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# Legislation, Litigation and Liability

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# Legislation, Litigation and Liability

A J See<sup>1</sup>

## ABSTRACT

Safety and health at work is about people. It is about people who plan for work, organise work and perform work. It is about those who come in contact with the workplace and those who are responsible for the workplace.

There are wider ranging safety and health obligations that are imposed on the industry stakeholders that span all phases of the production process. In all cases, those responsible for discharging the obligations must ask the questions: Is what we propose safe?, can it be done safer? and are we sure?

What we learn from recent legal cases before the courts is that it is essential that all stakeholders work together in a collaborative way when discharging these obligations.

Safety and health at work cannot become an issue that is viewed only through the eyes of a single stakeholder group. The reason for this is quite simple. The interrelatedness of the responsibilities that are imposed on each of the stakeholder groups, means that the performance based legislation simply wont work, where an active model of communication and consultation is not in place.

## INTRODUCTION

Australian workplace health and safety law has been the subject of much debate over the past several decades. In the late 1980s and early 1990s, many of the state based mining and non-mining laws were recast with a view to making health and safety a fundamental part of the production process.

Often the language of those involved in that debate spoke of pre-Robens versus post Robens legislation, with the predominant view being that performance based legislation in the style advocated by Lord Robens (Safety and Health at Work, 1972), was the panacea for ensuring health and safety at work. That is, what was required was legislating for outcomes, not prescribing the way in which safety was to be achieved.

But performance based legislation may not, in itself, be always that easy to implement.

While Australia's safety and health laws are arguably among the best in the world, there nonetheless remains a good deal of debate as to how the obligations of the individual stakeholders should be carried out. This paper seeks to highlight some of the issues that are pertinent to the debate, through an examination of some recent case law. The analysis takes place not for the purposes of examining the behaviour of the parties, but more to gain a better insight into the nature of the issues that form the backdrop to the potential legislation, litigation and liability that faces the coal mine operator.

## THE LEGISLATIVE BACKDROP

### Understanding the obligations of the coal operator and the site senior executive

The starting point for any analysis of this type must be the current legislative backdrop and what I intend to do is to consider this backdrop from a Queenslander's perspective.

The Queensland *Coal Mining Safety and Health Act 1999* has two objectives, to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations and to require that the risk of injury or illness to any

person resulting from coal mining operations be at an acceptable level (Section 6).

The primary obligations imposed on the coal mine operator focus on the place of work, the plant and the systems and people and it is through the role of the site senior executive that these obligations are discharged.

The most critical activity for the site senior executive is to ensure on behalf of the operator, that it develops and implements a safety and health management system for the mine and that it is supported by a management structure that will ensure that the system works.

The importance of having an effective management structure is made quite clear when one reflects on some of what the safety and health management system needs to do. For example, the system (Section 62) must:

- define the coal mine operator's safety and health policy;
- contain a plan to implement the coal mine operator's safety and health policy;
- state how the coal mine operator intends to develop the capabilities and support mechanisms necessary to achieve the policy; and
- include principal hazard management plans and standard operating provisions.

Yet the management structure of the operating company is not alone when it comes to the effective implementation of some of these responsibilities. Under Queensland law, the legislature has placed significant importance on the tri-partite responsibilities of all of the industry partners and this is evident in the roles given to the Safety and Health Council (Part 6), the Industry (Part 7) and Site (Part 8) Health and Safety Representatives.

The point to be made is that the legislative arrangements for the coal mine operator are complex and involve many stakeholders.

The following two case studies have been selected to demonstrate these complexities.

## A CONSIDERATION OF THE OBLIGATIONS IN THE CASE OF GRETLEY

### Background

On 14 November 1996, four mine workers at the Gretley Colliery were killed, when the continuous miner they were operating holed into abandoned workings of the Young Wallsend Colliery (YWC) causing a sudden inrush of water. Such was the force of the inrush that the 45 tonne continuous miner was moved 20 metres inbye and found after the accident, positioned diagonally across the heading.

