

Understanding Your Safety Responsibilities

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Background

The enforcement of safety and health obligations in the Queensland mining industry by way of prosecutions has, to date, been largely directed at corporate entities, including tenement holders and operators of mines. Where prosecutions have been brought against individuals, they have traditionally been limited to targeting the relevant Site Senior Executive (**SSE**) and, in some cases, directors of holders or operators.

However, recent cases highlight that, in appropriate cases, individuals will also be prosecuted for breaching their obligations, whether under the *Coal Mining Safety and Health Act 1999 (Qld)* (**CMSH Act**) or the *Mining and Quarrying Safety and Health Act 1999 (Qld)* (**MQSH Act**).

The consequences of a prosecution against an individual can be serious, bearing in mind that breaches of legislative workplace health and safety obligations are criminal in nature.

Because of the seriousness of these offences and the apparent increased focus on individual responsibility, it is important for mine workers to understand their statutory safety and health responsibilities, as well as their rights. Those employing workers at mine sites will also need to consider how their personnel should be treated in the aftermath of an incident.

Apart from these considerations, it is obvious that the goal of 'zero harm' in the Queensland mining industry cannot be achieved if individuals do not step up to the mark. As such, an awareness of rights and responsibilities will not only assist individual mine workers in the event an incident occurs, but will hopefully also drive home the message that when it comes to safety and health, prevention is certainly better than the cure.

Prosecution policy

The Queensland Mines Inspectorate has functions that include enforcement of the CMSH Act and MQSH Act (see section 128(a) CMSH Act and section 125(a) MQSH Act).

While responsibility for bringing prosecutions for offences under the CMSH Act and MQSH Act now rests with the Commissioner for Mine Safety and Health, the Mines Inspectorate remains responsible for making recommendations for prosecutions (see section 129(b) CMSH Act and section 126(b) MQSH Act).

As at the date of this paper, the prosecution policy adopted by the Mines Inspectorate can be found in the 'Mines Inspectorate Compliance Policy - November 2009' (**Compliance Policy**).

One of the stated purposes of the Compliance Policy (see at page 3) is to:

4. *Ensure that persons who have obligations under Queensland mining safety and health legislation who fail to discharge their obligations be held to account at the appropriate level.*

In addition, the principles that form the basis of the Compliance Policy set out under clause 4.1 (see at page 6) relevantly includes a statement that:

7. *The Mines Inspectorate is empowered by statute to require people with obligations under the Acts meet those obligations. Inspectorate officers will undertake this duty in an appropriate and independent manner consistent with the provisions of the legislation. Nothing in this Compliance Policy can or is intended to detract from the exercise of these powers in the performance of the functions stated in these Acts.*

When it comes to prosecutions, Part 5 of the Compliance Policy (see at page 10) relevantly states:

While the primary purpose of the Mines Inspectorate is to ensure that persons with obligations manage and control risks effectively, thus preventing harm, prosecution is an essential part of compliance. In the course of an investigation where the Mines Inspectorate has collected sufficient evidence to provide a realistic prospect of conviction and has decided, in accordance with this policy, that it is in the public interest to prosecute, then a recommendation to prosecute should proceed.

Part 5 also sets out matters that will be considered by the Mines Inspectorate when considering whether to recommend a prosecution (see at page 10), including where one or more of the following factors apply:

- Death resulted from the legislative breach or failure to work at an acceptable level of risk (but noting that the nature of the breach and the circumstances surrounding the death may not justify a prosecution in the public interest);
- Prosecution is warranted due to the gravity of an alleged offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offender;
- There has been reckless disregard of safety and health requirements;
- There have been repeated breaches which give rise to significant risk, or persistent and significant poor compliance;
- The obligation holder's standard of managing safety and health is far below legislative requirements and gives rise to an unacceptable level of risk;

- False or misleading information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives rise to an unacceptable level of risk;
- Inspectors have been intentionally obstructed in the lawful course of their duties.

It is therefore clear that individuals who breach their obligations under mining safety and health legislation can be prosecuted in appropriate circumstances.

Recent cases

It is not hard to find examples in both the Queensland coal and metalliferous mining sectors where individuals have been prosecuted.

In the coal mining sector, on 5 December 2008 five employees were fined following an incident at an open-cut operation. In this incident it was found that, among other things, the truck involved and that had rolled onto its side had defective brakes. The truck driver was badly injured.

