Projects currently being assessed

There is no automatic exclusion of projects already being assessed. The Act provides that development may be declared to be a project to which Part 3A applies even though action has been taken under Part 4 or Part 5 of the *EP&A Act* before the declaration, for the purposes of authorising the carrying out of development.

***Mining Act and Petroleum Onshore Act* changes**

The provisions in the *Mining Act* 1992 that protect holders of mining leases and prospecting operations from review under the *EP&A Act* will be repealed. Those provisions include sections 65(3), 74, 239 and 381. Similar provisions in the *Petroleum (Onshore) Act* 1991 will also be repealed. Transitional provisions in regulations are expected to deal with existing operations which had this protection.

COAL INDUSTRY SAFETY BREACH APPEALS CHALLENGE OHS LAWS*

Stephen Finlay McMartin v Newcastle Wallsend Coal Company Pty Limited & others ([2005] NSWIRComm 31 (unreported, IRC of NSW in Court Session, Staunton J, 11 March 2005)

Morrison v Powercoal Pty Ltd & Anor (No. 3) ([2004] NSWIRComm 61 (unreported, IRC of NSW in Court Session, Full Bench, 7 March 2005))

Morrison v Coal Operations Australia Limited (No 2) ([2005] NSWIRComm 239 (unreported, IRC of NSW in Court Session, Full Bench, 29 April 2005)

Occupational Health and Safety Act – Sentencing – Liability of companies – Liability of individuals – Appeals against criminal convictions – Constitutional Validity – Jurisdiction of Industrial Relations Commission

A recent series of cases in the NSW Industrial Relations Commission in Court Session convicting coal mining companies, and individuals, for safety breaches have been appealed to the NSW Court of Appeal. The appeals challenge the correct interpretation of the *Occupational Health and Safety Act 2000* (NSW) (OHS Act) and the jurisdiction of the Commission to hear criminal prosecutions. The absolute nature of the duties under the OHS Act and the uncompromising standards required to meet those duties or establish a defence may therefore come under scrutiny.

The appeals concern convictions in the Commission relating to incidents at Xstrata's (previously Oakbridge's) Gretley mine,[1] Centennial Coal's (previously Powercoal's) Awaba mine and Coal Operations' Wallarah mine.

GRETLEY: NEWCASTLE WALLSEND COAL COMPANY

The first decision on appeal is from a judgment of Justice Staunton convicting Newcastle Wallsend Coal Company Pty Limited (NWCC) which operated the Gretley mine, its parent

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1. See T Sebbens " Gretley Prosecution - Mine Managers and Surveyor Guilty of Safety Breaches " (2004) 23(3) *ARELJ* 299

company Oakbridge Pty Limited (OPL), the mine manager at the time of the incident, the predecessor mine manager, and the mine surveyor over their roles in the Gretley mine disaster.[2] The disaster occurred on 14 November when a continuous miner holed into the old workings of Young Wallsend mine which had been declared abandoned in 1928, causing an inrush of water and dangerous gases from these workings resulting in the death of 4 mine workers and exposing others to risk. Charges were laid against NWCC and OPL for failing to adequately research the extent of the old workings, to put in place adequate systems to assess the risk of inrush and to manage that risk in undertaking mining operations.

Decision of Staunton J

Her Honour found the NWCC and OPL guilty of failing to undertake adequate research in planning the mining, particularly in failing to access original drawings from the Department of Mineral Resources (DMR, now the Department of Primary Industries) (DMR) which would have indicated the extent of the Young Wallsend old workings which was the genesis of the fatalities of the four mine workers. Justice Staunton also found the defendants guilty of failing to perform a risk assessment in relation to the mining work which exacerbated the risk to persons working on the development roadway. Her Honour then went on to find the two mine managers and the mine surveyor as being concerned in the management of NWCC and OPL, deeming them to have committed the same offences as the corporate defendants.[3]

Sentencing

In a subsequent decision on sentencing, her Honour fined both NWCC and OPL $730,000 each. This consisted of fines of $400,000 for offences relating to the planning and research of the mining work, $250,000 for the system of work offences in the days leading up to the incident and $80,000 for offences on the night shift on which the incident occurred. Her Honour held that the roles of NWCC and OPL were not able to be distinguished and therefore the culpability of each company was equal. In considering the need for general deterrence her Honour found that this had already been achieved by the dramatic effects the disaster had had in the industry. The incident led to a combined judicial and coronial inquiry by the Court of Coal Mines Regulation. The recommendations of the inquiry[4] in turn led to amendments to the *Coal Mines Regulation Act 1983* (NSW) (CMRA) in 1998[5] and the Department of Mineral Resources (DMR, now the Department of Primary Industries) being restructured. Her Honour therefore focussed on specific deterrence for NWCC and OPL, now owned by Xstrata, which continued to operate in "an industry replete with risks to safety on an ongoing basis".

