

SUPREME COURT OF QUEENSLAND

CITATION: *Woods v Newman, Chief Inspector of Coal Mines* [2020] QSC 10

PARTIES: **STEPHEN WOODS**
(applicant)
v
PETER NEWMAN, CHIEF INSPECTOR OF COAL MINES
(respondent)

FILE NOS: 586 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 11 February 2020

DELIVERED AT: Brisbane

HEARING DATE: 30 January 2020

JUDGE: Applegarth J

ORDERS: **1. The application is dismissed.**
2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.

CATCHWORDS: ENERGY AND RESOURCES - MINERALS - MINING FOR MINERALS - CONDUCT OF MINING OPERATIONS - MINE SAFETY - GENERALLY - where inspectors and other officers may require a person to attend before the officer and answer questions about certain matters - where privilege against self-incrimination does not apply to answers given in response to questions asked in compulsory examination about a serious accident - where one of the functions of an Industry Safety and Health Representative ("ISHR") is to participate in investigations into serious accidents and high potential incidents - where applicant submits an ISHR has a right to attend and participate in compulsory examinations - where no express power to do so is given to an ISHR - whether the ISHR's function of participating in investigations implies a power or right to attend and ask questions at a compulsory examination by an inspector or officer

Coal Mining Safety and Health Act 1999 (Qld), s 118(1)(d), s

119, s 157

Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47, cited

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited

COUNSEL: R Reitano for the applicant
S J Keim SC, with A E Cappellano, for the respondent

SOLICITORS: Hall Payne Lawyers for the applicant
Department of Natural Resources, Mining and Energy for the respondent

- [1] The applicant is an elected Industry Safety and Health Representative (“ISHR”) under the *Coal Mining Safety and Health Act 1999* (Qld). The respondent is the Chief Inspector of Coal Mines.
- [2] A fatal accident occurred at a mine on 25 November 2019, and the next day an inspector appointed under the Act commenced an investigation into the accident. The Act confers extensive powers upon inspectors and other officers appointed under the Act to conduct a variety of investigations. Under s 157 of the Act an officer may require a person to attend before the officer and to answer questions on relevant matters. It is an offence to fail to comply with the requirement, unless the person has a reasonable excuse.¹ Ordinarily it is a reasonable excuse for an individual not to comply with a requirement to answer an inspector’s question if to do so might tend to incriminate the individual or make the individual liable to a penalty.² However, this privilege does not apply if the requirement to answer the inspector’s questions relates to a serious accident or a high potential incident.³
- [3] An ISHR is appointed to represent coal mine workers on safety and health matters. An ISHR has a number of functions, and s 119 confers limited powers on an ISHR. One of the ISHR’s functions is “to participate in investigations into serious accidents and high potential incidents and other matters related to safety or health at coal mines”.⁴ However, the Act does not give an ISHR an express power to attend and question a person at a compulsory examination conducted by an inspector under s 157. Only the inspector or another officer has the power to require a person to attend and to question the person at a compulsory examination.
- [4] The applicant asserts that an ISHR has a right to attend and participate in the process by which an inspector or other officer requires an attendee to answer questions, including by questioning the attendee. The inspector in the case at hand, and the respondent, dispute this.
- [5] The issue may be formulated as follows. Does the ISHR’s function of participating in investigations of various kinds confer an implied power or right to participate in the

¹ The Act, s 158.

² The Act, s 158(2).

³ The Act, s 158(3).

⁴ The Act, s 118(1)(d).

process of questioning a person required to attend and answer an inspector's questions under s 157? An associated issue arises. Does the function confer a right or power to participate in every aspect of an investigation and to the fullest extent possible, including by questioning a person required to attend before an inspector to answer questions, including answers which might incriminate the person?

The function and powers of inspectors

- [6] Part 9 of the Act concerns "Inspectors and other officers and directives". The Inspectorate consists of inspectors, inspections officers and authorised officers who are appointed by the chief executive.⁵ The officers must have appropriate competencies and adequate experience to effectively perform their functions under the Act.⁶
- [7] The Act provides for inspectors and other officers to "monitor the effectiveness of risk management and control and coal mines, and to take appropriate action to ensure adequate risk management".⁷ Inspectors and inspection officers have a number of functions. One of them is to "investigate serious accidents and high potential incidents at coal mines".⁸
- [8] Section 128 provides:

"128 Functions of inspectors and inspection officers

Inspectors and inspection officers have the following functions –

- (a) to enforce this Act;
- (b) to monitor safety and health performance at coal mines;
- (c) to inspect and audit coal mines to assess whether risk to persons is at an acceptable level;
- (d) to help persons to achieve the purposes of this Act by providing advice and information on how the purposes are to be achieved;
- (e) to check that safety and health management systems and procedures are in place to control risk to persons affected by coal mining operations;
- (f) to provide the advice and help that may be required from time to time during emergencies at coal mines that may affect the safety or health of persons;
- (g) if unsafe practices or conditions at coal mines are detected, to ensure timely corrective or remedial action is being taken and, if not, require it to be taken;

⁵ The Act, ss 125, 128 and s 129A.