*A central factor in the disaster was that the south east boundaries of the old workings were always 100 metres or more closer to the proposed mining activity boundaries for 50/51 panel than the official mine plans for the colliery were depicting at all relevant times.*

As a result of the fatalities and following a judicial inquiry before the Court of Coal Mines Regulation and a coroner's inquest, 52 charges were brought against the corporate defendants, the Newcastle Wallsend Coal Company Pty Limited

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(NWCC) and its parent company Oakbridge Pty Limited (Oakbridge), under the *Occupational Health and Safety Act 1983* (NSW) Industrial Relations Commission of New South Wales (IRC, 2004). An additional 24 charges of a similar nature were brought against eight personal defendants.

Some eight years later, the health and safety community are now considering the implications of Gretley following the decision handed down by the Industrial Relations Commission of New South Wales in Court Session on 9 August last year.

In the case of the corporate defendants, at issue was whether they had discharged their statutory obligation under ss 15 and 16 of the *Occupational Health and Safety Act 1983*, by ensuring the health safety and welfare of their employees and those involved in the employer's undertaking.

In assessing the corporate defendants' obligations, the prosecutors brought three different types of charges against the corporations. These were:

- *planning, research and assessment charges* relating to events that had occurred between 22 March 1994 and 14 November 1996;
- *system of work charges* relating to events that had occurred between 16 September 1996 and 13 November 1996; and
- *night shift charges*, relating to events that had occurred on 13 and 14 November 1996.

### Planning, research and assessment charge

The planning research and assessment charges as their name indicates relate to the original planning undertaken by the corporations prior to commencing the mining operation. These charges cover the time period from when NWCC signed the relevant coal lease with the New South Wales Department of Mineral Resources up and until the time of the accident.

The essential thrust of these charges was that it was alleged that the corporate defendants failed to undertake planning by way of properly researching available sources and information on the location and extent of YWC old workings.

### Relevant statutory obligations

There are several relevant statutory obligations that must be understood, before an analysis of the planning charges takes place.

Firstly, the mine manager had a statutory responsibility under Section 8(2) (a) of the *Coal Mines Regulation (Methods and Systems of Working – Underground Mines) 1984* to take such steps as may be necessary to ensure that he or she is at all times in possession of such information as would indicate or tend to indicate the presence of any disused excavations or workings, in the vicinity where work is being carried on or proposed to be carried on.

Secondly, the mine manager is also obliged under Section 37(2) of the *Coal Mines Regulation Act 1982* that he or she will take such steps as may be necessary to ensure that at all times the manager is in possession of all available information relevant to the behaviour of strata surrounding the mine and its relationship to the safe working of the mine and all available information regarding disused excavations or workings in the vicinity of the mine.

Finally, in the case of the mine surveyor, the duties under Section 8 (g) of the *Coal Mines Survey and Plan Regulation 1984*, include the requirement that where a mine surveyor has any doubt as to the accuracy of any plans, drawings or sections of the mine not prepared by the mine surveyor, or under the supervision of the mine surveyor, which may have an effect upon the working and operation of the mine or the safety of persons at the mine, that the mine surveyor shall draw such doubt to the attention of the manager of the mine.

Let us consider these obligations within the context of the facts of the case.

### The record tracings

At issue in relation to the planning, research and assessment charges was the reliability of the record tracings that were held by the Department of Mineral Resources. The record tracings (RT 523) were made up of three sheets.

The first sheet, *Sheet 1*, was headed '*Plan Shewing Young Wallsend Coal Workings*' and was copied from the colliery plan at the coal field office in 1892. Sheet 1 contained two sets of workings that were depicted separately by black and red ink.

According to Staunton J (IRC, 2004), the two sets of workings appear to overlay each other, particularly in the north western and south eastern boundaries, so much so that:

*any person looking at RT 523 Sheet 1 could not help but wonder as to the precise import of the red and black workings and their relationship to each other* (at IRC, 2004, page 388).

By contrast, *Sheets 2 and 3* came into existence some time around 1980 and were created according to a departmental Minute Paper written at the time:

*due to the fact that the workings of both seams that directly overlay each other and were shown by differing colours on the one plan of abandonment, as well as the poor condition of the plan, that a separate tracing of each working had to be made* (at IRC, 2004, page 389).

