

## NEW SOUTH WALES

### NEW SOUTH WALES *MINE HEALTH AND SAFETY ACT 2004*\*

#### **Introduction**

The *Mine Health and Safety Act* has recently passed the New South Wales Parliament and presently awaits proclamation (and regulations).

The main new obligations are set out below.

#### **OH&S Act**

The Act will place special additional obligations, protections and procedures necessary for the control of particular risks arising from work at a mine. The obligations, protections and procedures in the *Occupational Health and Safety Act 2000* will continue to apply to mines. Compliance with this 2004 Act will not of itself be a defence for proceedings of an offence against the 2000 Act.

#### **Mines**

The *Mine Health and Safety Act* applies to the following places of work (called “mines” in this Act):

- (a) any place within a mine holding registered under the *Mining Act*;
- (b) any other place where the extraction of material from land for the purpose of recovering minerals or quarry product is carried out;
- (c) any place where the treatment of any such extracted material or the treatment of minerals or quarry product is carried out if that place is near the mine holding or at or near the other place from which the material, minerals or quarry product were extracted;
- (d) any place where the storage or treatment of waste resulting from the extraction of material from land for the purpose of recovering minerals or quarry product or the treatment of minerals or quarry product is carried out if that place is near the mine holding or is at or near the other place from which the material, minerals or quarry product were extracted;
- (e) any place where recycling operations are carried out, if that place is at or near the place (not within a mine holding) from which material was extracted from land for the purpose of recovering quarry product to be used in the recycling operations;
- (f) any place where the manufacturing of ready-mix concrete or bitumen hot mix is carried out if that place is at or near a place from which material was extracted from land for the purpose of recovering quarry product and is under the control of the same person and entity that has control of such place;
- (g) any place (not within a mine holding) where mining exploration is carried out;
- (h) any place (not within a mine holding) where the treatment of the zircon, rutile ilmenite, monazite and associated minerals is carried out;

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- (i) any place where offshore exploration or mining activities within meaning of the *Offshore Minerals Act 1999* is carried out;
- (j) any place where operations associated with the care, security or maintenance of a place referred to in paragraphs (b) to (i), (k) or (l) above are carried out during any time when activities or operations at that place are suspended;
- (k) any place where operations associated with the decommissioning or abandonment of a place referred to in paragraphs (b) to (j) above are carried out;
- (l) any place that has ceased to be within a mine holding or where an activity or operation referred to in paragraphs (b) to (k) above is or has been carried out and that is being rehabilitated.

Any building, structure, pit, shaft, drive, level, incline, decline, excavation or work that is at a place referred to in (b) to (l) above and in the course of construction and is intended to be a mine is taken to be part of the mine constituted by that place.

The Act is also to apply to the following places (also called a “mine”), whether or not they are places of work:

- (a) an abandoned mine (other than an abandoned mine used for the storage, treatment or disposal of waste that is not connected with an activity or operation referred to in (b) to (l) above);
- (b) any place described in (b) to (l) above during any time when activities or operations at that place are suspended;
- (c) any place on which drilling operations are carried out;
- (d) any land on which activities or uses take place that are the subject of or required to be the subject of a tourist or educational permit under Div 3 of Pt 6.

For the purposes of the above, a place is taken to be near a mine holding or other place if the relevant place is operating on an ongoing basis and the relevant place or any part of it is within 10 kilometres of the nearest boundary of the mine holding or other place.

The Minister may by notice to be published in the *Government Gazette* exclude a mine or place from the application of the Act.

This Act will not apply to coal mines which will be regulated by the *Coal Mine Health & Safety Act 2002*.

A mine holder is the person who is registered as the holder of a mine under s 163A of the *Mining Act* or is the person who holds a mining title under the *Mining Act* or mining licence under the *Offshore Minerals Act 1999* or is the person who otherwise has the right to extract minerals or quarry product from the land.

### **Mine Holder Obligation**

A mine holder must not undertake any work directly related to mining or allow any other person to undertake any work directly related to mining at a mine unless the mine holder has nominated one person who is the employer with the day to day control of the mine as the operator of the mine.

### **Nomination Process**

The mine holder may nominate itself as the operator. Where there is more than one separate and distinct mine at a place, the mine holder may nominate the person who is the employer with the day to day control of each such mine individually or collectively. The nomination must be in the prescribed form and must be made in writing to the chief inspector. The chief inspector may reject the nomination if he believes the nominated operator is not the employer with the day to day control of the mine or in other limited circumstances. If a nomination is rejected, it is taken not to have been made. The operator may be changed by another nomination made which is subject to the same rejection provisions.