⁶ The Act, ss 126, 127, 129B and 129C.

⁷ The Act, s 7(f).

⁸ The Act, s 128(h).

- (h) **to investigate serious accidents and high potential incidents at coal mines;**
- (i) to investigate matters at coal mines that affect the successful management of risk to persons;
- (j) to investigate complaints about matters relating to safety or health resulting from coal mining operations.”

(emphasis added)

[9] Section 129 states that inspectors have the following additional functions:

- “(a) to advise the chief inspector on safety and health at coal mines;
- (b) to make recommendations to the commissioner about prosecutions under this Act.”

[10] Inspectors, inspection officers and authorised officers have extensive powers which are detailed in Division 4 of Part 9 of the Act. Their powers include the power to:

- (a) enter places, including any coal mine;⁹
- (b) search any part of a coal mine or relevant other place;¹⁰
- (c) inspect, measure, test, photograph or film any part of the coal mine or relevant other place;¹¹
- (d) copy documents;¹²
- (e) take persons, equipment and materials that the officer reasonably requires for exercising a power under the division;¹³
- (f) require a person at the coal mine or other relevant place to give the officer reasonable help to exercise the officer’s powers under s 139(3)(a) – (e);¹⁴
- (g) require a person to answer questions to help the officer ascertain whether the Act is being or has been complied with, or for the purpose of conducting an investigation;¹⁵
- (h) seize evidence;¹⁶

⁹ The power to enter is conferred in s. 133 and the procedures for entry are outlined in ss 134 – 138A.

¹⁰ The Act, ss 139(3)(a)

¹¹ The Act, ss 139(3)(b).

¹² The Act, ss 139(3)(d).

¹³ The Act, ss 139(3)(e).

¹⁴ The Act, ss 139(3)(f). It is an offence to fail to comply with this requirement, without a reasonable excuse: s 140 of The Act.

¹⁵ The Act, ss 139(3)(g). It is an offence to fail to comply with this requirement, without a reasonable excuse: s 141 of The Act.

¹⁶ The Act, ss 143 – 150.

- (i) stop and secure plant and equipment;¹⁷
- (j) require a person to state their name and address in certain circumstances;¹⁸
- (k) require the production, copying and certification of documents;¹⁹
- (l) **require attendance of persons before an officer to answer questions.**²⁰

[11] The last of these listed powers directs attention to s 157 of the Act. It provides:

“157 Power to require attendance of persons before an officer to answer questions

- (1) **An officer may require a person to attend before the officer and to answer questions –**
 - (a) relevant to the discharge of the person’s safety and health obligations under this Act; or
 - (b) on safety and health matters relevant to coal mining operations; or
 - (c) to ascertain whether this Act is being complied with; or
 - (d) relevant to any action carried out by the officer under this Act.
- (2) A requirement made of a person under this section to attend before an officer must –
 - (a) be made by notice given to the person; and
 - (b) state a reasonable time and place for the person’s attendance.
- (3) When making a requirement under this section, the officer must warn the person it is an offence to fail to comply with the requirement, unless the person has a reasonable excuse.”

(emphasis added)

[12] Importantly, s 158 creates an offence if the person who is required to attend and answer questions fails to attend, or when attending before the officer fails to comply with the requirement to answer a question, unless the person has a reasonable excuse. Section 158(2) provides:

¹⁷ The Act, s 151.

¹⁸ The Act, s 152. It can be an offence to fail to comply with this requirement: s 153 of the Act.

¹⁹ The Act, s 154. It is an offence to fail to comply with these requirements, unless the person has a reasonable excuse: ss 155 and 156 of the Act.

²⁰ The Act, ss 157 – 159.

“It is a reasonable excuse for an individual not to comply with a requirement to answer a question if complying with the requirement might tend to incriminate the individual or make the individual liable to a penalty.”

However, s 158(2) does not apply if the requirement relates to a serious accident or high potential incident.²¹

- [13] Section 159 deals with the use that may be made of any answer given in response to a requirement under s 157(1). It governs direct and derivative use by providing that neither the answer nor any information, document or other thing obtained as a direct or indirect result of the answer is admissible in any proceedings against the individual, other than a proceeding in which the falsity or misleading nature of the answer is relevant.