The purpose of Sheets 2 and 3 was to separate the red and black mine workings depicted on Sheet 1, with the bottom seam workings appearing to be represented in Sheet 2 and the top seam workings being reproduced in Sheet 3.

The problem that appeared to arise as a consequence of the reproductions of these workings was that:

*whoever created them interpreted Sheet 1 in a particular way. That is, the red and black workings depicted as superimposed on each other in Sheet 1 had been separated out and depicted as stand alone workings in two different seams, vertically 18 metres apart* (at IRC, 2004, page 401).

The inaccuracy of these maps proved fatal to the company and it was the preferred view of at least one witness that it was more than likely that the drawings related to the workings of the upper seam only.

According to Staunton J, the defendants failed to do research and planning properly, because they failed to independently and objectively consider anomalies in Sheet 1 that Sheets 2 and 3 didn't resolve.

In this respect there are several issues that should be noted. Firstly the court accepted the evidence of an expert witness that there were basic surveying principles ignored by the surveyor, when he was confronted with the glaring inconsistencies identified in Sheets 2 and 3.

Secondly, the court was of the view that against that backdrop, the defendants should have sought additional information from the department, such as from the Abandonment Register to clarify the extent of the workings. There was no evidence of this taking place.

Finally, an independent drilling program undertaken by the defendant established that the purported Borehole Seam workings in the south-eastern direction as depicted in Sheet 2, did not exist as had been depicted.

To summarise the court held that the:

*Defendants did not critically scrutinise Sheets 2 and 3 seeking background information to satisfy themselves about that information causing Sheets 2 and 3 to be depicted the way they were. Furthermore, no filed notes were made of surveys, and no abandonment plan of YWC was filed; therefore there was no certainty of the extent as to the continuation of old workings. This was actually confirmed by an independent drilling report throwing doubt onto the whole situation.*

It was the court's view that the defendant's reliance on Sheets 2 and 3 as the basis for planning mining at Gretley, especially in 50/51 panel created a real and potential risk to the health and safety of its employees working in that panel.

### **Further derivative planning and research charges**

What is important to observe in the Gretley analysis, is the reliance by the Crown prosecutor on derivative charges. That is, further charges that are brought about derived from an initial alleged failure. While the court recognised that the prosecutor was technically correct in casting the charges this way, his Honour was of the view that such a process could on occasions be unnecessarily duplicative.

That being said, the court held the corporate defendants liable for the following derivative charges stemming from their failure to undertake planning and research:

1. the defendant's failure to accurately depict the location/extent of YWC old workings on any mine plans;
2. the defendant's failure to accurately depict the location/extent of YWC old workings on the Application submitted to the Department on the 6 September 1994;
3. the defendant's failure to accurately depict the location/extent of YWC old workings on the redrawn plans forwarded to the Department on the 27 October 1994; and
4. the defendant's failure to accurately depict the location/extent of the YWC old workings on the Variation submitted to the Department on or about 11 August 1995.

*The court dealt with these derivative charges together and found the defendant's guilty on each occasion, because once established that the defendant failed to accurately depict the YWC old workings on the initial mine plan of Gretley, they would continue to do so in all future mine plans subsequently produced by Gretley.*

### **Failure to undertake appropriate risk assessment**

Another example of planning charges that were dealt with by the Court related to:

- a failure to plan by way of risk assessment for the development of 50/51 panel; and
- a failure to carry out an assessment of the risks to the health, safety and welfare of the employees and mine workers in the event of an inrush of water and/or dangerous gases.

Despite the contention of the corporate defendants that a risk assessment process had taken place by the companies when the original miniwall application was made, the Court was of the view that such a process was not the same as a documented risk identification and assessment process that would include a risk management policy; duties and responsibilities of persons involved, a risk register and risk action plan.

His Honour stated:

*Given the nature of the risk, an adequate risk assessment would have encompassed much more than acknowledging the presence of the old workings and the intention to leave a barrier. In identifying risks as being the risk of inrush from water and/or dangerous gases, the consequences of such a risk would have been identified as death or injury to workers. This would have highlighted as a risk prevention strategy the need to ensure that the depiction of the Young Wallsend old workings could be relied upon with question as to their accuracy (at 550).*

The Court (IRC, 2004) found that while the Gretley Collieries Emergency Procedure Document identified clear procedural steps to be followed at an administrative level once the incident leading to a decision to evacuate had occurred, there was nothing in the document that directed the actual employees at the site of the major incident.

