act being the issue of the prospectus. There was only one offence committed by issuing the prospectus, whether there were two or more untrue or misleading statements contained in it. Accordingly, an information alleging several such statements*

was not bad for duplicity.”

Does s 233 of the WHS Act permit multiple risks to be pleaded as part of a single offence?

Section 233, like its predecessor s 49A of the Occupational Health and Safety Act 1983 (NSW) (OH&S Act), should not be narrowly construed. It aims to promote efficient prosecutions under the WHS Act, by allowing prosecutors to charge multiple breaches of the same general duty as a single offence where the alleged breaches arise out of the same factual circumstances. It operates to avoid technical duplicity arguments, without offending the rule, namely fairness to an accused to know what case is against them.

However, what the authorities appear to make clear is that purpose of s 233 is to allow the prosecutor to charge the failure to comply with multiple measures directed at the same risk as a single offence. It was not intended to permit the prosecutor to particularise multiple risks as a single offence: *Robert Darcy Coombs v Patrick Stevedores Holdings Pty Ltd* [2002] NSWIRComm 215 (“Coombs”) at [52]-[54] per Haylen J; *Newcastle Wallsend* at [108]-[121] per Walton and Boland JJ.

In the context of a Category 2 offence under s 32 of the WHS Act (set out at [9] above), the provision therefore operates in respect of the element which is the failure to comply with a health and safety duty under s 32(b). It does not extend to the inclusion of multiple risks, pursuant to s 32(c) as part of a single charge. Where two alleged breaches are underpinned by the exposure of workers to different risks, they cannot be said to arise out of the same factual circumstances. Indeed, in *Coombs*, one of the matters upon which the defendant relied in contending that it had been exposed to double jeopardy (which argument ultimately failed) was that the risk to which the relevant worker had been exposed in each case was the same. Similarly, in *SafeWork NSW v Saunders Civilbuild* [2021] NSWDC 526, in finding that there was no duplicity, *Scotting DCJ* held that there was only one risk to which the workers were exposed.

Are there one or two risks?

Accordingly, in determining whether the charge is duplicitous, the first question to be determined is whether there are one or two pleaded risks. I accept that paragraph 23 of Annexure A to the Summons sets out one risk. That risk is the risk of falling from one level to another of the building. On a plain reading, what follows are examples of how that risk can manifest, namely by falling either from or through the formwork. Those possible manifestations relate to potential incidents rather than the risk which underpins them. It is well established that focusing on individual incidents is apt to lead to error due to a misunderstanding of the real facts on which a charge is based: *WorkCover Authority of NSW (Inspector Keelty) v Crown in Right of the State of NSW (Police Service of NSW)* (No 2) [2001] NSWIRComm 90; (2001) 104 IR 268 at 288-9; *WorkCover Authority of NSW (Inspector Childs) v Kirk Group Holdings Pty Limited and Anor* [2004] NSWIRComm 207 at [132]-[133], [161], [166]; *Unity Pty Ltd v SafeWork NSW* [2018] NSWCCA 266 at [55].

The difficulty arises from the manner in which the prosecutor has particularised its case in correspondence with RCC. As set out at [15]-[16] above, in response to RCC's request for particulars, the prosecutor accepted that two distinct risks affected different groups of workers and were addressed by different (although partially overlapping) measures. Further, the prosecutor advised RCC that not all of the facts stated in the Prosecutor's SOF applied to each of the examples of how the risk might manifest. In submitting to this Court that the Summons was not duplicitous in that the alleged contravention concerned only one risk, the prosecutor focused entirely on the Summons and did not grapple with the way in which it particularised its case in correspondence with RCC. The following exchange, which occurred after RCC's submission in reply, that the prosecutor had entirely disregarded the further and better particulars of its case is instructive:

"MOIR: That your Honour understand the prosecutor's submission in case I didn't make this clear before, that all of the pleaded measures, despite the colour coding in the tables, all of the pleaded measures in the charge relate to the broad risk..."

...

Because my friend has just sort of suggested to your Honour that it's the case that some of the measures relate to part of the broad risk but not all of the broad risk.

HER HONOUR: But that's what's in the prosecutor's particulars.

MOIR: In terms of the specific examples of the risk, yes. But in terms of all of - all of the alleged failings still relate to the risk and that's how it's pleaded in the summons.

HER HONOUR: So, how do I do causation then because I think Mr Magee makes a helpful point there.

...