The functions and powers of an Industry Safety and Health Representative

- [14] An Industry Safety and Health Representative is a person who is appointed under s 109(1) “to represent coal miners on safety and health matters” and who performs the functions and exercises the powers of an ISHR mentioned in Part 8 Division 2. Section 109 provides for the Construction, Forestry, Mining and Energy Union, after a ballot of its members, to appoint up to three persons to be ISHRs. The persons appointed must be holders of a first or second class certificate of competency or a deputy certificate of competency.²² The appointment must be for four years and the ISHR must work full-time in that capacity, performing the functions of an ISHR.²³ The union must fund the ISHR for the representative’s term.
- [15] Section 118 of the Act provides:

“118 Functions of industry safety and health representatives

- (1) An industry safety and health representative has the following functions –
 - (a) to inspect coal mines to assess whether the level of risk to the safety and health of coal mine workers is at an acceptable level;
 - (b) to review procedures in place at coal mines to control the risk to safety and health of coal mine workers so that it is at an acceptable level;
 - (c) to detect unsafe practices and conditions at coal mines and to take action to ensure the risk to the safety and health of coal mine workers is at an acceptable level;
 - (d) **to participate in investigations into serious accidents and high potential incidents and other matters related to safety or health at coal mines;**

²¹ The Act, ss 158(3).

²² The Act, ss 109(2).

²³ The Act, ss 109(3), 110.

- (e) to investigate complaints from coal mine workers regarding safety or health at coal mines;
 - (f) to help in relation to initiatives to improve safety or health at coal mines.
- (2) The following persons may accompany the industry safety and health representative during an inspection –
- (a) the site senior executive or a person representing the site senior executive;
 - (b) a site safety and health representative or a person representing the site safety and health representative.”
- (emphasis added)

[16] Section 119 provides:

“119 Powers of industry safety and health representatives

- (1) An industry safety and health representative has the following powers –
 - (a) to make inquiries about the operations of coal mines relevant to the safety or health of coal mine workers;
 - (b) to enter any part of a coal mine at any time to carry out the representative’s functions, if reasonable notice of the proposed entry is given to the site senior executive or the site senior executive’s representative;
 - (c) to examine any documents relevant to safety and health held by persons with obligations under this Act, if the representative has reason to believe the documents contain information required to assess whether procedures are in place at a coal mine to achieve an acceptable level of risk to coal mine workers;
 - (d) to copy safety and health management system documents, including principal hazard management plans, standard operating procedures and training records;
 - (e) to require the person in control or temporarily in control of a coal mine to give the representative reasonable help in the exercise of a power under paragraphs (a) to (d);
 - (f) to issue a directive under section 167.
- (2) A person in control or temporarily in control of a coal mine required to help the industry safety and health representative

under subsection (1)(e) must comply with the requirement, unless the person has a reasonable excuse.

Maximum penalty – 100 penalty units.

- (3) If the industry safety and health representative requires access to documents for subsection (1)(c), a person with an obligation under the Act with access to the documents must produce them as soon as reasonably practicable after being asked, unless the person has a reasonable excuse.

Maximum penalty – 100 penalty units.”

The dispute

- [17] On 25 November 2019 there was a serious accident at the Carborough Downs coal mine which resulted in the death of a coal miner. An inspector appointed under the Act, Mr Nugent, commenced an investigation into the accident. On 26 November 2019 the CFMEU and the applicant, Mr Woods, received a notice under s 198 of the Act which provided details of the serious accident.
- [18] In early December Mr Woods told Mr Nugent that it was his intention to sit in on interviews to be conducted with workers. He relied upon the fact that it was his function under the Act to participate in investigations into serious accidents. On 12 December 2019 Mr Nugent issued a notice under s 157 to a Mr Shailer to attend upon the inspector and to answer questions. The next day Mr Nugent informed Mr Woods that he would not be permitted to be present at the interviews. The interview programed for Mr Shailer on 23 December 2019 was cancelled and another notice requiring him to attend was issued. Lawyers representing Mr Woods wrote to Mr Nugent telling him that Mr Woods would participate in that interview. Mr Newman indicated that he would not allow Mr Woods to participate in the planned s 157 questioning process.
- [19] As a result of the dispute, the applicant seeks a declaration that on the proper construction of the Act, he may participate in the process convened by the s 157 notice.