The truck in question had been supplied through a plant hire company. Five employees of that plant hire company, as well as their employer, pleaded guilty to breaches of the CSMH Act. No convictions were recorded, but in addition to the fine imposed on the employer, the employees were each fined individually, with penalties ranging from \$7000 down to \$1000, plus \$500 each in costs.

In the metalliferous sector, on 29 September 2008 a mine worker pleaded guilty to breaching his personal obligations under the MQSH Act. The prosecution was instigated after an incident in which a mine worker was killed when the man basket he was working in detached and fell to the ground. The mine worker prosecuted was alleged to have failed to check the effectiveness of the locking pins on the man basket attachment. A fine of \$1200 was imposed with no conviction recorded.

On 28 October 2008, aside from the mine operating entity involved, two individuals were prosecuted after an incident on an exploration site in which a worker was killed when a front end loader tipped over. The individuals concerned were the SSE and the person who had supplied the hired front end loader. Both pleaded guilty to breaches of obligations under the MQSH Act. No convictions were recorded, however:

- (a) the SSE was fined \$3000, plus \$2000 investigation costs and \$500 legal costs; and
- (b) the individual who had supplied the hired front end loader was fined \$5000, plus \$2000 investigation costs and \$500 legal costs.

Most recently, on 4 June 2010 an individual was found guilty of breaching his obligations under the MQSH Act in an incident that resulted in the death of a co-worker at an underground mine. The fatality occurred as a result of a worker being caught between a light vehicle and a tool carrier. The hearing of the matter occurred over a six month period and resulted in the worker being sentenced to an 8 month jail term, wholly

suspended for 15 months, and being further ordered to pay \$13,437 in court and investigation costs.

Individual obligations

Mine workers and everyone else at a mine site who may affect safety and health at the mine, or who otherwise might affect the health and safety of others through mine operations, have specific statutory obligations (see section 33 CMSH Act and section 30 MQSH Act).

Even though others may also owe concurrent obligations under the legislation (such as the broad safety and health obligations of mine operators and SSEs), this will not relieve an individual of their own statutory responsibilities (see section 36 CMSH Act and section 33 MQSH Act). In other words, the fact that others might also owe duties about safety and health does not mean that individuals can shirk their own responsibilities.

There are three key obligations of mine workers specified in the legislation (see section 39(1) CMSH Act and section 36(1) MQSH Act). In general terms, these obligations can be described as follows:

- (a) to comply with the relevant Act, standard work instructions and applicable procedures in the mine's safety and health management system;
- (b) to tell others about matters within their knowledge that will assist those others to fulfil their obligations or duties under the relevant Act, or to protect themselves from the risk of injury or illness;
- (c) to take any other reasonable and necessary course of action to ensure that persons are not exposed to unacceptable levels of risk.

The legislation also prescribes an additional six obligations on mine workers, or other persons at the mine (see section 39(2) CMSH Act and section 36(2) MQSH Act).

Broadly, these obligations are as follows:

- (a) to manage the risk of injury or illness (whether personal or to any other person) in relevant work and activities, so that the risk is at an acceptable level;
- (b) to ensure, within the scope of their responsibilities and duties, that the risk of injury or illness in the work and activities under the worker's or other person's control, supervision, or leadership, is managed so that the risk is at an acceptable level;
- (c) to the extent of their involvement, to participate in and conform to the risk management practices of the operations;
- (d) to comply with instructions given for safety and health issued by the mine operator, the SSE or a supervisor at the mine;

- (e) to only work at the mine while in a fit condition to carry out the work without affecting the safety and health of others; and
- (f) to not wilfully or recklessly do anything that might adversely affect the safety and health of someone else at the mine.

Each of these matters requires action on the part of individuals to ensure their own safety and health, as well as the safety and health of others. Workers cannot act on the assumption that safety and health is someone else's responsibility. Adopting a 'hands off' approach will not assist in preventing incidents and will not allow a worker to establish a defence if an incident occurs.

Potential liability

The consequences for breaching mining safety and health obligations for individuals can be extremely serious, noting that the offences are criminal in nature.

The maximum penalty available is dependent on the outcome of the contravention. As at the date of this paper, the maximum penalties available against an individual are as follows (see section 31 CMSH Act and section 31 MQSH Act):

- (a) for a contravention causing multiple deaths - \$200,000 or 3 years imprisonment;
- (b) for a contravention causing death or grievous bodily harm - \$100,000 or 2 years imprisonment;
- (c) for a contravention causing bodily harm - \$75,000 or 1 year's imprisonment;
- (d) for a contravention involving exposure to a substance that is likely to cause death or grievous bodily harm - \$75,000 or 1 year's imprisonment;
- (e) for any other contravention - \$50,000 or 6 months imprisonment.