The culpability of the defendants was mitigated by the role the DMR played in providing the drawings in relation to the Young Wallsend old workings which were inaccurately redrawn by the DMR and then provided to, and relied upon by, the defendants. Her Honour held that the DMR's role in providing the drawings "implicitly conveyed to the defendants that they … were correct. In that sense the defendants were 'lulled into a false sense of security'" (at [60]). This was compounded by the DMR approving NWCC's development application for the mining work.

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2. *Stephen Finlay McMartin v Newcastle Wallsend Coal Company Pty Limited & others* [2004] NSWIRComm 202 (unreported, Industrial Relations Commission of NSW in Court Session, Staunton J, 9 August 2004).
3. Under s 50(1), now s 26(1) of the OHS Act
4. See T J Wassaf "Legal Issues Arising from the Staunton Report on the Gretley Colliery Tragedy of 14 November 1996" (1998) 17 *AMPLJ* 345
5. *Mines Legislation Amendment (Mines Safety) Act 1998* (NSW)

In relation to the individuals deemed to have committed the same offences as NWCC and OPL, the predecessor mine manager was fined $30,000, the mine manager in charge at the time of the incident was fined $42,000 and the mine surveyor was fined $30,000. Justice Staunton held that the individual defendants were not as culpable as NWCC and OPL. Her Honour stated that the mine managers' culpability had to be viewed in the context of them having ultimate statutory responsibility for the safety of the mine under the CMRA and their roles in facilitating a workplace free of risk to safety on behalf of NWCC and OPL. Further, they had key roles to play in the manner in which the work was researched and undertaken. Their culpability was mitigated, however, by their reliance on the opinion of the mine surveyor and their commitment to safety and involvement in ongoing safety initiatives. For one mine manager, his having only recently taken up his role and not having been involved in the planning and research for the work was taken into account.

Her Honour found that the mine surveyor's culpability should be established by the steps taken, or omitted, in researching and verifying information on the location of the Young Wallsend old workings. Of significance to her Honour was that the mine surveyor had a duty to "bring an independent, professional and critical appraisal to the process of checking and verifying" the accuracy of the mine plans supplied by the DMR (at [256]) and the reliance of the mine managers' placed on this appraisal.

Her Honour ordered NWCC and OPL to pay ninety percent of the prosecutor's costs which will be substantial given the length of the proceedings.

Appeal to Court of Appeal and Application to Stay Penalties

NWCC, OPL and the individual defendants appealed the convictions to the NSW Court of Appeal and also sought a stay of the penalties, but not the convictions, pending determination of their appeals. They argued that the fines should not be required to be paid until the appeals were finalised.[6] Vice-President Walton J, held that the penalties should not be stayed for NWCC and OPL rejecting their argument, amongst others, that if the fines were paid there was risk of the prosecutor not repaying them if the appeals were successful as the prosecutor was not the Crown, but an individual authorised by the Crown to commence the prosecutions.

His Honour however noted that the grounds of appeal were "plausibly arguable". His Honour went on to stay the fines against the individual defendants, on the basis that their payment would create a significant level of financial hardship. His Honour required the individuals to "diligently prosecute their appeals" as a condition of the stay in circumstances in which the grounds of appeal were "at least arguable" (at [19] and [27]). His Honour noted that in relation to the mine surveyor being found to be a 'person concerned in the management' of a corporation, that there were "substantial matters to be reviewed by an appellate court" (at [19]) on that question.

POWERCOAL

The second decision under appeal, is from a judgement of the Full Bench of the Commission which convicted Powercoal Pty Ltd (now owned by Centennial Coal) and a mine manager in relation to an underground roof collapse at the Awaba mine resulting in fatal injuries to an operator of a continuous miner.[7]

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6. *Porteous & Others v Inspector McMartin* [2005] NSWIRComm 122 (unreported, IRC of NSW in Court Session, Walton J, Vice-President, 2 May 2005);
7. *Morrison v Powercoal Pty Ltd & Anor (No. 3)* [2004] NSWIRComm 61 (unreported, IRC of NSW in Court Session, Full Bench, 7 March 2005)

Powercoal was in the process of pillar stripping to obtain residual coal and pillars and then retreating via supported roof to the exit of the mine under an approval from the DMR. Following pillar stripping, a reduced pillar called a 'stook' was left to support the roof. In July 1998 pillar stripping was being conducted in a panel of the Awaba mine known as Panel 304. The roof between two stooks which were to be left in Panel 304 was weak due to the roof being made of conglomerate rock. The stook was reduced beyond its safe dimensions, a process known as "robbing the stook", and the weak roof collapsed. The roof fall extended over to the point where the mine worker operating the continuous mining machine was working. He was struck by falling rocks and suffered fatal injuries.