The issue

- [20] The issue is one of statutory construction. It does not depend on the circumstances of the particular case and the reasons Mr Nugent did not wish Mr Woods to participate in the process of questioning this particular attendee. If granted, the declaration sought would have broader implications of allowing ISHRs to participate in any compulsory questioning of attendees in the future, including by questioning any person who is compelled to appear before an inspector (or other officer) and compelled to answer questions, including answers which might tend to incriminate the individual.
- [21] This raises the following issue:

“Does the ISHR have a right to participate in such questioning, including by questioning the person who is compelled to attend and answer questions, even in a case in which an inspector has grounds to conclude that such participation will be detrimental to the efficient and fair conduct of the compulsory questioning or the conduct of the investigation?”

Expressed differently, and framed in terms of the ISHR's function to participate in investigations into serious accidents and high potential incidents and other matters related to safety or health at coal mines, the issue may be stated as follows:

“Does the ISHR's function of participating in investigations of various kinds confer an implied power or right to participate in the process of compulsorily questioning a person required under s 157 to attend before an officer and to answer questions?”

A further issue is this: does the function confer a right or power to participate in every aspect of an investigation and to the fullest extent possible, including questioning a person required to attend before the officer to answer the officer's questions?

Statutory context

[22] The specific provisions which are relevant to these issues must be interpreted in their context so as to best achieve their purpose and the purpose of the Act.²⁴

[23] The objects of the Act are:

- “(a) to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations; and
- (b) to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level; and
- (c) to provide a way of monitoring the effectiveness and administration of provisions relating to safety and health under this Act and other mining legislation.”²⁵

[24] Section 7 of the Act sets out how the objects of the Act are to be achieved. Section 7(e) and (f) are of particular relevance in the present matter.

“The objects of this Act are to be achieved by –

- (a) imposing safety and health obligations on persons who operate coal mines or who may affect the safety or health of others at coal mines; and
- (b) providing for safety and health management systems at coal mines to manage risk effectively; and
- (c) making regulations and recognised standards for the coal mining industry to require and promote risk management and control; and
- (d) establishing a safety and health advisory committee to allow the coal mining industry to participate in developing strategies for improving safety and health; and

²⁴ *Acts Interpretation Act 1954 (Qld)*, s 14A.

²⁵ The Act, s 6.

- (e) **providing for safety and health representatives to represent the safety and health interests of coal mine workers; and**
- (f) **providing for inspectors and other officers to monitor the effectiveness of risk management and control at coal mines, and to take appropriate action to ensure adequate risk management; and**
- (g) providing a way for the competencies of persons at coal mines to be assessed and recognised;
- (h) and requiring management structures so that persons may competently supervise the safe operation of coal mines; and
- (i) providing for an appropriate coal mines rescue capability; and
- (j) providing for a satisfactory level of preparedness for emergencies at coal mines; and
- (k) providing for the health assessment and health surveillance of persons who are, will be or have been coal mine workers; and
- (l) establishing the office of Commissioner for Mine Safety and Health.”

(emphasis added)

- [25] As noted, the Act provides for an ISHR to “represent coal mine workers on safety and health matters”.²⁶ The Act provides for two types of safety and health representatives: industry safety and health representatives (“ISHRs”), such as the applicant, and site safety and health representatives (“SSHRs”).
- [26] The functions of an ISHR are stated in s 118, as quoted above. They cover a range of matters. Participating in investigations into serious accidents and other matters related to safety or health at coal mines is one such function.
- [27] The specific powers conferred upon an ISHR by s 119 are not conferred simply to facilitate participation in investigations. However, it is possible to imagine how the exercise of such a specific power, for example, the power to enter any part of a coal mine at any time to carry out the representative’s functions, if reasonable notice is given, would aid an ISHR in performing the function of participating in investigations.
- [28] Investigations into a serious accident by inspectors and other officers may involve a variety of steps and undertaking inquiries and other investigations for which no specific power is required. For example, the function of investigating a serious accident may involve inquiries which do not require the inspector to exercise a power. Information might be given voluntarily. An investigation is likely to commence shortly after the site senior executive for the coal mine notifies an inspector about the accident, as required by s 198. An officer may require a person to give the officer “primary information” about the accident, incident or death.²⁷ As soon as practicable after receiving a report of a serious accident causing death at a coal mine, an inspector must attend the place of the

²⁶ The Act, s 27.