The observation was also made by the Court that there was no direct evidence received from any witness who worked at the Gretley mine, as to their knowledge of and reliance upon the Emergency Procedure Document.

To summarise the above, the scope of the planning charges were wide ranging and impacted on all aspects of the health and safety system.

### **System of work charges**

The second type of charges laid against the corporate defendants, were the system of work charges.

Again while the nature of these charges have as their foundation the initial failure by the defendants to undertake effective planning and research, the analysis of the issues did identify several unique considerations.

Of interest are those aspects of the charges that are particularised to include:

- a failure to investigate, adequately or at all, Deputies written and oral reports from 1 November 1996;
- a failure to inform Deputies, the employees and other mine workers that the Young Wallsend coal workings were full or water and under a head of pressure; and
- a failure to instruct Deputies, the employees and other mine workers to be vigilant in looking for signs of water make whilst working in the panel.

It is worth noting that on three occasions before the accident, that the Mine Deputy had entered into his statutory reports the presence of water in the 50/51 panel.

These included:

- 1 November 1996 – nuisance accumulation of water;
- 4 November 1996 – large amount of nuisance water; and
- 13 November 1996 – coal seam is giving out considerable amount of water seepage at face of C heading.

While the court did not conclude that these reports were extraordinary in themselves, coupled with the fact that the defendants were relying on inaccurate mine plans created a situation of far more significance.

The court also heard evidence of a discussion held between the mine surveyor and the Mines Subsidence Board several weeks before the accident, when the surveyor was advised that:

*we were having a water management problem and management wanted to know where these plans were or the accuracy of the plans.*

Additional evidence was given as to the presence of a contractor's hydraulic drill rig that may have been brought in for drilling ahead in the 50/51 panel either scheduled for the day or the following day of the disaster.

The conclusions of the Court in relation to these charges were that the system of work charge is derivative in nature as it stems directly from the defendants' failure to properly research and assess the location and extent of the YWC old workings.

The Court held that although the mine workers knew that they were working towards old workings where they thought they were, the court held that the mine managers and workers should have been made fully aware of the YWC old workings. As a consequence, the defendants were found guilty of the system of work charges.

## Night shift charges

The final category of charges related to the time period for the night shift of 11.30 pm 13 November 1996 until 7.30 am on 14 November 1996.

The night shift charges were particularised in the exact same terms as the system of work charges.

Again in the case of the night shift charges, the majority of the particularised failures alleged, derived from the defendant's primary failure to properly research the location and extent of the Young Wallsend old workings.

While according to the Court these charges relied on differing factual particulars or differing aspect of primary fact in order to establish the basis of the alleged offence, for predominantly the same reasons and conclusions the majority of the failures as particularised were proven.

## Defences under Section 53 of the OHS Act

### *Did the defendants do all that was reasonably practicable?*

A defence under Section 53(a) requires the defendant to meet the objective test as to whether it was reasonably practicable for the defendant to have complied with the Act. In *WorkCover Authority of NSW (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd* (2001) 110 IR 182 at 204, Walton J said that in assessing the merits of whether a defendant had done all that is reasonably practicable, requires a:

*balancing of the nature, likelihood and gravity of the risk to safety occasioning the offence with the costs, difficulty and trouble necessary to avert the risk.*

In that respect the corporate defence failed.

Staunton J found that it was always reasonably practicable for the defendants to:

- plan by way of risk assessment for the development of 50/51 panel;
- carry out an assessment of the risks to the health, safety and welfare of the employees and mine workers in the event of an inrush of water and/or dangerous gases;
- plan by means of test drilling to establish the location and the extent of the Young Wallsend coal workings, prior to the development of the 50/51 panel;
- allow or not, as the case may be the operation and use of the continuous miner at the face of 'C' heading;
- prevent mining operations in the area of 50/51 panel where it had failed to ascertain the location and extent of the Young Wallsend coal workings;

- ensure that there was an adequate barrier between where the employees were working and the Young Wallsend coal workings;
- test drill, or cause test drilling to be performed to locate Young Wallsend coal workings;
- inform deputies, the employees and other mine workers that 50/51 panel was heading towards the Young Wallsend coal workings;
- inform deputies, the employees and other mine workers that the Young Wallsend coal workings were full of water and under a head of pressure; and
- instruct deputies, the employees and other mine workers to be vigilant in looking for signs of water make whilst working in 50/51 panel.

