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# Queensland Mining Industry Health & Safety Conference

## Safety and Health Legislation – Five Year Review – The Good, the Bad and the Ugly



### Overview

Safety in the Queensland mining industry is regulated by four key pieces of legislation

- » *Coal Mining Safety and Health Act 1999*
- » *Coal Mining Safety and Health Regulation 2001*
- » *Mining and Quarrying Safety and Health Act 1999*
- » *Mining and Quarrying Safety and Health Regulation 2001*

Today is an opportunity to discuss the positive, negative and controversial aspects of the safety legislation now that it has been in operation for just over five years. This presentation will consider what should be changed, what should not be changed and whether the objects of the legislation have been met or compromised by the manner in which they have been applied by the courts, regulators, operators and the unions.

This presentation will focus on practical and reasoned suggestions for change and consolidation.

### Have the objects of the Act been achieved?

In Queensland, workplace health and safety at coal mines is governed by the *Coal Mining Safety and Health Act 1999* ('the Act') and the *Coal Mining Safety and Health Regulations 2001* ('the Regulations').

The Act repealed the *Coal Mining Act 1925* (Qld). In development of the legislation, it was recognised that modern safety management focuses on creating a concept of on site ownership of safety and health issues, brought about by the introduction of duty of care principles. It was also a recommendation of the Moura Inquiry that duty of care principles be included in coal mining legislation. This concept formed the proposal for the *Coal Mining Safety and Health Bill 1999* ('the Bill')

As stated in the Explanatory Notes for the Bill, the major policy objective of the Bill was 'to encourage all persons involved in the coal mining industry to improve safety and health by providing industry with modern safety and health legislation'. The Bill was finalised after consultation with industry, unions, and other interested parties. The fundamental legislative principles contained in the Bill are

- » Requirement to answer questions
- » Requirement to produce documents
- » Sections of the Criminal Code do not apply
- » Entry without Warrant
- » Responsibility of executives of corporations
- » Creation of offences under regulations carrying penalties.

The Act was proclaimed on 29 October 1999.

## Objects of the Act

The objects of the Act are

- » To protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations
- » To require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level<sup>1</sup>.

The Act, in section 7, provides that the objects of this Act are to be achieved by

- » [Imposing safety and health obligations](#) on persons who operate coal mines or who may affect the safety or health of others at coal mines
- » [providing for safety and health management systems](#) at coal mines to manage risk effectively
- » [making regulations and recognised standards](#) for the coal mining industry to require and promote risk management and control
- » [establishing a safety and health advisory council](#) to allow the coal mining industry to participate in developing strategies for improving safety and health
- » [providing for safety and health representatives](#) to represent the safety and health interests of coal mine workers
- » [providing for inspectors and other officers](#) to monitor the effectiveness of risk management and control at coal mines, and to take appropriate action to ensure adequate risk management
- » [providing a way for the competencies](#) of persons at coal mines to be assessed and recognised
- » [requiring management structures](#) so that persons may competently supervise the safe operation of coal mines
- » [providing for an appropriate coal mines rescue capability](#)
- » providing for a satisfactory level of [preparedness for emergencies](#) at coal mines
- » [providing for the health assessment of coal mine workers.](#)

To achieve this, the Act places strict workplace health and safety obligations on any person who 'may affect safety and health at a coal mine or as a result of coal mining operations'.

There have been significant amendments to the Act since its commencement. On 8 November 2005 the *Natural Resources and other Legislation Amendment Bill 2005* (Qld) was introduced into the legislative assembly and subsequently became law on 6 February 2006.

These amendments apply to both the *Mining and Quarrying Safety and Health Act 1999* and the *Coal Mining Safety and Health Act 1999*. This Bill makes a number of amendments including enhancing the enforcement capabilities of the Inspectorate by enabling the Chief Executive to initiate a prosecution in relation to an alleged offence committed under the principal Act.

Significantly, the power of the chief inspector to institute a prosecution has been removed as has the capacity of the Minister or Attorney-General to authorise another party to commence a proceeding. In short, prosecutions may now only be brought by the Chief Executive.

### Have the objects of the Act been achieved over the last 5 years?

Most would agree that the objects of the Act would be achieved if

- » Safety is and has been regarded as paramount
- » Injury and risk to safety and health has been kept at a minimum
- » Entities or persons who are not willing to make efforts to make their place of work safe have been reprimanded
- » There has been effective collaboration between all stakeholders
- » An appropriate enforcement framework is in operation
- » The legislation and enforcement accurately reflect the considered views of all stakeholders

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<sup>1</sup> Section 6 of the Act

## What does the case law tell us?

The Supreme Court of Queensland considered the Act and the Regulations in a number of decisions since the enactment of the legislation.