²⁷ The Act, s 198A which defines “primary information”.

accident and investigate the accident to determine its nature and cause, and report the findings of the investigation to the chief inspector.²⁸ In conducting an investigation an officer may do a number of things, as listed in s 139(3), and may require a person at the coal mine or other place to answer questions by the officer to help the officer ascertain whether the Act is being or has been complied with, or for the purpose of conducting an investigation under the Act.²⁹

- [29] Subdivision 7 of Part 9 gives an officer various powers to obtain information. Giving a notice under s 157 which requires a person to attend before the officer and to answer questions is one such power.
- [30] The functions and powers of an ISHR are different to those of an inspector or other officer conducting an investigation. Two things should be noted about s 119 which specifies an ISHR's powers. First, it does not provide that the ISHR has such powers as are necessary or convenient to carry out the functions stated in s 118. The powers are specific and include powers which might be called upon in aid of the function of participating in investigations into serious accidents and other matters related to safety or health at coal mines. Second, s 119 does not confer a power to attend a compulsory examination under s 157 at which a person is compelled to answer questions including, in the case of a serious accident or high potential incident, questions which, if answered, might tend to incriminate the individual.
- [31] A distinction must be made between the functions and the powers of an ISHR. Ordinarily the word "function" includes duty.³⁰ However, the existence of a function or duty does not necessarily entail a power. The powers of an ISHR are to be found in s 119 or, arguably, when such a power arises by necessary implication because the function cannot be performed without such a power. In circumstances in which the legislature has chosen to confer defined powers upon an ISHR, one would not lightly assume that the ISHR enjoys additional powers which might be helpful to or facilitate in some way the carrying out of the various functions conferred upon an ISHR.
- [32] The word "investigations" in s 118(1)(d) would appear to embrace the different kinds of investigations which may be undertaken by inspectors and other officers in carrying out their various functions.
- [33] The function of an ISHR to participate in investigations is not limited to investigations by inspectors of serious accidents and high potential incidents at coal mines. An ISHR has the function of participating in investigations into other matters related to safety or health at coal mines.
- [34] The participation by an ISHR in an investigation may assist the ISHR to recommend to the Commissioner for Mine Safety and Health that there be a prosecution for an offence against the Act.³¹

Principles of statutory construction

²⁸ The Act, s 199.

²⁹ The Act, s 139(3)(g).

³⁰ *Acts Interpretation Act 1954 (Qld)*, s 36.

³¹ The Act, s 256.

- [35] These principles are not in contest. The words of any provision must be interpreted in their context and, so far as possible, enable a harmonious operation between different provisions. The interpretation of a provision that best achieves the purpose of the Act is to be preferred to any other interpretation. The relevant provision should be construed so that it is consistent with the language and purpose of all of the provisions of the statute.³²

Application of these principles

- [36] The objects of the Act are advanced by provisions which confer functions and powers on a variety of persons, including inspectors, and other government officers and upon ISHRs.
- [37] The subject matter and terms of the Act suggest that a policy is to have investigations undertaken by inspectors promptly, efficiently and fairly. Another policy, implicit in s 118(1)(d), is to have ISHRs participate in investigations of matters related to safety or health at coal mines.
- [38] In *Carr v Western Australia*,³³ Gleeson CJ stated:

“In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object ... That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.”

- [39] The present issue of statutory construction is not resolved by simply asking which interpretation makes for the most efficient conduct of investigations by inspectors or which interpretation gives the inspectors the greatest possible flexibility to conduct investigations, including by coercive questioning under s 157. Nor is the issue answered by asking which interpretation would allow an ISHR to participate in investigations, including compulsory questioning under s 157, to the fullest possible extent, notwithstanding the absence of a specific provision to empower an ISHR to attend, ask questions or otherwise participate in a s 157 examination.
- [40] To simply ask either of these questions is to suppose that the Act pursues a particular goal or policy to the fullest possible extent. It would be erroneous to construe the Act in a way which interpreted the investigative powers of inspectors, including the specific powers conferred by s 157, in a way which allowed inspectors to conduct investigations as speedily as possible and to the fullest extent possible, unconstrained by the

³² *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28 at [69]; (1998) 194 CLR 355 at 381.

³³ (2007) 232 CLR 138 at 142 [5] approved in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [51].

participation of an ISHR in an investigation. Similarly, it would be erroneous to construe the Act on the assumption that the legislature intended an ISHR to participate in every aspect of every investigation, including the compulsory examination of persons under s 157, even if such an involvement undermined the effective conduct of an examination or delayed or otherwise prejudiced an inspector's investigation.