### *Defence that the corporation had no control*

The second prong of the defence at Section 53(b) provides that it shall be a defence to any proceedings for the person to prove that:

- (b) *the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.*

The defendants sought a defence under this head on the basis that the existence and availability of information on the location and extent of the Young Wallsend Coal workings was not within the control of the defendants.

The court rejected that submission. It held that with the exception of one file, all other relevant information that went to researching the location and extent of the Young Wallsend Coal old workings was within the control of the defendants, in that it was readily accessible by them. Firstly, the Court observed that the defendants had the resources and personnel to enable them to carry out that task. Secondly, however, the Court was of the view that while it was correct for the defendants to assert that the errors made by the Department of Mineral Resources were not under the control of the defendants, that such a view missed the point.

*The defendants were not being held liable for the errors made by the department, but for their failure to properly research the location and extent of the workings and the consequences that flowed as a result.*

## Individual defendant's liability

The decision in Gretley has caused some degree of consternation among those persons engaged within the mining industry who hold statutory appointments.

The actions commenced against the eight personal defendants comes about by virtue of Section 50(1) of the *Occupational Health and Safety Act 1983*, that states:

- (1) *Where a corporation contravenes, whether by act or omission any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, shall be deemed to have contravened the same provision unless he or she satisfies the court that...*
- (b) *he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or*

- (c) *he or she, being in such a position used all due diligence to prevent the contravention by the corporation.*

The central issue for the court to determine was whether the individual defendants were concerned with the management of the corporation beyond a reasonable doubt, and if so did they exercise due diligence to prevent contravention of the Act.

It was the view of Staunton J, that the decision-making authority and the inherent responsibility of the employee must affect the whole corporation or a substantial part of the corporation, for the employee to be 'concerned in the management of the corporation'. There must be more than participation in the activities relevant to the responsibility and work undertaken at the mine.

*In other words for an employee to be 'concerned in the management of the corporation' their responsibilities must go beyond the statutory functions under the Coal Mining Regulation Act.*

### **Were the personal defendants concerned in the management of the corporation?**

In the case of the Gretley mine manager he was appointed as a general mine manager as well as a statutory mine manager. The significance of this according to the court, was the corporate title intended to encompass a broader range of duties associated with the total management of the business, far more than just the statutory function.

For example, there was evidence of the general mine managers' roles in the total management of the corporation. He attended and participated in meetings within the broader management structure of the corporate parent Oakbridge, and as part of that role was involved in the marketing, financial, direction and policy decisions of the corporate parent.

In addition, the Court heard that the general mine managers at Gretley implemented and oversaw the corporate safety meetings of Oakbridge, forming complex safety policies at various Oakbridge mines, including Gretley.

All of these responsibilities that were inherent in the role of the general mine manager, provided evidence that the position was one that was concerned with the management of the corporation. Yet that in itself is insufficient to establish a personal defendant. To do so requires a personal responsibility in the management of the corporation that includes some practical connection with the causal act or omission of the corporation.

*In the case of the general mine managers, their practical connection with the corporate defendant's failure to properly research the location and extent of the YWC old workings was established when they had signed applications for miniwall approval to the Department of Mineral Resources, where the application mentioned that the Borehole Seam workings are 'full of water' and 'don't pose a danger to Gretley workings.'*

#### **Role of surveyor**

In determining whether the Gretley mine surveyor was concerned with the management of the corporation, the court considered the duties of the surveyor as contained in Clause 8 of the *Coal Mines Regulation (Survey and Plan) Regulation 1984*.