Aside from the penalties or imprisonment arising from a successful prosecution, because of the criminal nature of the offences there can be further consequences. For example, if a conviction is recorded, the individual concerned is likely to face difficulties in obtaining future employment and may also be restricted in their ability to travel to some overseas destinations due to entry restrictions imposed on people with criminal records.

How you can protect yourself – defences

In practice, it is difficult to establish a defence to an alleged breach of a statutory safety and health obligation.

In broad terms, a defence is available where a person can prove that the offence was due to causes over which they had no control (see section 48(2) CMSH Act and section 45(2) MQSH Act). Proving that there was 'no control' over an incident is likely to be hard to do, especially when most workers will have an ability to exert some form of control over safety and health matters affecting those around them. Accordingly, while

not impossible to make out this defence, the circumstances in which it could be relied upon are likely to be few and far between.

The only other defences available to workers or other individuals who owe obligations depend upon whether there are any applicable regulations or guidelines.

If a regulation is made about how to achieve an acceptable level of risk, a defence is only available if the person followed that prescribed way to prevent the contravention (see section 48(1)(a) CMSH Act and section 45(1)(a) MQSH Act).

Where a guideline is made about how to achieve an acceptable level of risk, then a defence can only be made out if the person can show they either adopted and followed (see section 48(1)(b) CMSH Act and section 45(1)(b) MQSH Act):

- (a) the stated way to prevent the contravention; or
- (b) another way that achieved a level of risk equal or better than the acceptable level to prevent the contravention.

Where there is neither an applicable regulation nor guideline, a defence is only available where the person took '*reasonable precautions*' and '*exercised proper diligence*' to prevent the contravention (see section 48(1)(c) CMSH Act and section 45(1)(c) MQSH Act).

Workers will only be in a position to defend themselves against potential prosecutions if they have been properly trained in relation to the applicable requirements for managing risks. Without this knowledge, whether a defence will be available will be more reliant on good luck than good management.

How you can protect yourself – conduct during the investigation

Mines Inspectors have the power to require individuals to:

- (a) answer questions in order to help them to ascertain whether the relevant Act is being or has been complied with, or for the purpose of conducting an investigation (see sections 139(3)(g), 157, 159 and 198A CMSH Act and sections 136(3)(g), 154, 156 and 195A MQSH Act);
- (b) where suspected of committing an offence, provide their name and address (see section 152 CMSH Act and section 149 MQSH Act);
- (c) produce documents to which the person has access and that relates to the person's obligations under the relevant Act (see section 154 CMSH Act and section 151 MQSH Act)

It is an offence to refuse to comply, although in certain circumstances refusal to comply is permitted if there is a 'reasonable excuse'. What is a reasonable excuse is not defined, although it will include a claim against self incrimination. However, even where there is a right to claim privilege against self-incrimination, in some cases an answer

can still be required, although the answer cannot be admitted in evidence against the person claiming the privilege.

It is also an offence to state something to a Mines Inspector that the person knows is false or misleading in a material particular, to provide a document containing information the person knows is false or misleading in a material particular or to obstruct a Mines Inspector in the exercise of a power (unless the person has a 'reasonable excuse') (see sections 179, 180 and 181 CMSH Act and sections 176, 177 and 178 MQSH Act).

Not only is it an offence to provide false or misleading statements or documents to a Mines Inspector or to obstruct a Mines Inspector in exercising their powers, the Compliance Policy discussed earlier makes it clear that these types of actions will be relevant when the Mines Inspectorate consider whether to recommend a prosecution.

It is vital that workers are given proper advice about their obligations and rights, especially in circumstances where they can be exposed to offences for which penalties might be imposed, or a prosecution which could result in a penalty or, at worst, imprisonment.

As part of ensuring workers are properly advised, employers need to consider whether their workers should have separate legal representation. Often there will be no difficulty in an employer and their employees being represented by the same legal advisor. However, separate representation will be required where the interests of the employer and the employee differ. This could arise, for example, if the employer seeks to allege that the employee was acting outside the scope of their duties at the time of the incident in question.

Decisions about legal representation in the aftermath of an incident need to be made quickly to ensure that all parties affected are appropriately advised and protected.