MOIR: Well, you - it's by reference to the risk which is the risk of falling from one level to another and whether that is a substantial cause of the exposure to the risk of injury. So, whether the failings are a substantial cause of the exposure to that risk. It's still the same risk.

...

It comes back to the point it's the one risk.

...because my friend's inviting you to adopt a mindset of there are two risks.

...If you come back to the point that it is one risk as pleaded in the charge, a risk of falling from one level to another, those issues, in my submission, fall away. I just wanted to clarify that that's how the prosecutor puts its case; that all of the failings are relevant to that--

...

--broad risk."

RCC objected to that submission on the basis that it was inconsistent with the prosecutor's further and better particulars. Plainly, that correspondence does not align with the manner in which the prosecutor now puts its case. As submitted by RCC, the prosecutor could have responded to the defence request for further and better particulars by making clear that the examples of falling from and through the formwork were manifestations of a single risk to which workers were exposed, namely the risk of falling from one level to another, as pleaded in the Summons. They did not. Further, when RCC took objection to the prosecutor submitting at hearing that all of the measures related to the one broad risk contained in the Summons, counsel for the prosecutor maintained that "I'm not resiling from the correspondence in any way."

Nonetheless, the further and better particulars are further and better particulars of the offence particularised in the Summons. As noted at [32] above, that offence particularises only one risk. The circumstances of the instant matter, which address different ways that a single risk might manifest can be contrasted with charging two distinct risks, such as the exposure of a worker working on plant which is not isolated to a risk of serious injury or death because of (a) becoming entangled in unguarded plant or (b) electrocution. The exposure to two distinct risks, even though they both related to the circumstances of a worker working on plant which is not isolated would amount to separate offences which s 233 of the WHS Act would not permit to be charged as a single offence.

Do the manifestations of the risk arise from the same factual circumstances?

Even where it is accepted that the alleged offence pleads only one risk, s 233 of the WHS Act will only permit multiple contraventions to be charged as a single offence where they arise from "the same factual circumstances". Whether or not possible manifestations of a risk arise from the same factual circumstances for the purposes of s 233 of the WHS Act is a question that must be determined on the facts of each case.

In the instant matter, paragraphs 20 and 21 of Annexure A to the Summons outline two different factual scenarios by which the pleaded risk might have manifested. The first, which in fact occurred, is the collapse of the formwork under the weight of workers who set foot on it because of the instability of its structure. The second is that workers fall from a formwork deck which lacks edge protection and handrails and features uncovered penetrations. Both sets of circumstances concern the unsafe construction of the formwork deck being used at the Site on the morning of 25 May 2023.

Paragraphs 38–43 of the Prosecutor's SOF served with the Prosecution Brief of Evidence (Annexure MPK-2 to the affidavit of Ms Kington which is Annexure F to the SOAF) are as follows:

"38. On 25 May 2023, Mr Chau Doan and Mr Viet Doan accessed Level 11 upon the direction of Mr Giallombardo. They were tasked with infilling the gaps that remained in the existing Faresin Alufort formwork around a boom pump pillar/column."

39. Mr Chau Doan and Mr Viet Doan accessed Level 11 about two hours prior to the incident. They accessed Level 11 either by a ladder to the deck or the stair tower known as the 'stretcher stair'.
40. There were other formworkers present at the site on that day. The formworkers were supervised by Mr Giallombardo. Their work was being completed both from below, and on top of, the Level 11 deck.
41. Both Mr Giallombardo and Mr Lynch worked on the deck of Level 11 on the day of the incident while the deck was not completed. They were not on Level 11 when the incident occurred. Mr Lynch walked past Mr Chau Doan on the incomplete Level 11 deck shortly after Mr Chau Doan started to work on the deck.
42. At the time of the incident, there were at least three other formworkers working on the deck of Level 11, in addition to Mr Chau Doan and Mr Viet Doan. They too had been instructed by Mr Giallombardo to access Level 11 and install conventional formwork. Both Mr Giallombardo and Mr Lynch were aware of their presence and work activities on the deck during that day.
43. At approximately 11 am on the day of the incident, Mr Chau Doan and Mr Viet Doan were on Level 11 completing the installation of the formwork deck. Mr Chau Doan was carrying a plywood sheet measuring 300mm x 800mm to infill the deck adjacent to the boom pump pillar/column when he stepped onto the Alufort formwork. The Alufort formwork partially collapsed, and Mr Chau Doan fell 2.8 metres to the concrete slab of Level 10 below."