Particularly relevant were the duties located at subclauses (c), (f) and (g) as follows:

- (c) *draw attention of mines' employees or officials to any neglect or deviation from centres, marks, or instructions given, and*

*shall report to the manager of the mine any deviation considered by the mine surveyor excessive or outside deviation limits set by the manager...*

- (f) *prepare, or supervise preparation of all plans, drawings and sections required to be prepared or kept by this Regulation or Surveying and Drafting Instructions and shall certify the accuracy of all such plans, drawings and sections in writing thereon*
- (g) *where the mine surveyor has any doubt as to the accuracy of any plans, drawings or sections of the mine not prepared by the mine surveyor, or under the supervision of the mine surveyor, which may have an effect upon the working and operation of the mine or the safety of persons at the mine, draw such doubt to the attention of the manager of the mine.*

In terms of the first tranche of the management test, the court determined that the mine surveyor had certified the accuracy of the incorrect mine plans. These plans were then utilised in supporting decisions taken at management level of the organisation to depict proposed future mining activity and the extent of current workings, and workings that have been abandoned.

This was sufficient for the court to determine that Gretley's mine surveyor was concerned in the management of the corporation. The Court was also of the view that the mine surveyor had a practical connection, through decision making and advice, between the corporate defendants and the primary failure of the corporate defendants to properly research the location and extent of the YWC old workings.

#### **Role of under manager**

In determining whether Gretley's under managers were concerned with the management of the corporation, the court looked to the statutory responsibilities of the under manager as contained within Section 41 of the *Coal Mine Regulation Act 1982*.

There was no evidence of any delegation of managerial responsibility by the mine manager to the under managers in accordance with Section 56 of the Act. In addition, Clause 9 of the *Coal Mines Regulation (Managers and Officials – Underground Mines) Regulation 1984* causes the under managers to be responsible for mine safety only to the extent of the under managers' jurisdiction. On that basis, the under managers were not held personally liable.

### **Due diligence required to avoid contravention of Section 50**

The second prong of determining the case against the personal defendants once found to be concerned with the management of the corporation, requires an examination of the due diligence employed by those persons.

#### **The case of the mine manager**

In the case against the mine managers, the court held that evidence indicates they were in a position to influence the conduct of corporations regarding the contraventions of NWCC and Oakbridge already established under s15(1) and s16(1) of the *Occupational Health and Safety Act 1983*.

It was established that the mine managers did not use all due diligence to prevent contravention of the Act by either NWCC or

Oakbridge. The mine managers signed and approved plans and applications regarding approved plans of the previous mine surveyor of Gretley when the original applications were made to the DMR in 1994 and 1995.

These plans made by the previous mine surveyor incorrectly depicted on Sheet 3 the presumed old workings of YWC. Therefore the court held that the mine managers failed to discharge their statutory responsibilities under Section 37 of the Act and Part 3 of the *Coal Mines Regulation (Methods and Systems of Working – Underground Mines) Regulation 1984*.

In addition, the mine managers advised and were involved in corporate decision making through their participation in Oakbridge's corporate strategic planning meetings regarding proposed mining activities at Gretley.

The Court found that Section 37 (2)(h) of the Act is quite clear with respect to the statutory responsibilities of the mine manager. That person must ensure that he or she possesses all available information regarding surroundings, the actual mine, and safety. The court held that it was clear that as the under managers at Gretley did not know of the extent of the YWC old workings and the potential for inrush of water, that the mine managers must have failed in meeting their obligations under the Act.

On this basis, Staunton J held that the mine managers did not exercise due diligence to prevent the contraventions by NWCC and Oakbridge occurring.

### *The case of the Surveyor*

In assessing whether the mine surveyor exercise all due diligence, his Honour stated that by certifying the accuracy of mine plans relevant to Gretley, that the mine surveyor took on the liability this invites. According to Staunton J, it was clear that the mine surveyor did not use all due diligence to research the correct location and extent of the YWC old workings to prevent contraventions by NWCC and Oakbridge.

In certifying significantly incorrect mine plans that had been made before his employment, although the mine surveyor isn't liable under the planning, research and assessment charges, he does incur liability for not exercising due diligence.

The court established that based on such evidence, that it was apparent that the mine surveyor, being involved in the management of the corporation, did not exercise due diligence to prevent NWCC and Oakbridge from contravening sections 15 and 16 of the *Occupational Health and Safety Act 1983*.