### **Operator Obligations**

The operator of a mine must ensure that all persons working at the mine (including managers and supervisors) have the necessary skills, competence and resources to undertake their work safely and to ensure the safety of others.

The operator of a mine must ensure that work directly related to mining is not carried out by any person at the mine unless a mine safety management plan that complies with the Act and its regulations has been implemented for the mine and must ensure that work at the mine is carried out in compliance with that plan. Such work includes work undertaken by contractors who undertake work at the mine.

The mine safety management plan must provide the basis for the identification of hazards and of the assessment of risks arising from those hazards by the operator of the mine, for the development of controls for those risks and for the reliable implementation of those controls.

A mine safety management plan must include the document that sets out the management structure, the contractor management plan, the emergency plan and any other matter required by the regulations. Persons who work at the mine must be consulted during the preparation of the mine safety management plan and before its amendment.

The operator of a mine must communicate the mine safety management plan or a summary of the plan to the persons working at the mine, regularly review the plan including a process of consultation with those persons and ensure that no contractor starts work at the mine without having been provided with a copy of or with access to the plan for places of work relevant to the contractor.

The management structure of the mine to be included in the mine safety management plan must nominate persons within the structure by position and must outline their areas of responsibility and accountability, include competent persons with appropriate engineering competence and include competent persons to perform the functions of supervisors of the mine. An operator must take all reasonable steps to maintain the management structure including having others acting in, and the timely filling of, vacant positions in the structure.

The contractor management plan to be prepared as part of the mine safety management plan must state how the risks arising from the use of contractors at the mine will be managed. The operator must ensure that before work commences there is consultation with the contractor so that the contractors arrangements for safety management are consistent with the mine safety management plan.

The operator must ensure that the activities of the contractor are monitored to the extent necessary to determine whether or not the contractor is complying with the operator's mine safety management plan and with the requirements of relevant laws. If the contractor is not so complying

then the operator must ensure that the contractor is directed to take action immediately to comply with the relevant plan and laws. If a risk to the health or safety of a person arises because of such non-compliance the operator must ensure that the contractor is directed to stop work immediately and to not resume work until the relevant requirements are complied with unless an immediate cessation of work is likely to increase the risk to health and safety in which event the contractor must be directed to stop work as soon as it is safe to do so.

### **Emergency Management**

The operator of a mine must ensure that work is not carried out at the mine unless an emergency plan that complies with the Act is implemented for the mine. The emergency plan must contain an up to date plan of the mine and must adequately address emergency evacuation and any other prescribed matter. The operator must ensure that the emergency plan is reviewed and tested as soon as practicable after any emergency has occurred at the mine and whenever the mine safety management plan is reviewed and the persons who work at the mine must be consulted during that review.

### **Penalties**

An operator or former operator of a mine who contravenes whether by act or omission a provision of Division two is guilty of an offence and liable to penalties of up to 7,500 penalty units (a penalty unit is currently \$110) and in the case of individuals 750 penalty units or imprisonment for two years or both.

### **Duties of Employees**

An employee who works at any mine must comply with the mine safety management plan for the mine, must follow the operator's procedures for emergency as set out in the emergency plan for the mine and must, before commencing work and at frequent intervals during the employee's work day, carefully examine the working place and any machinery or system intended to be used so as to be satisfied that it is safe and must take any actions within the employee's responsibility to control a danger at the mine.

An employee who works at a mine must immediately report to the employee's immediate supervisor any situation that the employee believes could present a risk to health and safety and that is not within the employee's competence to control. The penalty for breach of this duty is up to 45 penalty units.

### **Right of Employees**

An employee who works at a mine has the right to remove himself or herself from any location at the mine when circumstances arise that appear to the employee, with reasonable justification, to pose a serious danger to the employee's own health, safety or welfare.

### **Duties of Persons in Management Positions**

A person who holds a management position at a mine must comply with the mine safety management plan for the mine and must inform the operator of the mine if the person is aware that the conduct of the mine does not conform with any laws.

A person who holds a management position at a mine must:

- (a) ensure that the workplace and work methods for which the person is responsible are safe;

- (b) ensure that hazards at the workplace for which the person is responsible are identified and that associated risks are controlled;
- (c) ensure that safety information concerning the workplace for which the person is responsible is communicated to relevant persons, particularly other supervisors at the change of a shift;
- (d) have regard to appropriate risk management standards; and
- (e) implement risk management practices in the areas that the person controls.

A person who contravenes this provision is guilty of an offence and liable to a penalty of up to 75 penalty units.

