QUEENSLAND MINING INDUSTRY HEALTH AND SAFETY CONFERENCE

17 – 20 AUGUST 2008

Safety Seminar Paper

Lessons from the Goonyella Riverside Case

1. Introduction

On 28 July 2004 an incident occurred at BMA's Goonyella Riverside Mine which resulted in two employees of Thiess suffering grievous bodily harm.

In late July 2005 proceedings were commenced against BMA, the SSE at Goonyella Riverside, and a BMA supervisor alleging a failure to discharge obligations under the Coal Mining Safety and Health Act (**Act**).

Proceedings against the Supervisor were withdrawn prior to the matter proceeding to trial.

BMA made various representations to the Department as to why the prosecutions against it and the SSE should not proceed. A settlement offer was made by BMA. These representations and the settlement offer were rejected.

The proceedings against BMA and the SSE went to trial commencing on14 January 2008. They were the first (and currently only) contested prosecutions under the Act. As such, the prosecutions are of significance as they provide insight into Crown Laws view about key sections of the Act and certain evidentiary matters.

The trial was originally scheduled for 4 weeks but was to be extended by at least another 2 weeks. However, on 30 January 2008 (day 11 of the trial) the prosecutions against BMA and the SSE were discontinued and terms of settlement agreed.

The settlement arose at the initiative of the prosecution and followed a number of earlier offers to settle which had been made by the prosecution but which had been rejected by BMA and the SSE. Clearly the prosecution was keen to avoid the trial proceeding.

While the prosecutions were discontinued and so the trial came to an end, during the conduct of the trial the prosecution put various submissions concerning the meaning of the Act and about various evidentiary matters which are of importance to the mining industry as they go to the heart of how safety is managed in the industry.

In this paper I will identify some of these submissions and why they are important.

Before doing so I will deal with the facts in more detail.

2. Background Facts

At approximately 8.55 am on Wednesday, 28 July 2004, 2 Thiess coal mine workers were cleaning out the undercarriage of a RH170 excavator. The undercarriage was full of compacted dry mud as a result of the excavator being bogged at Ramp 27 at Goonyella Riverside. The 2 workers were working beneath the excavator undercarriage using sledge hammers and shortened crowbars to remove the hardened mud. A large quantity of material came loose, fell and crushed the 2 employees. Both workers sustained injuries amounting to grievous bodily harm as that term is defined in the Act.

The excavator was Thiess equipment and was being used by Thiess as part of a major overburden removal contract at Goonyella Riverside. All work relevant to the incident was being carried out by Thiess and its employees rather than by BMA or its employees. Thiess had been awarded the contract following a comprehensive competitive tender process including a detailed analysis of safety issues including past safety performance. Thiess' SHMP was then mapped against BMA's to ensure the highest safety standards were applied by Thiess.

The excavator had been bogged on 4 previous occasions in the preceding 6 weeks as a result of wet conditions at Ramp 27. On these 4 occasions, either shovels and/or crowbars or a high pressure hose has been used to clean the undercarriage of the excavator.

On 27 July 2004, when the excavator became bogged, it broke down and the operator contacted a Thiess Mining Foreman to arrange for a fitter to repair the breakdown. When the excavator had been repaired, the operator asked the Foreman if he wanted the mud removed from the underside of the excavator. The Foreman confirmed that cleaning was

required so the operator dug a trench about a metre deep with the excavator bucket, parked the excavator over the trench and called the workshop to obtain crowbars to dig out the mud. The workshop had 3 crowbars delivered.

Another dozer operator who was going to participate in the cleaning task called the Foreman requesting a copy of the previous JSEA for working under the excavator. The Foreman advised that he would obtain one and not to start work until he had provided it. The Foreman found that no JSEA had been previously completed so he took a blank JSEA form to the site. The Foreman met with the Thiess team who were to do the cleaning work. The team discussed the hazards and controls associated with the task and filled in the JSEA form. The hazard of "mud falling onto person" was noted and one of the listed controls was "Dig around slew ring area" (such that workers were not standing directly under the mud). The probability of the risk was rated as: "D – known to occur or it has happened" and the consequence as "4 – serious lost time injury or illness". This created a risk rating of 21 (extreme).

In his statement to the Department, the Foreman stated that the work team considered the risk of falling material and agreed to control this risk by using a spotter to look for loose pieces falling and to work at the mud from the sides of the tub under the steel frame, ie so workers would not be working directly under the mud. Workers who completed the JSEA had various qualifications, including S1, S2 and S3.