### **Lessons learnt from Gretley thus far**

The ultimate result of Gretley is unlikely to be known for some time. What is clear though from this potted analysis of the issues is that the expansive nature of the safety and health responsibilities under the coal mining safety and health law cannot be understated. The implications for the coal mine operator and the statutory delegates such as the site senior executive are significant.

Consider for example, the implications of the planning activity, the reliance on departmental supplied mining plans and the spiralling effect that the inaccuracies of the mine plans produced on this occasion. Of significance also in this case, is the impact on the individual statutory appointee, particularly where that person is concerned with the management of the corporation.

While no doubt the further appeal against this decision is likely to produce a similar smorgasbord of issues to consider, the lesson to be learnt by all stakeholders is the sheer extent and significance of the mining safety and health management system.

## **THE GRASSTREES DECISION: A QUESTION OF INTERPRETATION**

By way of contrast and in a much more concise way, I wish to turn to the issues raised in the case of *Construction, Forestry, Mining and Energy Union v State of Queensland and AngloCoal (Grasstrees Management) Pty Ltd*.

The Grasstrees mine is located near Middlemount in Central Queensland.

The central issue in the Grasstrees' dispute was whether the underground mine required a third shaft in order to comply with Section 296(1) of the *Coal Mining Safety and Health Regulation 2001 (Qld)*.

Section 296(1) provides:

*The site senior executive must ensure the mine has at least two trafficable entrances ('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*

*The applicant's case was that the two shafts at the mine, while trafficable entrances and thereby escapeways, were not adequately separated because a reasonably foreseeable event happening in one of the escapeways, could affect the ability of person to escape through the other escapeway.*

Put simply, did the two present escapeways, one of which was a ventilation shaft only, have to be separated by a third escapeway for health and safety purposes in the event of one of the escapeways being unavailable.

### **Determining an acceptable level of risk**

In considering this question, the Supreme Court of Queensland turned to a number of fundamental principles. Firstly, what is an acceptable risk of injury?

Section 29(2) of the *Coal Mining Safety and Health Act 1999* sets out what is an acceptable level of risk from a mining operation.

*In determining whether risk is within acceptable limits, regard must be had to:*

- a. the likelihood of injury to a person rising out of the risk; and*
- b. the severity of injury or illness.*

At the heart of this issue, was the applicant's concern of the incapacity of the existing system in the case of fire. That is, that a fire in the intake shaft would contaminate the air by producing smoke, reducing the oxygen content of the air and producing carbon monoxide, with the result being that the contaminated air would inevitably flow through the roadways and the exhaust shaft.

In assessing this issue, the Court turned to Section 37 of the Regulation that deals with the requirements for a coal mine's safety and health management system, including issues relating to fire prevention and control, as well as the standard operating procedures. The legislation makes it clear that a risk of injury being at an acceptable level is dependant on the risk's likelihood and severity.

*The case for the applicant was that if the two escapeways in a mine are not adequately separated, in the event of a fire, the likelihood of injury to a person arising out of that risk, and the severity of that injury, are very real.*

## Determining a reasonably foreseeable event

The real issue for the court to determine was whether the possibility of a fire down the Grasstrees' mine shaft was a reasonably foreseeable event.

McMurdo J held that whether a potential event is an unacceptable risk depends on the nature and effectiveness of relevant controls. He said that a fire is an event, but no unreasonable risk is assumed if recommended controls are implemented.

It was his Honour's view that whether a reasonably foreseeable event is a risk is a subjective test.

In this regard the court scrutinised the specialist evidence from the Minerals Industry, Safety and Health Centre at the University of Queensland.

Despite the fact that the court heard evidence that 2000 litres of fuel burning within the fuel pod would take some 280 minutes to completely combust and that such a fire would not adversely affect the ability of persons to exit the mine via the exhaust shaft, the court nonetheless was of the view that such a risk of injury for workers at the mine, was foreseeable.