### **Duties of Contractors**

A contractor who works at a mine must comply with the mine safety management plan of the operator for the mine to the extent that it applies to work done by the contractor provided that a contractor may prepare its own safety management plan and if that is accepted by the operator then compliance with that plan only is required. However, that plan must be compatible with and contain an equivalent standard of risk assessment and provide for an equivalent standard of safety to the mine safety management plan for the mine prepared by the operator.

A contractor must not undertake work in a mine unless the contractor has undertaken an assessment of the risks associated with the work to be carried out by the contractor, has prepared a written safe work method statement that includes a copy of the assessment of those risks and has provided a copy of that statement to the operator of the mine. The contractor must ensure that all work carried out by the contractor at a mine is carried out in accordance with the safe work method statement prepared by the contractor. A contractor can be liable for penalties for contraventions of up to 7500 penalty units if a corporation or up to 750 penalty units or imprisonment for two years or both if an individual.

### **Stop Work Orders**

The Minister may issue stop work orders for up to 28 days if the Minister is of the opinion that any action is being or is about to be carried out by any person at a place of work that involves or is likely to result in a serious breach of the Act or the regulations or the *Occupational Health and Safety Act* or the regulations under that Act. The order may be extended for a further 28 days. These orders override any direction or notice previously issued by any person. If there is non-compliance with a stop work order then the Minister may cause the work to be carried out for the purpose of stopping the work and any expenses incurred are a debt due to the Crown. A person who without reasonable excuse fails to comply with the requirement imposed by a stop work order is guilty of an offence. In the case of a corporation, the penalty is up to 1500 penalty units and in the case of a continuing offence a further penalty not exceeding 750 penalty units for each day the offence continues. In the case of an individual, the penalty is up to 750 penalty units and in the case of continuing offence a further penalty not exceeding 375 penalty units for each day the offence continues.

### **Metalliferous Mines and Extractive Industries Competence Board**

A Metalliferous Mine and Extractive Industries Competence Board will be established by the Act which will be subject to the control and direction of the Minister. The functions of this Board are to oversee the development of competent standards for persons performing functions at mines that may impact on health and safety, to undertake initial and ongoing assessments of the competence of persons performing functions at mines and to advise the Minister on matters related to the competence required of persons to perform functions at mines.

### **Oversight of Mines**

There are provisions for the appointment of the chief inspector, inspectors, mine safety officers and investigators and their functions and powers are broadly similar to their current functions and powers.

### **Codes of Practice**

The Act contemplates mining industry codes of practice being prepared and approved by the Minister. If the Minister thinks appropriate, there is to be consultation with relevant persons and organisations on the code contents. Any such codes may be relevant in prosecutions of an offence under the Act.

## **JUST AND EQUITABLE COAL COMPENSATION\***

*The Nardell Colliery Pty Ltd v NSW Coal Compensation Board* (CCRT Number 1999/11)

*Just and Equitable Compensation – Coal Acquisition Act 1981 – Coal Acquisition (Re-Acquisition Arrangements) Order 1997*

### **Court of Appeal Final Orders**

The decision of the Court of Appeal has been reported in this Journal.<sup>1</sup> That report should be read in conjunction with this note.

The Court of Appeal made final orders on 30 March 2004 and those orders were that directions 3, 4 and 5 of the Coal Compensation Review Tribunal's decision on 17 April 2002 be set aside and that the Tribunal reconsider the matter according to law. The Court of Appeal also confirmed that in re-determining the direction relating to "r", the super royalty is to be included where applicable in the calculation of compensation and that so much of the front end payment as is attributable to coal appropriated from Nardell is to be included in the compensation calculation.

Nardell requested the Court of Appeal to make specific directions concerning the use of the WACC formula but the Court declined to do so saying it would go beyond the Court's role to do so in judicial review proceedings.

### **Tribunal Consent Orders**

As mentioned, directions 3, 4 and 5 were sent back to the Tribunal for reconsideration. The appeal before the Tribunal was finally disposed of on 7 September 2004 with Consent Orders. Those Consent Orders included the following directions to replace the original directions:

- “ 3. In respect of ‘r’ the Respondent is to apply a value based on 7/8ths of the relevant royalty rate for coal for each relevant period including super royalty where applicable in the calculation up to the commencement of the Mining Amendment (Royalties) Regulation 2004, and thereafter at a value determined by the Board based on 7/8ths of the royalty that in the Board’s opinion has been or will be payable in each relevant period for coal that in the Board’s opinion has been or will be extracted from the land

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<sup>1</sup> (2004) 23 ARELJ 15-16.