### [Smyth v State of Queensland & Ors \[2005\] QSC 175](#)

#### Facts:

- » The employee was driving a triple road train hauling raw coal along Wollombi Road, Glenden, when it veered off the road and the lead trailer came to rest on top of the prime mover.
- » The accident site was about 6 km from the first mining lease site and 1 km from the second mining lease site.
- » The Chief Inspector considered that he lacked jurisdiction to investigate the accident because the accident happened on a public road.
- » The Union sought a declaration that the location of the accident occurred at a coal mine within the meaning of the Act and that the functions and powers of the inspector under the Act applied to the accident.
- » The Court was required to consider what constituted an on-site activity for the purposes of section 9(1)(b).

#### Decision:

- » In this case, there were two distinct coal mines. The Court held that the transportation of raw coal along Wollombi Road from one site to another was not an 'on-site activity'. It therefore followed that the accident was not a coal mine for the purposes of s9(1)(b) of the Act.
- » The orders sought by the union were not granted.

### [Edwards v North Goonyella Coal Mines Pty Ltd \[2005\] QSC 242](#)

#### Facts:

- » The employee had been employed as a coal miner by the company since September 1994, and he was not employed to carry out low risk tasks as defined by s44 of the Regulations.
- » The employee underwent his 5 year statutory health assessment in October 2004. The employee was found to require exercise stress tests and blood tests to determine control and stability of a medical condition prior to determination of fitness for current fitness.
- » When he turned up for his rostered shift on 21 October 2004, the mine manager told the employee that he could not commence work and he had to go home and make arrangements to undertake the tests listed in the health assessment report.
- » The employee, on the advice of his union, refused to undertake the further tests and did not attend at the mine site.

#### Held:

- » The Court examined whether the health assessment was carried out in the approved form, as required by the Regulations.
- » The Court found that the health assessment form used by the nominated medical adviser ("NMA") did not envisage that the NMA would have the right to require the worker to undertake further medical tests, apart from practical tests for abnormal colour vision or hearing.
- » The Regulations do give the employer power to provide for assessments for physical or psychological impairment in fitness provisions, however the employer had not developed any relevant fitness provisions in its form to the NMA, and therefore the Court found that there was no power in the Regulation for the employer to make the employee undergo further medical tests.
- » The Court also found that because of the comprehensive statutory regime, it was not necessary to imply a term into the contract of employment that the employer could require the employee to undergo further medical tests.

### [Johnson v Anglo Coal \(Callide Management\) Pty Ltd \[2005\] QSC 255](#)

#### Facts:

- » The employee was employed as a coal miner at Callide mine. He injured his right knee in 1975 and his left knee had deteriorated over time until he developed osteoarthritis in both knees. He had worked as a production mine worker at the mine site since 1982.
- » In May 2003, the employee was told that he would have to start training on the EH4500 trucks, however he had not previously been advised of this. He apparently did not feel safe driving the trucks because they were “too big and too fast”.
- » The employee underwent an occupational therapy assessment in July 2003 and he was removed from his role and placed on alternative duties for 4 months. He was then assessed by an NMA, who stated that the employee had a number of restrictions in the workplace, such as prolonged walking or walking on uneven ground. The NMA recommended that the employee undergo further review.
- » A health assessment was carried out in July 2004 by Dr Adam, who also identified a number of restrictions.
- » The employee did not agree that Dr Adam’s assessment was one which showed that was unable to carry out his tasks as a production employee at the mine without creating an unacceptable level of risk, and therefore he did not agree that his employer could make a decision under s48(2) of the Regulations to give the employee an opportunity to undergo a further health assessment.

Held:

- » The Court held that Dr Adam’s report was not a health assessment report that shows the worker was unable to carry out his tasks at the mine without creating an unacceptable level of risk in accordance with the requirements of s48(1).

### [CFMEU v State of Queensland v Anor \[2004\] QSC 181](#)

Facts

- » The Court was asked to consider whether the underground mine operated by Anglo Coal at Middlemount, complied with s296(1) of the Regulations
- » S296(1) states that mines must have at least 2 trafficable entrances, or escapeways, from the surface that are separated in a way that prevents any reasonably foreseeable event happening in one of the escapeways affecting the ability of persons to escape through the other escapeway.

Decision

- » The court held that two entrances from the surface of the mine were not escapeways for the purposes of s296(1) of the Regulations

Over the last five years the Supreme Court has been asked to interpret the legislation on a number of occasions. This has provided interested parties, including unions, employees, operators, holders, employers and the State of Queensland, the opportunity to consider and argue the nature of the legislation, highlighting the objects of the Act, and the scope of the legislation as it applies to coal mines and coal mine workers.