Powercoal, the mine manger and deputy manager were charged under the OHS Act for failing to assess the safety of the roof in Panel 304, failing to record the history of the roof conditions in the area and failing to notify employees of these historical conditions. Powercoal claimed it had suitable systems in place to prevent the incident including training employees to identify roof instability and requiring regular checks to be carried out including sight, sound and vibration assessment.

Decision of Peterson J

At first instance, Justice Peterson found Powercoal and the mine manager not guilty of any breach of the OHS Act,[8] as Powercoal could not have reasonably foreseen the weaknesses in the roof or the additional risk caused by robbing the stook. As Powercoal was found not guilty, the mine manager could not be deemed guilty. In a separate judgement the mine deputy in charge of the area, who pleaded guilty, was fined $1,275 for making the decision to rob the stook, resulting in the roof fall.[9]

Appeal to Full Bench

The prosecutor appealed against the acquittals and the Full Bench, consisting of Vice-President Walton J, Boland and Staff JJ, overturned Peterson J's decision and found Powercoal and the mine manager guilty.[10] The Full Bench found that Powercoal had failed to implement a system of recording and notifying employees of roof problems and roof history and there was a causal nexus to this failure and the risk to safety. Their Honours held that Powercoal was aware of warning signs of a roof fall running into a work area during pillar stripping and should have taken measures to prevent it.

Further, the Full Bench found there was a failure to adequately assess the risk of a roof fall and a failure to avert this risk. Whilst 'sounding the roof' was the only known and accepted means of assessing the roof stability, their Honours found that this system was inadequate to ensure the employees' safety. There had been an over reliance on visual inspection and sounding methods which had detracted from a more systematic and broader approach. The Full Bench rejected Powercoal's argued defence that it was not reasonably practicable to comply with the OHS Act as the risk of a roof fall was not foreseeable as there were no means available to detect the weakness in the roof. They stated it was not a good answer to the charge for an employer "to contend that it

8. *Morrison v Powercoal Pty Ltd* [2003] NSWIRComm 342 (unreported, IRC of NSW in Court Session, Peterson J, 21 November 2003)
9. *Rodney Morrison v Gregory Alan Gardner* [2003] NSWIRComm 440 (unreported, IRC of NSW in Court Session, 10 December 2003)
10. *Morrison v Powercoal Pty Ltd & Anor* [2004] NSWIRComm 297 (unreported, IRC of NSW in Court Session, 18 November 2004)

was unable to assess whether something was safe because there was no method or technology available to do so" (at [127]).

The Full Bench also stated that it was a wrong approach to the OHS Act that "in an industry such as underground coalmining there is an acceptable level of risk", but rather the employer must 'guarantee, secure or make certain' there is no risk to employees (at [104]). Their Honours held that there were measures available to identify the risk, and that there was nothing impracticable in terms of money, time and trouble to prevent Powercoal in ordering the mining to cease until an adequate assessment of safety of the roof had been carried out.

The Full Bench also found that the mine manager was concerned in the management of Powercoal, particularly due to his statutory safety role under the CMRA.

Appeal to Court of Appeal and Application to Stay Penalties

Powercoal and the mine manager appealed to the NSW Court of Appeal to quash the findings of guilt by the Full Bench,[11] and thereupon sought a stay of sentencing from the Commission[12]. The appellants argued their application on the basis that the Court of Appeal would determine the jurisdiction of the Commission to hear and determine criminal proceedings. Secondly, they argued that if the Commission proceeded to sentencing, section 179 of the *Industrial Relations Act 1996* (NSW), which makes the Commission's decisions not reviewable by any other court, would have an irreversible affect on their prospects of a successful appeal in the Court of Appeal.

The Full Bench refused to stay the sentencing hearing, stating that the arguments to support the stay application had "no merits whatsoever" and arose from a challenge to the Commission's jurisdiction which was "opportunistic" and an "afterthought". The Full Bench stated that it would not prevent itself from proceeding to sentencing as a "legal artifice designed to avoid the operations of s 179" (at [10]). It stated that vacating the hearing would result in an avalanche of similar applications to stay hearings pending the outcome of the Court of Appeal proceedings from a decision of the Full Bench. The Full Bench also noted that the fact that there was no further avenue of appeal did not create any special circumstances upon which to seek a stay.