At hearing, the prosecutor's position was that the factual circumstances underpinning the charge were the same in terms of the factors referred to at [20] above and by reference to the pleaded risk in the broad sense that it is pleaded.

In asserting that the prosecutor had charged two matters arising from different factual circumstances, for the purposes of s 233 of the WHS Act, RCC pointed to paragraphs 54 and 55 of the prosecutor's written submissions before this Court as being an acknowledgement that both the risk pleaded and the reasonably practicable measures particularised did not arise from the same factual circumstances. Those paragraphs were as follows:

"54. In the present proceedings, the risk pleaded is not confined to the precise factual circumstances of the incident involving Mr Doan. The pleaded risk includes something akin to the incident involving Mr Doan (i.e. falling through the formwork deck on level 11), although fortunately he was not seriously injured. However, the pleaded risk also encompasses other factual circumstances (i.e. falling from the formwork deck on level 11).

55. Further to this, the particulars provided by the prosecutor show that the reasonably practicable measures that should have been taken by Richard Crookes are not confined to the factual circumstances of the incident involving Mr Doan. Rather, those measures arise out of the factual circumstances of the risk of falling from height that existed on the formwork deck of level 11 during the morning of 25 May 2023.” (Emphasis added.)

Read fairly, this submission means only that the risk pleaded focuses on the general class of risk rather than the specific risk which gave rise to the incident, and therefore the particularised measures do likewise. As noted above at [32], that the prosecutor would approach the matter from the perspective of the risk to which the workers were exposed rather than the incident which occurred is the correct approach.

Further, as submitted by the prosecutor, RCC’s obligation was to eliminate the exposure to a risk to the health and safety of its workers at the Site due to falling from one level of the building to the one below. SafeWork NSW came on Site in response to the incident in which the formwork deck collapsed under Mr Chau Doan because of the way that it was constructed. Having come onto the Site for that reason, SafeWork NSW inspectors found a lack of edge protection, handrails and penetration covers on the formwork deck from which Mr Chau Doan fell. Both the manner in which the formwork was constructed, and the incomplete nature of the formwork were matters which allegedly exposed workers to a risk to their health and safety, because of the potential for them to fall from Level 11 of the formwork deck on the morning in question. To require the prosecutor to charge those alleged deficiencies as separate offences is to take an unduly restrictive view of the factual circumstances to which the offences rely.

In making such a finding, I have given consideration to the inclusion in the Prosecutor’s SOF facts which go to only one or the other potential manifestation of the pleaded risk. However, viewed in its entirety, those facts demonstrate the significant degree of connection between the two potential manifestations of the risk.

Conclusion

The rule against duplicity is ultimately one of fairness to a defendant. This matter is yet to be listed for trial. The true nature of the prosecution case is now clear. There is no prejudice to RCC in the matter proceeding as presently particularised. RCC can make an informed decision about the extent to which it defends the case or objects to evidence. If RCC wishes to contest some but not all of the pleaded measures, it can do so at a disputed facts hearing.

Further, the contrary decision would endorse an approach which would expose a defendant to two penalties for allowing workers to work on an unsafe formwork deck at the same site, on the same morning, exposing them to the risk of falling from one level to another, because of the different ways in which that risk might manifest. In *Inspector Mansell v Robert Josef* [2003] NSWIRComm 339, in reference to s 15 of the OH&S Act, Curtis AJ held as follows at [67]-[69]:

“[67] The legislature has fixed a maximum penalty for each conviction of s15 or s16 of the Act. It is only through accidents of legal history, statutory language, and the judicial policy of imposing clarity in pleading, that the nature of the offence under s15 has been interpreted as referable to identifiable acts and omissions, rather than a general characterisation of conduct allowing an unsafe circumstance to exist (see Byrne v Baker; Chugg v Pacific Dunlop Ltd, [1988] VR 411; Boral v Magill).

[68] ...

[69] The relevant judicial policy has been driven by concern that defendants facing charges of contravening s15 are afforded procedural fairness by knowing precisely what is alleged against them (See Byrne v Baker at 452). The legal rules developed in consequence ought not be perverted by prosecutors, through technical subdivision of the offending conduct into as many separate offences as he or she may abstract from a general failure, unfairly multiplying the number of available convictions.”

For these reasons, I find that the prosecutor’s Summons is not duplicitous.

Orders

I make the following orders:

I dismiss the application.

I list the matter for directions before the Registrar on 14 September 2026.

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Decision last updated:

04 September 2026

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