## [Powers granted to the Regulator and Industry Safety and Health Representatives](#)

### **Powers of inspectors**

An inspector has the power to:

- » Enter a coal mine or other places in certain circumstances
- » Seize evidence
- » Search any part of the coal mine or other place
- » Inspect, measure, test, photograph or film
- » Take a thing or sample at the coal mine for analysis for testing
- » Copy documents
- » Take equipment and materials into or onto the coal mine
- » Require a person to give reasonable help to exercise his or her power
- » Require a person to answer reasonable questions

### **Powers of industry safety and health representatives**

Industry Safety and Health Representatives have the power to:

- » Make inquiries about the operation of coal mines relevant to the safety or health of coal mine workers
- » Enter any part of a coal mine at any time to carry out the representative's functions on reasonable notice to the SSE or SSE's representative
- » Examine any documents relevant to safety and health if the representative has reason to believe the documents contain information relating to processes in place at a coal mine to achieve acceptable level of risk to coal mine workers
- » Copy safety and health management system documents
- » Require the person in control of the coal mine to give reasonable help in the exercise of power
- » Issue a direction under s167 to suspend operations for an unacceptable level of risk

Over the past five years, inspectors and industry safety and health representatives have used their powers under the Act to enforce compliance. Whether inspectors have achieved the objects of the Act in monitoring the effectiveness of risk management and control at coal mines, and have taken appropriate action to ensure adequate risk management over the past 5 years, is a matter for all interested parties to consider having regard to safety and compliance in the industry.

Whether industry safety and health representatives have achieved the objects of the Act in representing the safety and health interests of coal mine workers is also a matter for interested parties to consider having regard to safety and health of all coal mine workers.

### The way forward and the need for clarity

#### Are enforceable undertakings a viable option for change?

The Act does not provide for enforceable undertakings to be entered into by operators/holders when there has been a breach of the safety legislation.

#### What is an enforceable undertaking?

- » A legal agreement in which a person or organisation undertakes to carry out specific activities to improve worker health and safety and deliver benefits to industry and the broader community
- » At present, an organisation can only apply for an enforceable undertaking if it has breached either the *Electrical Safety Act 2002* or the *Workplace Health and Safety Act 1995*
- » If an application for an enforceable undertaking is not accepted, a prosecution will proceed
- » Compliance with an enforceable undertaking will generally cost an organisation more than the fine which they might receive at prosecution
- » The organisation may be required to carry out
  - › Substantial education and safety promotion
  - › Safety upgrades
  - › Audits
  - › Training
- » The organisation makes commitment to future safety standards, including taking steps to ensure that an incident of that nature does not occur again.

It would be beneficial to the mining industry for enforceable undertakings to be introduced to the existing safety legislation, as they are a suitable alternative to a prosecution, and provide a long term benefit to the organisation, its employees and the community. This is something for interested parties to consider for legislative review. The objectives of safety legislation can often be better met by investment in safety promotion via an enforceable undertaking, rather than simply imposing a financial penalty.

### How will WorkChoices affect safety at mines?

While occupational health and safety laws remain regulated by the states, the *Workplace Relations Amendment Act (WorkChoices) Act 2005* has touched on, and affects, occupational health and safety and the legal and practical implications of OHS in the workplace. WorkChoices has also fundamentally affected agreement making at coal mines.

Additional hours:

- » An employer may require an employee to work reasonable additional hours
- » This reflects the AIRC's reasonable hours test case decision, which determined that an employee may refuse to work additional hours where working this would result in the employee working hours which are unreasonable having regard to, amongst others, 'any risk to employee safety'
- » It has been argued that extending work hours resulting from individual bargaining may create tired employees who are an OHS risk.

Removal of provisions from agreements:

- » It has been argued that in agreement making, negotiating away conditions such as meal breaks, public holidays and annual leave may have effects on OHS in the workplace
- » It has been argued that the removal of these provisions from agreements may result in fatigued and tired workers who pose a risk to OHS in the workplace.

### [Injury Management, medical assessments and fitness for duty – do the regulations improve safety?](#)

Injury statistics obtained from the Department of Natural Resources, Mines and Water reveal the following:

#### **Coal Open Cut Statistics**

Lost time injury frequency rate from 1 July 2000 to 30 June 2005

- » Has gradually decreased over time.

Disabling Injury Frequency Rate

- » Has remained fairly constant, but started to steadily decrease in early 2004.

Occurrence of high potential incidents (HPIs)

- » 1999/2000: 28
- » 2000/2001: 56
- » 2001/2002: 196
- » 2002/2003: 208
- » 2003/2004: 244
- » 2004/2005: 298

The Open Cut statistics demonstrate that despite the commitment to injury management, while lost time injury frequency rates have decreased over the past five years, the occurrence of HPI's has increased. Whether this is a result of any failure of the Regulations, or due to the increases in productivity is something to be examined.

#### **Coal underground statistics**

Lost time injury frequency rate from 1 July 2000 to 30 June 2005

- » Has gradually decreased over time, but not significantly.

Occurrence of high potential incidents (HPIs)

- » 1999/2000: 28
- » 2000/2001: 56
- » 2001/2002: 196
- » 2002/2003: 208

- » 2003/2004: 244
- » 2004/2005: 298

The Underground statistics demonstrate that despite the commitment to injury management from all parties, while lost time injury frequency rates have decreased over the past five years, the occurrence of HPI's has increased. Whether this is a result of any failure of the Regulations, or due to the increases in productivity is something to be examined.

## Further information

This article does not constitute legal advice. If you would like further information, please contact:

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