How far must the company go to protect a worker's safety?

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Introduction

In November 2007, whilst visiting a regional office, a Commonwealth government employee was directed to stay in a motel arranged and paid for by her employer. During her stay, the female worker engaged in sexual intercourse with a male friend in the hotel room, during which a glass light fitting above the bed was pulled from its mount and fell on her. The employee made an application for workers' compensation. Following numerous earlier hearings, the full Federal Court ultimately found that the worker was injured in the course of her employment and therefore could claim workers' compensation.[1] (**the Comcare case**).

The decision has being appealed to the High Court, of which the High Court has reserved its decision. The case will be significant in that it will ultimately determine what activities, if engaged in the workplace, will be within the course of employment. This in turn will dictate to what extent employers seek to regulate non-work related activities. The Comcare case as it currently stands, demonstrates that in the context of workers' compensation claims, an injury which occurs within an "interval or interlude" of a period of work may still be within the course of a person's employment, so long as the employer induced the employee to spend the time in question at a particular place or in a particular way.

The Comcare case raises significant questions outside the workers' compensation sphere, and especially for employers in the mining industry from a safety perspective. Does the same wide interpretation of what constitutes the course of a person's employment extend to mining safety legislation? How can employers ensure that risks are at an "acceptable level" within this broader definition?

These underlying issues are of paramount importance to the mining industry generally, but more specifically in relation to mines that provide on-site accommodation, such as those with FIFO arrangements.

The question for employers in the safety sphere is a vital one: how far must a company go in protecting a worker's safety when he or she is engaged in activities outside the literal "workplace", or in behaviours of a seemingly inappropriate nature? These questions also act as a reminder of the importance to the mining industry of regulating employees' behaviour, not only whilst at work, but when they are "not at work" whilst still on a mine site.

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[1] *Comcare v PVYW* [2012] FCAFC 181.

In order to determine whether an operator may be liable for a breach of their duty to protect workers, it is relevant to first assess the applicable mining legislation to determine the scope of "the duty".

Legislation

Mine operators (whether coal or otherwise) have an obligation to ensure the risk to mine workers while at the operator's mine is at an acceptable level.[2] In comparison to workers' compensation legislation, the obligation is not defined in terms of a worker doing things in the course of their employment. "The duty" is instead delineated by the presence of a worker at a particular location, namely "at the operator's mine".

In fact, a "mine" extends to more than just the facilities for the extraction and processing of coal and other minerals. The term mine (or coal mine) is defined broadly under the legislation, and includes:

> *buildings for administration, accommodation and associated facilities within the boundaries of land the subject of the mining tenure for the mine or on land adjoining, adjacent to, or contiguous with the boundaries of the land the subject of the mining tenure.*[3]

This broad definition raises two issues. The first is the responsibility of a mine operator for workers undertaking non-mining activities on the statutorily defined "mine". The second is that a mine operator's safety obligations may be even more far-reaching than workers' compensation legislation in situations where workers are involved in misconduct.

Workers undertaking non-mining activities

There have been a number of recent cases involving "non-work" related activities which have resulted in successful claims for workers' compensation. We consider a few of these to demonstrate the potential scope of safety legislation in respect of workers undertaking non-mining activities within a mining tenure, and therefore what employers should do, to discharge their obligations.

In the case of *Clarke v Waylexson Pty Ltd* [2009] NTSC 19, the worker was employed by Waylexson Pty Ltd and on-hired to work at a remote uranium mine in Jabiru. The worker was required to work rotating shifts during his employment at the mine. Consequently, he was encouraged by his employer to stay awake when on changeover from day shift to night shift, in order to allow his body to adjust. During one such change over, the worker was injured in a motor vehicle accident while on an early morning fishing trip. Ultimately, the Northern Territory Supreme Court found that this was in the course of his employment and the worker was therefore entitled to compensation.

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[2] *Coal Mining Safety and Health Act 1999 (*Qld) s 41; *Mining and Quarrying Safety and Health Act 1999* (Qld) s 38. Similarly, senior site executives have an obligation to ensure the risk to persons from operations is at an acceptable level.

[3] *Coal Mining Safety and Health Act 1999* (Qld) s 9.

What if this case was assessed under the mine safety legislation? It could be argued that a road is an “associated facility” under the definition of “mine” above. Assuming the motor vehicle accident occurred on a road within the mining tenure, the incident would fall within the safety legislation.

In response to the question of whether an operator would have discharged its obligation to keep risk to an “acceptable level”, you would consider such factors as:

- rostering of shifts
- the worker had already finished a shift and was encouraged by his employer to keep himself awake between shifts
- the employer had allowed the trip or acquiesced to it

In the case of *Thiess Pty Ltd and Q-COMP* (C/2010/11), the worker had a history of intermittent back pain. He had noticed a worsening of the pain in the six weeks prior to the incident, and had felt a pain in his leg on the shift before the incident occurred. After his shift, the worker returned to the accommodation provided by Thiess and was taking his washing off the line when he sneezed and felt immediate pain in his back. The pain was later discovered to be the result of a herniated disc. The Commission subsequently found that the worker was injured in the course of his employment and thus entitled to compensation.