The terms and purposes of s 118(1)(d) and s 157

- [41] The starting point is the ordinary meaning of the relevant provisions.
- [42] The applicant correctly points out that the ordinary meaning of s 118(1)(d) envisages a role for the ISHR to be involved in "investigations", and this would include formal inquiries and evidence gathering in investigations into serious accidents at coal mines. The legislature did not intend for s 118(1)(d) to have a theoretical rather than a practical operation.
- [43] The respondent's submissions point out that the functions of an ISHR, stated in s 118 of the Act, do not amount to powers, and that s 118(1)(d) does not have the effect of expanding the scope of s 157, which bestows a specific power on inspectors, inspection officers and authorised officers. The respondent also relies upon the fact that the powers of an ISHR, as defined in s 119 of the Act, do not contain any specific power to attend and participate in a compelled interview convened under s 157. The respondent submits that if the legislature intended for ISHRs to have a power to attend and participate in compelled interviews under s 157, then there would have been express wording in the Act to that effect.
- [44] As to the terms of s 157, the respondent relies upon the specific reference to attendance before an "officer".³⁴ Section 157 does not refer to the attendance of persons before anyone other than an "officer". It provides that an officer may require a person to attend before the officer and to answer questions. It describes before whom the person must attend and, in context, indicates that the questions are asked by the officer.³⁵ This, however, does not preclude the attendance before the officer of other persons, including persons whose presence is necessary to enable the officer to ask questions and obtain answers so as to fulfil the purposes of s 157 and the Act in general.
- [45] In addition to the terms of s 118(1)(d), the applicant relies upon the context in which that provision appears, being legislation that has the objective of securing safety at coal mines. The applicant submits that s 118(1)(d) should be construed to the fullest extent possible to achieve that objective, and also have regard to the fact that an ISHR is a full-time position requiring qualifications and is someone who performs the function of representing coal mine workers on safety and health matters. The ISHR is required to be given notice of an accident and to be furnished with "primary information". The ISHR may make recommendations about prosecutions. ISHRs are said to be "integrated" into investigations. These matters are submitted to require an ISHR to be involved in investigations in a representative capacity "in a real sense". Section 118(1)(d) is submitted to provide a means by which employees are represented in investigations under the Act so as to achieve the ultimate objective of protecting the health and safety of employees at coal mines. The applicant submits that these purposes

³⁴ Defined in s 132A to mean an inspector, an inspections officer or an authorised officer.

³⁵ The respondent's oral submissions acknowledged that implicit in s 157 is that the questions would be the inspector's, not someone else's.

are best achieved by an expansive view being taken of the role to be performed by an ISHR and that there is “no downside” to having an ISHR involved in all aspects of the investigation process into serious accidents.

[46] These submissions have considerable force. However, they mainly serve to emphasise that the Act should be construed so as to ensure that ISHRs in fact may participate in various forms of investigations. The issue, however, is not whether an ISHR may participate in investigations. The issue is whether the function of participating in investigations extends to insisting upon a right to attend coercive interviews and to participate in that compulsory process by, for example, asking questions. That issue is resolved by considering which interpretation best advances the purpose of statutory provisions which:

1. place the conduct of investigations in the hands of inspectors and other officers, not in the hands of ISHRs;
2. define the relevant role of an ISHR as being one in which the ISHR may “participate in” (rather than conduct) investigations;
3. do not confer an express power upon an ISHR to conduct investigations, to question witnesses or to attend and conduct questioning at a compulsory interview at which a person is required to attend before an officer;
4. confer the power to compel a person to answer questions upon an inspector or other officers;
5. abrogate the privilege against self-incrimination if the requirement to attend before the officer and to answer questions relates to a serious accident or high potential incident.

[47] The power conferred upon an inspector or other officer to require a person to attend before the officer and to answer questions, including in certain circumstances to answer questions which might tend to incriminate the individual, is extraordinary. The power is conferred upon the officer so as to facilitate official investigations and to achieve the objects of the Act. The power is exercised by officers, such as inspectors, who do not represent the interests of employers, workers or any other specific interest.

[48] Regard should be had to the subject matter of s 157 in its context. An inspector undertaking an investigation, independently and in the public interest, would be expected to exercise the power under s 157 and conduct compulsory questioning in a manner best adapted to ascertain the truth and facilitate an investigation, particularly an investigation into a serious accident. The exercise of investigative powers by such an inspector is likely to involve forensic decisions about the sequence in which individuals, including eye witnesses, are asked questions. The proper conduct of an investigation ordinarily would ensure that the recollections and other evidence of individuals are taken individually, so as to avoid recollections being influenced, distorted or contaminated.