The workers cleaned the undercarriage of the excavator until the end of the day shift on 27 July without incident.

The nightshift continued cleaning under the excavator without incident.

At 6.00 am on 28 July, the Foreman met the oncoming dayshift crew and informed them that cleaning needed to be continued. Two new workers were part of the crew. They were asked to read the JSEA and sign it and they did so.

Just before 8am, the Thiess Qld Mining Operations Manager, the Thiess Mining Superintendent and the Thiess Project Manager went to Ramp 27 to review the prolonged

outage of the excavator. The Thiess Mining Superintendent put his personal isolation lock on the excavator, went under it and watched two workers performing the cleaning task.

Immediately prior to the incident the two injured workers relieved two other workers who had been doing the cleaning work. A large chunk of material fell and both workers were partially buried by the material. Other workers rendered assistance by moving material off the injured workers and calling for assistance.

A BMA Contract Supervisor (dedicated to the Thiess contract) had been at the excavator at approximately midday on 27 July 2004 when the crews was tagging it out before commencing work. Later in the day, he returned to the site and asked for the JSEA. He was assured by the crew that they had completed a JSEA but it had been taken to the office.

On 28 July 2004 at around 8.15 am, the BMA Contact Supervisor and a BMA Business Analyst went to Ramp 27 as part of a safety contact round. They met some of the Thiess management at the site. There were at least 6 workers in the trench under the excavator at the time. The BMA Contact Supervisor spoke to one of the crew members about the progress of the job, checked for correct use of PPE and that isolation tags were in place. He then spoke to Thiess managers about different methods of digging. The BMA Contact Supervisor did not have a personal lock at that time so did not go underneath the excavator.

The BMA Contact Supervisor decided he would come back and review the work being performed after the Thiess Management personnel had gone. Soon after the BMA Contact Supervisor left the site the incident occurred.

The recovery of the injured workers and emergency response went well and those involved are to be congratulated.

Immediately after the incident an open ICAM was conducted by BMA and reports provided to the Department by BMA / the SSE as required by the Act. BMA personnel fully participated in the Departments investigation, including by attending interviews on a voluntary basis and answering all questions asked of them.

The decision to commence a prosecution was not made until immediately prior to the expiry of the 12 month limitation period. The decision to prosecute was, in the view of BMA and the SSE, attended by significant controversy. That said, this paper will not explore the decision to commence the prosecution.

The complaints against BMA and the SSE had a number of elements. The elements of the offences were initially pleaded as follows, in summary:

(a) BMA was the coal mine operator of Goonyella Riverside on or about 28 July 2004.

(b) On or about 28 July 2004 there was a serious accident involving falling mud from the underside of an excavator during operations at Goonyella Riverside.

(c) The accident caused injuries to two coal mine workers, employees of Thiess.

(d) The injuries suffered by the coal mine workers amounted to grievous bodily harm within 34(a) of the Act.

(e) In breach of sections 41(1) and 42(a) of the Act, BMA / SSE failed to ensure that the maintenance of mobile plant at Goonyella Riverside, being the excavator, by removal of mud from the undercarriage, was carried out in a way that did not expose the coal mine workers to an unacceptable level of risk.

(f) Further, or alternatively, BMA / SSE failed to ensure they had in place standard operating procedures (SOPs) for maintaining the particular excavator in its operational location at the mine.

(g) By failing to ensure that the excavator was maintained in a manner and/or pursuant to an appropriately constituted management and operating system and/or pursuant to an appropriately constituted safety and health management system, BMA / SSE failed to discharge their safety and health obligations to ensure the risk to the coal mine workers while at Goonyella Riverside was at an acceptable level.

(h) Further, or alternatively, BMA / SSE did not follow the prescribed way in 72(c) of the Regulation which requires that a coal mine must have SOPs for, among other

things, "assembling and maintaining fixed and mobile plant in its operational location".

3. The Pleadings & Provision of Material

In the fair conduct of a criminal prosecution it is important that the defendants are clearly put on notice as to what is alleged against them and what evidence exists, which may either favour or be against the prosecutions case. These are basic propositions which have been articulated by various superior courts over many years. In the usual criminal context, these principles are satisfied by way of the charge against the defendant/s and the provision to the defendant/s of the full prosecution brief.