How you can protect yourself – prevention

Aside from the matters raised earlier about awareness of prescribed risk management strategies, there are other means by which mine workers can exercise rights to protect themselves and others from harm.

The legislation allows workers who believe that there is immediate personal danger to:

- (a) remove himself or herself to a position of safety; and
- (b) refuse to undertake a task allocated to the worker that may place the worker in immediate personal danger.

Statutory protections are in place to prevent workers from being disadvantaged by exercising this right (see section 274 CMSH Act and section 253 MQSH Act).

However, the exercise of this right is subject to the worker not being competent and able to eliminate the hazard. Otherwise, the worker must either stop the use of any relevant equipment, substances or operations so to remove the hazard or, if this does

not limit the hazard to an acceptable level, the worker must withdraw from the relevant area (see sections 273(2) and (3) CSMH Act and sections 252(1) and (2) MQSH Act).

Mine workers should be able to raise and manage safety and health matters with their employer. However, where this is not possible, workers have power to make a confidential complaint to the Mines Inspectorate (see section 275 CSMH Act and section 254 MQSH Act).

If a worker makes a complaint, the Mines Inspectorate is required to investigate and the complainant's name must not be disclosed as part of that investigation.

According to the 2008-2009 Queensland Mines and Quarries Annual Report prepared by the Department of Employment, Economic Development and Innovation, 94 complaints were received by the Mines Inspectorate during the 2008–09 financial year. Of these, 80 were complaints from mine workers or their representatives.

81 of the 94 complaints are reported as being fully completed by 30 September 2009, with outcomes including directives or substandard condition or practice notices being issued and mine record entries being made.

Complaints can be made to the Mines Inspectorate by telephone, letter, email or in person and can also be made through a union representative. Contact details for the Mines Inspectorate are on their website at: www.dme.qld.gov.au/mines/contact.cfm

Potential changes in the pipeline

Changes to individual safety and health responsibilities may occur if the proposed national harmonisation of workplace health and safety laws becomes a reality. The outcome of the upcoming Federal election may impact on whether the harmonisation process will proceed and, if so, what the changes will look like. As such, for the moment, all that can be said is that a watching brief on this should be maintained.

Lessons learned

The manner in which the mining safety legislation is drafted requires workers to take steps to ensure the safety and health of themselves, others working with them and those who otherwise may be affected by their actions.

Failure by mine workers to take action to ensure health and safety may result in an incident for which the Mines Inspectorate will more actively consider recommending a prosecution. At the worst end of the scale, it is clear from the Compliance Policy that reckless disregard for health and safety is a factor that is considered by the Mines Inspectorate when determining whether to recommend a prosecution.

The difficulty in establishing statutory defences means that workers need to be properly trained in effective hazard management. The goal of such training is obviously to prevent incidents from arising. However, if an incident occurs then being able to demonstrate that the appropriate hazard management steps were taken will provide workers with the best possible chance of establishing a statutory defence.

Because prevention is always better than the cure, workers also need to be trained as to their rights and obligations in the event they encounter a dangerous event or circumstance. Workers should be encouraged to exercise their rights to remove themselves and others from danger in relevant circumstances.

It is also preferable for workers to have an open line of communication for having health and safety issues raised and dealt with. Employers who fail to put these processes in place risk anonymous complaints being raised and investigated by the Mines Inspectorate.

Finally, if an incident occurs, in order to protect the workers involved as much as possible, a strategy needs to be in place that enables urgent advice about appropriate legal representation to be provided. Such advice needs to encompass whether the workers involved require separate legal representation and the workers' obligations and rights during the investigation process (including, where relevant, about the right to claim privilege against self-incrimination).

Conclusion

The prosecution of individuals for mining safety and health breaches can perhaps be described as a blunt tool in the effort to achieve the goal of 'zero harm'. It may in fact be counter-productive to achieving that goal by making workers more defensive and becoming disinclined to provide feedback on safety and health incidents for fear of personal sanctions.

However, individuals clearly cannot assume that they are immune from prosecution and must recognise that the legislative scheme provides few excuses for failing to discharge the heavy responsibilities placed on them.

It therefore seems that the best form of 'defence' for individuals is a concerted effort to discharge their statutory obligations, coupled with a cooperative relationship with employers aimed at appropriately managing and, where possible, avoiding hazards. Given the nature of the mining industry, this is no doubt easier said than done, but is the challenge that workers must try to meet in order to minimise their personal exposure.