[49] The power given to an inspector or other officer to require a person to attend before the officer and to answer questions is given in aid of an investigation. It is analogous to other provisions by which officials are given the extraordinary power to require a

person to attend and to answer questions, thereby abrogating the “right to silence” or the privilege against self-incrimination in certain circumstances. In general terms, it is in aid of obtaining information, as the heading to subdivision 7 of Part 9 suggests. The conduct of such a compulsory questioning process in the course of an investigation may be contrasted with the conduct of an official inquiry and, in particular, the conduct of a Board of Inquiry which is to be held in public, except in special circumstances,³⁶ and at which the Board must give a person involved in the serious accident or high potential incident the opportunity of defending all claims made against the person.³⁷

- [50] By contrast, s 157 does not contemplate that the questioning will be in public, such that the answers given are available to the general public, including other witnesses and interested parties.
- [51] The absence of specific recognition in s 157 of the presence of others in attendance before the officer does not mean that others may not be present so that the process of questioning may operate fairly and facilitate the purpose of s 157. For example, the absence of specific recognition of the presence of others would not prevent an inspector allowing the presence of someone to assist him or her in the process, someone to record the conversation, someone to support the person required to attend and to place that person at ease, a legal representative or an interpreter. The officer may take the view that the presence of such a person is required in the interests of fairness or will facilitate the purpose of obtaining accurate answers. In some circumstances the inspector may be assisted by the presence of an expert or an ISHR to inform the inspector of certain things and to assist the inspector to formulate questions. In allowing for the presence of others the inspector might impose conditions, including terms as to the confidentiality of information which is provided compulsorily.
- [52] In short, in some circumstances the inspector may invite or allow others to attend, on certain terms, if to do so aids the process contemplated by s 157. The presence of others may facilitate the provision of responsive and honest answers.
- [53] By the same token, in some circumstances the presence of certain other persons may inhibit the provision of reliable and honest answers. This may be so where the person who is present represents interests or adopts a position which conflicts with the interests or version of events of the person who is required to attend and answer questions. During the hearing I gave the hypothetical example of a case in which there were 10 eye witnesses to an accident. Nine say that the accident occurred according to scenario X. The tenth person disputes this and says that scenario Y happened. The interests of the nine employees may be best served by propounding scenario X. The presence of the nine other potential witnesses or their representative may inhibit the other witness from giving a competing version, which is contrary to the interests of the nine. Arguably, the presence of someone, including an ISHR, who represents interests which are in conflict with the interests of the attendee, may affect the provision of information and the answering of questions by the attendee. It is also arguable that the presence of such a person may create an incentive for the attendee to tell the truth, knowing that otherwise those who are present may inform the examiner of matters which contradict the attendee’s version of events. However, that possibility is insufficient to conclude that such a person, including an ISHR representing the interests of coal mine workers such

³⁶ The Act, s 208.

³⁷ The Act, s 206(1)(d).

as the nine other potential witnesses, has a *right* to attend the compulsory interview, ask questions and otherwise participate.

- [54] The recognition of such a right is unlikely to facilitate the purpose of s 157 and the conduct of investigations by inspectors if on occasions involvement in the compulsory interviewing process impedes, delays or otherwise prejudices the process of examination by the inspector.
- [55] The proper conduct of investigations may incline an inspector who conducts a compulsory examination under s 157 to limit disclosure of the attendee's testimony, at least until the examination of other witnesses and investigations have progressed to a certain point.
- [56] If the applicant is correct and an ISHR is entitled to attend as of right, rather than on the terms stated by the inspector, there is no apparent power to prohibit disclosure by those present of what was said or the lines of inquiry adopted by the examiner. Such a disclosure may have the adverse consequence of allowing potential witnesses to tailor their evidence or, at least, to have their recollections contaminated by reports of what other witnesses have said.
- [57] The purpose of s 157, in its context, is not facilitated by an interpretation that permits outcomes which impede, delay or otherwise prejudice the process of compulsory questioning under s 157 and the conduct of investigations more generally.
- [58] An interpretation which best serves the purpose of s 157 is one which allows the inspector to reasonably decide who should attend the examination (in addition to the compelled attendee) and the basis upon which such attendance is permitted, so as to facilitate the conduct of the compulsory questioning under s 157 and the fair and efficient conduct of an inspector's investigation more generally.

Does this interpretation deprive s 118(1)(d) of practical context?