In reaching his view, his Honour considers the application of the High Court (1980) decision in *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

## Applying the test in *Wyong Shire Council*

In that case, the High Court found that:

*When we speak of a risk of injury as being foreseeable, we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting the risk is not one that is far fetched or fanciful (at 42).*

Despite the fact that the company's evidence was that the ignition of fuels within or spilt from the fuel pod could occur only through a combination of several human and/or mechanical failures, the Court decided that the event of a fire remained a real possibility unless safety mechanisms such as welding were regarded as incapable of failure through human error.

It was his Honour's view that the transportation of fire burning fuel through the intake shaft in the mine is a foreseeable event constituting a risk.

McMurdo J, stated:

*The fact that the applicant's interpretation of s 296 could require in an individual case, more than is necessary to achieve an acceptable level of risk does not necessarily demonstrate that the interpretation is incorrect. Rather, the fact that the regulation requires more than is reasonably necessary in an individual case could reflect a preference for certainty and for the avoidance of dangerous conditions from an erroneous judgment by the mine operator about whether the mine does represent an acceptable risk (at 48).*

## Conclusions of the Court

It was the conclusion of the court that a fire in the intake shaft was a reasonably foreseeable event. Such an event could contaminate the airways throughout the mine and its exhaust airway, at least to the extent of requiring the protective equipment to be worn at all times by a person who was escaping until that person was safe at the surface. This in turn according to the Court, had the potential to substantially, rather than negligibly, affect the utility of the escapeway.

The court concluded that the two entrances at the mine were not separated as required by Section 296(1) of the Regulation and as a

consequence, the ultimate result on this occasion was that a third shaft was constructed at a significant cost to the company.

## CONCLUSIONS

So what are the conclusions that are to be drawn from all of this? In the case of Gretley what can be absorbed to the extent that one can learn from the decision at the present time, is that the responsibilities and obligations under the law are far reaching, overlapping and interconnected. The very notion of derivative charges that takes place as a flow on from an earlier act or omission shows the unrelenting way that the responsibilities and liabilities under the law can be determined and prosecutions pursued.

Gretley also serves as a timely way for all those charged with statutory obligations to consider the significance of what they do and their own personal exposures under the law. The Grasstrees decision on the other hand, shows that the safety and health law can be open to much debate as it is interpreted for implementation in the workplace.

What the legislation is based on is an environment of social partnership between government, industry and unions to forge common goals within a framework that recognises the pre-eminence given to safety and health, while maintaining economic incentives. An outcome based approach to the legislation assumes that the performance of the parties will take place in a cooperative fashion.

Perhaps in the scheme of things, to have the courts interpret the legislation, as a point of last resort is still the better approach than a system of overly prescriptive regulation. That may be the case, providing the lessons from the decisions of the court are built back into the understanding of the parties and that the intractability of the parties may be softened against an environment that shows time and time again, the benefits of consultation and cooperation, rather than conflict and chaos.

## REFERENCES

- Coal Mines Regulation Act (NSW), 1982.
- Coal Mining Safety and Health Act (Qld), 1999.
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- Construction, Forestry, Mining and Energy Union v Oaky Creek Coal P/L, Supreme Court of Queensland, 28 February 2003.
- Construction, Forestry, Mining and Energy Union v State of Queensland and AngloCoal (Grasstrees Management) Pty Ltd, Supreme Court of Queensland, 18 June 2004.
- Industrial Relations Commission of New South Wales, 2004. Stephen Finlay McMartin v Newcastle Wallsend Company Pty Limited and Others, Industrial Relations Commission of New South Wales in Court Session, 9 August 2004.
- Occupational Health and Safety Act (NSW), 1983.
- Safety and Health at Work, Report of the Committee, 1970-1972, HMSO, Cmnd 5034, 1972.
- WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd, 110 IR 182.

## END NOTE FOLLOWING DECISION 11 MARCH 2005

On 11 March 2005, Staunton J handed down his decision in relation to the penalties in this matter.

Newcastle Wallsend Coal Company and Oakbridge together were fined \$1.46 million, that was moderated downwards based in accordance with sentencing law.

The mine manager at the time of the accident and the two other personal defendants were fined \$42 000 and \$30 000 each respectively.

In reaching its decision the court considered the scope of the defendant's ongoing obligations and the positive cooperation that has taken place on behalf of the companies.