In the context of mining safety laws, these principles present more difficulty. The general state of the law (as determined by the Industrial Court of Queensland) is that a charge under safety laws must be accompanied by particulars of the alleged breach which particularise the "risk of death, injury or illness" from which the legislation requires workers to be made free. Further, with reference to the defences available under safety legislation, President Hall has said that it is not a legitimate use of the power to order particulars, to limit the burden upon a defendant by requiring the complainant to nominate, for example, why it was that "the precautions taken by a defendant were not 'reasonable precautions'" or how the defendant "fell short of an advisory standard or code of practice".

Given the general nature of obligations under safety laws this puts a defendant at a disadvantage. This disadvantage was magnified in the Goonyella Riverside case as on a number of occasions during the trial the prosecution sought to amend its case against the defendants. In the defendants view this amounted to an unfair "shifting of the goal posts". Ultimately, because the case settled, formal rulings on these issues were not required but the Magistrate indicated on more than one occasion his "sympathy" for BMA and the SSE.

What is clear however, is that any corporate entity or individual facing charges under mining safety laws will need to pay close attention to the particulars provided and to ensure to the maximum extent possible that the goal posts are not moved.

In relation to the production of materials, the defence of the charges required the use of Freedom of Information (**FOI**) laws to gain access to all relevant material. Those applications were resisted and half a dozen were required to be taken on review to the Office of the Information Commissioner. The extensive use of FOI laws is time consuming and costly for the applicant and also for the Department. No doubt in a perfect world use of FOI laws would be unnecessary. But in the Goonyella Riverside case use of FOI laws was essential for the defendants to gain a full understanding of the case against them and how the prosecutions came about. In this context, Premier Blighs recent announcements about enhancing public access to material under FOI laws is to be welcomed. In my view, the more transparent the prosecution process, the more likely it is that industry players will have confidence in the process and its fairness.

4. Use of ICAMS

The conduct of investigations into incidents in the mining industry using the Incident Cause Analysis Method (ICAM) is very widespread.

While in my view an ICAM investigation report is of limited value as a forensic tool for legal purposes, it has proven a useful tool of general application to advance safety in the mining industry. Indeed the Department itself has used ICAMs as a preferred investigation methodology.

As previously noted, BMA conducted an ICAM into the incident. As is always the case, the ICAM identified a range of failed defences and the like.

In the conduct of the trial, the prosecution sought to put BMA's ICAM into evidence. Critically, the prosecution sought to do so on the basis that the ICAM contained admissions by both BMA and the SSE. Put differently, the prosecution sought to use BMA's ICAM as evidence of an admission of guilt by BMA and the SSE. These steps by the prosecution were opposed by the defence and no final ruling was made as the case settled.

It is immediately obvious that the prosecutions view (that is that an ICAM may be used as evidence of an admission) suggests that ICAM's or similar should not be conducted other than in a legally privileged environment so as to avoid them later being used against the

relevant parties. On its face this is not a welcome outcome as, generally speaking, it is in the interests of safety for all incidents to be investigated in an open and transparent way. The attempted use of an ICAM by the prosecution as occurred in the Goonyella Riverside case will inevitably prejudice such outcomes.

5. Onus

The position taken by the prosecution regarding the respective onuses under the Act is fairly clear and was explained in this way:

(a) The prosecution need only establish a breach of an obligation in the Act, even if it is a breach simpliciter;

(b) It is a matter for the defence to establish that all reasonable precautions were taken to ensure an acceptable level of risk. That is, if there was anything which might have been done, with the benefit of hindsight, to reduce the risk to a lesser level, then the defence will fail.

(c) It is a matter for the defence to establish that anything that any person might now say could have been done differently to lessen the risk was unfeasible, unreasonable or impractical.

An example of how this approach would apply is typified in the following submission made by the prosecution regarding the admissibility of (and weight to be given to) a revised JSEA form used by Thiess following the incident:

> *Don Fraser QC: "The only thing we need to show is that a new practice was introduced and that it might have some probative force in establishing that it would be safer to have a form in place which identified the existence of extreme risks even where those risks were subsequently addressed by the workers involved, including their supervisor, to bring it down to a level - as being as safe as reasonably practicable. That's the only thing we have to show, that there was a new procedure introduced which might have made it safer.*

And then I started to address your Honour about the specifics of whether or not in fact it would have made a difference. Now, there are two levels to that. Firstly, that is not what the Act requires in terms of the risk. The risk involves an assessment at an objective level… Our learned friends proceed on the basis that it's necessary to show that this would have affected the particular procedure as a matter of causation. With respect, that is wrong as a submission of law.