How would this case be decided under the safety legislation? This is a case where the “acceptable level” test makes the obligation less onerous than the workers’ compensation test. Although the incident occurred in accommodation 2km away from a mine site, had the incident occur on a mine, the risk of sustaining this particular injury as a result of normal domestic tasks is probably at an acceptable level. In this instance, if the case was assessed under the safety legislation, the employer would no doubt be able to establish that it has discharged its obligations under the legislation and therefore not liable under the safety legislation.

However, this case also provides precedent for the fact that employees may be encouraged to partake in activities should their employer provide relevant facilities. We might ask: would the outcome be different if the company had instead provided recreational facilities such as a gym or bar? Such facilities are likely to be located at “the mine” and are therefore within the scope of the mine safety legislation. An operator could foreseeably fail the “acceptable level” test in providing these facilities, for example, if alcohol was served irresponsibly or inadequate supervision was provided in exercise facilities.

Accordingly, this case demonstrates the potential application of “the duty” in regards to facilities provided by employers which are located on, or in close proximity to the mining tenure. This acts as a reminder that the employer must undertake a risk assessment of these activities to ensure that the risk arising from these activities are at an acceptable level, such that the employer can discharge its obligations under the safety legislation.

In the case of *Kent v Employers Mutual Limited (Kingswood Aluminium Pty Ltd)* 2011] SAWCT 19, a supervisor was sent to Christmas Island for six weeks by

Kingswood Aluminium Pty Ltd ('Kingswood'). Kingswood had become aware of morale issues on the island and related behavioural issues. As such, the supervisor was impliedly instructed to get involved with workers and encourage the employees under his supervision to engage in social and leisure activities to boost morale. In an effort to do so, the supervisor took a group of three colleagues snorkelling on a public holiday and suffered a fatal heart attack. Consequently, the Tribunal found that the snorkelling was within the course of the supervisor's employment.

This case is demonstrative of the risks that exist in recreational activities. The facts of the case could be modified in a range of different ways to fall within the scope of mine safety legislation. For example, a mine operator might decide to improve morale on a mine by organising a sporting tournament, during which multiple workers suffer injuries. Would organising such an activity between potentially inexperienced players discharge the obligation to keep risk at an "acceptable level"?

It should also be noted that the recreational activity need not have been organised by the operator to fall within the scope of safety legislation. In the fishing trip example above, the operator was aware of the practice of workers going fishing, and had not objected to the activity. Under those circumstances, the operator must still fulfil its obligations in managing risk, despite not being the organiser of the activity.

A broader obligation?

The second issue raised by the definition of "mine" is that the obligation may be even broader than the workers' compensation test, given that the obligation simply applies to activities occurring at the mine.

In workers' compensation cases, an injury will not be within the course of employment where the employee was guilty of gross misconduct taking him or herself outside the course of employment. But there is no correlative caveat in the mining safety obligation: anything that happens at the mine (as defined) comes within the scope of the obligation. The only potential leniency for the operator is if it can show that the risk was at an "acceptable level".

Perhaps the best example to demonstrate the point is a situation where a worker fatally ingests an illicit drug such as ecstasy or methamphetamine in his accommodation at a mine site. The case would fail the "in the course of employment" criteria for workers' compensation because taking the drugs would be deemed gross misconduct; this would take the worker outside the course of his employment. However, would the mine operator have breached its safety obligation? Assuming the regulator led evidence that illicit drugs were easily available at the mine, would the risk to workers of illness or death from ingesting illicit drugs be at an "acceptable level"?

Conclusion

The cases discussed above draw a relevant comparison between the wide ambit of workers' compensation legislation and an operator's obligations under mining safety legislation. The cases demonstrate the potentially broad scope of the obligation to keep risks at an "acceptable level". In particular, operators should be aware that their

duty applies to almost all activities conducted within a mine tenure, not just mining activities. The scope of this obligation stems largely from the all-encompassing legislative definition of “mine”. Like employers facing workers’ compensation claims, mine operators might be surprised by the broad reach of their obligations.

Employers in the mining industry need to be aware of the broad scope of “the duty” to ensure that risk is at an “acceptable level” in regards to all events which could potentially occur at a mine. Employers need to consider the assessment they have undertaken of certain events, how their policies and procedures respond to not only work-related but non-work related activities occurring on a mine site to ensure that at all times they are discharging their duties of risk being at an “acceptable level”.

For employers in the mining industry that are not situated on a mine site, adjoin or are adjacent to, or contiguous to a mine site, they will fall within the scope of the Work Health and Safety Act or other safety legislation, therefore must follow the obligations under that legislation.