Sentencing

On sentencing, the Full Bench fined Powercoal $200,000, being $100,000 for each of the 'range of assessment' and 'recording and history' offences.[13] It described Powercoal's failure to provide an adequate system for assessing the safety of the roof as a "lapse on its part in an otherwise sound occupational health and safety regime at the mine" (at [85]). A conviction was not entered for the mine manager pursuant to section 10 of the *Crimes (Sentencing Procedures) Act 1999* (NSW) and the charge was dismissed against him. The Full Bench exercised its discretion in relation to the mine manager not to enter a conviction due to the "extraordinary and highly exceptional circumstances" (at [143]). These circumstances included that the mine manager had only been in the position for a short period of time and had limited opportunity to be completely familiar with the mine operations, he had actively managed safety, he had found nothing in the reporting system

11. *Peter Lamont Foster v Industrial Relations Commission of New South Wales and Rodney Dale Morrison; Powercoal Pty Ltd v Industrial Relations Commission of New South Wales and Rodney Dale Morrison* – Court of Appeal Matters 40062 and 40063 of 2005
12. *Morrison v Powercoal Pty Ltd & Anor. (No. 2)* [2005] NSWIRComm 6 (unreported, IRC of NSW in Court Session, 2 February 2005)
13. *Morrison v Powercoal Pty Ltd & Anor (No. 3)* [2004] NSWIRComm 61 (unreported, IRC of NSW in Court Session, Full Bench, 7 March 2005)

to alert him to risk of roof instability, and he was not involved in the planning stages of the pillar stripping.

COAL OPERATIONS

The third case under appeal is a decision of the Full Bench of the Commission concerning convictions entered to the Court of Appeal against Coal Operations for an incident in July 1998 at its Wallarah mine.[14] On 5 and 6 July 1998, a work team was mining an area of the mine in close proximity to and running at a shallow angle more or less parallel with a fault zone. The work team hit the fault and reported it to the undermanager who 'sounded' by striking it with a bar to assess its stability, and determined it to be ''very competent'. A roof fall occurred about an hour after this assessment.

Later in the shift, two mine workers undertaking roof bolting to support the roof, experienced a second roof fall. The workers tested the roof with a metal bar and considered it competent. After this second roof fall, continued the roof bolting, which required them to go out and work under unsupported roof after sounding the roof and finding it competent to continue roof bolting. This was done in accordance with the support rules which had been approved by the DMR. Whilst undertaking this work a third fall occurred which buried one worker causing him fatal injuries. The fall also pinned the legs of the second worker causing multiple fractures.

The minimum support rules approved by DMR provided amongst other things that workmen were not to proceed beyond the last test hole or temporary support unless the roof had been tested by sounding with a metal bar and found secure. The minimum support rules also provided that the mining official may direct additional support be installed "when roof conditions deteriorate". The DMR laid two charges on Coal Operations alleging that they had failed to have an adequate system for the erection of roof support and had failed to adequately assess the stability of the roof.

Decision of Peterson J

At first instances, Justice Peterson[15] found Coal Operations not guilty on the basis that the support rules were established under the CMRA and no work done in accordance with them could be an offence under the OHS Act, pursuant to section 33(3), as it was an activity "expressly permitted" to be done under associated safety legislation

Appeal to Full Bench

On appeal, a Full Bench, consisting of President Wright J, Boland and Staunton JJ, overturned Peterson J's decision.[16]

At the appeal, Coal Operations argued that the minimum support rules permitted the two workmen to be performing the work under an unsupported roof and the minimum support rules had been approved by DMR. On this basis, Coal Operations argued that there could be no finding of guilt because section 33(2) of the OHS Act provides that a person is not guilty of an offence where the

14. *Morrison v Coal Operations Australia Ltd (No 2)* [2005] NSWIRComm 96 (unreported, IRC of NSW in Court Session, Full Bench, 29 April 2005)
15. *Rodney Dale Morrison v Coal Operations Australia Limited* [2003] NSWIRComm 249 (unreported, IRC of NSW in Court Session, Peterson J, 15 August 2003)
16. *Rodney Dale Morrison v Coal Operations Australia Limited* [2004] NSWIRComm 239 (unreported, IRC of NSW in Court Session, Full Bench, 10 November 2004)

act of the person was permitted to be done. The Full Bench found that although section 33(2) of the OHS Act had to be strictly construed, there could be no finding of guilt based solely on this charge, given that the support rules had been approved by DMR and this approval therefore triggered the operation of section 33(2) of the OHS Act.