The second thing is that in fact it is apparent that this form might have made a difference because the form speaks for itself. I don't have to ask the witness to comment about every aspect of it.

…

If one asks would this have made a difference, of course it would, with respect, have made a difference.

…

Bear in mind, this is not a matter about which the prosecution has an onus. This is about the defendants seeking to establish that they did what was required under the Act in order to make good a defence, that is, that the system which they had in place was appropriate and that it was carried forward in a manner which left the risk at an acceptable level to the workers involved.

The effect of this submission, if accepted, is to make any incident virtually undeniable in circumstances where the prosecution becomes aware of any change, modification or improvement made to a form, system, procedure or policy after the event which might have lessened the initial risk. The position taken by the prosecution discourages open communication between mine operators and inspectors and discourages self-auditing and continual improvement, all of which are each clearly in the best interests of safety.

6. Online mining incident report

On several occasions the prosecution attempted to put into evidence the on-line "Mining Incident Report" filed by an employee of BMA and also attempted to use it as an admission

by BMA/SSE. The on-line report is a pro-forma document with mandatory fields to complete and is compulsory.

The position taken by the prosecution will discourage employees from being forthcoming with information in such reports introduced into evidence as admissions.

7. Section 252 Certificates

The prosecution tried repeatedly to use the "evidentiary aids" process as contained in section 252 of the Act to put into evidence, without the need to prove documents in the ordinary way, the following types of materials:

(a) letters of appointment of personnel and position descriptions;

(b) ICAM and other internal investigation reports, statements and reports of third parties about the incident; and

(c) incident reports submitted to the Department.

These attempts were challenged by the defence but no final ruling was made as the case settled.

The problem with this practice, if it were permissible, is that it would allow a range of potentially prejudicial material to be put into evidence without the prosecution being required to lead evidence from the document's author or originator. This is what is required in the normal course in order for material to be admitted as evidence in a prosecution.

8. Unpredictability

The prosecution relied on an expert report which accepted that BMA's systems were leading practice and aligned with dominant industry and Government approaches to safety. Nevertheless, the prosecution expert reasoned that in his view those dominant approaches were flawed in many important respects. The prosecution's expert himself contradicted Departmental practices and guidelines. For example, the current practice by the mining industry in relation to JSEA's was heavily criticised.

It is curious that the prosecution would seek to rely on expert evidence which in many important respects was contrary to what would otherwise be regarded as accepted (and indeed leading) industry practice. Because the case settled, the prosecutions expert was not tested under cross examination. However, in the circumstances, the prosecutions intention to rely on such evidence gives rise to a level of uncertainty about a range of accepted industry practices and approaches.

9. Conclusion

The Goonyella Riverside case had a most unusual (and in my view highly unsatisfactory) history. Ultimately the case against BMA and its SSE was withdrawn and, in my view, justice was served. The case does however, give rise to a range of important issues.

As I understand it, the Department is acutely aware of these issues and is reviewing them. This is a most welcome development.

At the end of the day all of us who work in the mining industry are committed to achieving zero harm. I remain hopeful that Departmental policies and approaches to prosecutions and enforcement generally will always be assessed against the following test: "Will this enforcement action enhance safety outcomes?". If the outcome of any such enforcement action results in an environment characterised by fear of prosecutions, particularly against individuals, and a fear that anything a person says or does can and will be used against them then inevitably, in my view, the interests of safety will not be advanced.

Can I conclude by quoting Industrial Magistrate Gordon who presided in the case and who made the following statement when advised that the prosecutions had been withdrawn and the terms of settlement had been agreed. His statement reflects extremely well on BMA and its SSE at Goonyella Riverside:

> *"I'm delighted that this result has been achieved.*
>
> *Might I say this to you, Mr Zietsman and through you to BMA: The opportunity to… inspect the Goonyella Riverside open-cut site last Thursday was very much appreciated. Without going into detail… might I say this, that with my feel for or alertness to matters of matters of safety and security I was mightily impressed with what I observed and what I heard during that inspection. Now, that was after the*

event, of course, but the fact that one could almost – well, I could – sense from the outset that BMA is focused upon security [safety], and that came through loud and clear, and it wasn't simply because a judicial officer and lawyers were attending. I am abundantly confident that the same would apply if any of us had a flash visit to the site today."

Ian Humphreys
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Blake Dawson
6 August 2008