The Full Bench found that section 33(2) provided a very limited exception and that even though the support rules permitted workers to be exposed to a risk, this was based on the premise everything to avoid that risk had been done. However, this did not exculpate the defendants to an "overall system of work" charge. The Full Bench considered that this system of work, which placed employees under unsupported roof, undeniably exposed the employees to risks in using the roof bolter under unsupported roof.

However the DMR also alleged that the system of work in relation to erection of roof support did not require the provision of temporary support immediately adjacent to the part of the roof being drilled or bolted. Given the indicia of an unstable roof existing at the time, the Full Bench upheld this allegation of the DMR and found that the failure to provide for temporary support was directly related to the risk of roof fall.

Further, the DMR alleged that the system of work in relation to the erection of roof support was not sufficiently prescriptive in relation to unstable roof conditions. The Full Bench found that the minimum support rules were not sufficiently prescriptive as to what constituted unstable roof conditions and as to what was to be done, in any precise way, when unstable roof conditions existed. The Full Bench found that the failure of Coal Operations to sufficiently prescribe the system of work to be followed in identifying and dealing with unstable roof conditions was casually related to a risk of roof fall.

The Full Bench also found that the system of work in relation to assessing the stability of the roof structure was not sufficiently prescriptive in relation to the indicia of unstable roof conditions, and that it did not require that work cease below unsupported roof where indicia of unstable roof conditions were present.

Sentencing

On sentencing, [17] the Full Bench found that whilst the defendant's approach to safety was one of an employer who accepted its responsibilities for workplace safety and acted upon them in a comprehensive and plain manner, the offences were objectively serious and towards the upper middle of the penalty range available to be imposed.

Despite evidence that roof falls were, at most, "relatively rare", the Full Bench commented that the risk to safety that presented itself was "abundantly obvious" and that the likely outcome of the risk of roof fall when working underground is death and/or serious injury. Given the indicia of roof stability present at the time, the minimum support rules were not sufficiently prescriptive as to what constituted unstable roof conditions and what was to be done if such conditions existed. This lack of prescription as to assessment and support of a clearly unstable roof was held to have "undoubtedly allowed the workplace circumstances where the miners were working to deteriorate rapidly to one of the imminent risk to safety in the form of a roof fall."

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17. *Morrison v Coal Operations Australia Ltd (No 2)* [2005] NSWIRComm 96 (unreported, IRC of NSW in Court Session, Full Bench, 29 April 2005)

When determining sentence, the Full Bench took into account the need for general and specific deterrence. With no prior convictions under the OHS Act, penalties of $150,000 were imposed in relation to each of the roof support charge and the assessing roof stability charge. Taking into account the principal of totality, these penalties were later reduced from $300,000 to a total penalty of $200,000.

APPEALS TO THE NSW COURT OF APPEAL

The appeals of the Gretley, Powercoal and Operations convictions to the NSW Court of Appeal, if successful will have major implications for the operation of the OHS Act. The grounds of the appeals are firstly that the Commission lacks jurisdiction to hear and determine proceedings for an offence under the OHS Act because it is incapable of being granted a criminal jurisdiction. The OHS Act imposed criminal liability, with sentencing including fines and imprisonment for individuals.

Secondly, the appellants say that the OHS Act inappropriately shifts the burden of proof to the employer to prove that they have exercised all due diligence to prevent a contravention. The OHS Act, by establishing absolute liability, removes any need for intent (*mens rea*) for there to have been a criminal offence.

Thirdly, the appellants argue that section 179 of the *Industrial Relations Act 1996* (NSW), which provides that all decisions of the Commission are final and not appealable or reviewable, effectively removes any right of appeal to the High Court of Australia. As the constitution places the High Court at the apex of the nation's justice system, it is argued that such a provision is therefore unconstitutional.

Finally, the individuals claim that section 26 of the OHS Act which deems directors and "persons concerned in the management of a corporation", to have committed the same offences as the corporate defendant. Such a deeming provision, without more, does not lay a proper charge before the Commission upon which to make a conviction and any such conviction is therefore invalid.[18]

The NSW Government has intervened in both the appeals, with Minister Della Bosca stating that the government was doing so to "ensure the effective and practical safeguards to protect everyone in NSW workplaces".[19]

The appeals have been listed for hearing before a Full Bench consisting of Chief Justice Spiegelman, President (of the Court of Appeal) Mason, and Handley JA and is set down for hearing in July 2005. The outcome will be eagerly awaited by employers in NSW.

18. "Mining companies challenge NSW OHS laws" *OHS Alert*, 31 January 2005
19. "NSW Government intervenes in miners' challenge to OHS laws" *OHS Alert*, 7 February 2005