- [59] The absence of an express power in s 119 by which an ISHR may attend, as of right, an examination of a person under s 157 is relevant, though not decisive.
- [60] The harmonious interpretation of the various relevant provisions, including ss 118, 119 and 157, requires an interpretation which permits an ISHR to participate in investigations into serious accidents and other matters related to safety or health at coal mines, whilst at the same time not impeding, delaying or otherwise prejudicing the conduct of investigations, including the exercise of the power to require a person to attend and give evidence pursuant to s 157. The ISHR's function of participating in investigations into serious accidents and other matters related to safety or health at coal mines is advanced by recognising that an inspector may permit an ISHR to attend an examination under s 157.
- [61] There is no express power in s 119 which entitles an ISHR to attend, question witnesses and otherwise participate in an examination under s 157. It is not necessary to recognise an implied power and corresponding right in the ISHR to attend, question witnesses and otherwise participate in an examination under s 157 in order to give the

participation function in s 118(1)(d) work to do and to give effect to s 118(1)(d)'s purpose.

- [62] The interpretation which I prefer does not deprive s 118(1)(d) of practical operation. The Act permits and facilitates an ISHR's participation in investigations, without conferring a right to attend and participate in coercive questioning under s 157. Participation in investigations would occur, for example, where the ISHR is consulted by the investigator or asked for advice or a contribution to the investigation. As discussed, in a particular case, the inspector may consider that the proper conduct of the investigation would be aided by allowing the ISHR to attend coercive questioning, subject to certain conditions.
- [63] In addition, the powers conferred by s 119 enable an ISHR to carry out many functions, including the function of participating in an investigation. The specific powers conferred by s 119 might be exercised by an ISHR so as to participate in an investigation. These include the powers to enter any part of a coal mine at any time to carry out the representative's functions, to examine documents pursuant to s 119(1)(c) and to require the person in control or temporarily in control of the coal mine to give the representative reasonable help in the exercise of the powers conferred by s 119(1)(a) – (d).
- [64] In summary, I do not accept that the interpretation which I prefer deprives the ISHR of the ability to carry out the function of participating in investigations, including by exercising the specific powers that are conferred upon an ISHR by s 119.

The consequences of conferring an implied right for the interests of attendees and the conduct of investigations

- [65] The declaration sought by the applicant is not limited to a declaration that an ISHR may simply attend the process convened by the notice given under s 157. It seeks a declaration that he may "participate in the process" convened by the notice and this seemingly would extend to asking questions.
- [66] A relevant consideration in that regard are the rights and interests of attendees, including important common law privileges. Section 157 authorises an inspector to compulsorily question a person, and in certain circumstances to require answers which may tend to incriminate the person who is required to attend and answer questions. The abrogation of the privilege against self-incrimination is clear and concerns a power invested in an inspector, who is taken to act independently. It should not be lightly concluded that s 157 permits other individuals, in particular an ISHR, to undertake questioning of the attendee who is required to attend before the inspector.
- [67] The terms of s 157 do not provide for the attendee to attend before any person other than the inspector. This tends against an interpretation by which an ISHR has an automatic right to attend at the questioning of the person by virtue of the function conferred by s 118(1)(d).
- [68] If, as the applicant contends, he is entitled to attend and ask questions, as of right, there is no limit on disclosure by the ISHR to other parties or the general public. Such disclosure may be inconsistent with the purpose of an examination under s 157 and the

conduct of an investigation. In addition, if s 157 and the other provisions were to be interpreted as conferring a right upon an ISHR to attend and ask questions, there is no apparent power conferred upon the inspector to control the extent, duration or conduct of questioning by the ISHR.

- [69] Counsel for the applicant points to a provision which create an offence to obstruct an inspector, inspection officer or authorised officer in the exercise of a power,³⁸ and also the power in the Minister to end the appointment of an ISHR if the Minister considers the ISHR is not performing the representative's functions satisfactorily.³⁹ In my view, the existence of these provisions does not justify construing the Act so as to confer a power or right upon an ISHR to attend, ask questions or otherwise participate in an examination of a person by an inspector pursuant to s 157 of the Act. The existence of an offence provision for obstruction and the power to terminate an appointment are blunt instruments to control an important and time-sensitive process. The institution and prosecution of proceedings for obstruction would be protracted and unlikely to resolve in a timely way a dispute over the conduct of an ISHR at a particular compulsory questioning process.
- [70] The construction for which the applicant contends has implications beyond the process of examination of attendees under s 157. An interpretation of the Act which is to the effect that the function of being able "to participate" in investigations entitles the ISHR to participate to the fullest extent possible and in every aspect of any investigation may, in isolation, be said to best serve the purpose of s 118(1)(d). However, as previously discussed, a proper interpretation should have regard to the Act as a whole, including the consequences of such a suggested interpretation upon the conduct of investigations.
- [71] Investigations take many forms and the Act makes their conduct the function of inspectors and other authorised officers. To interpret s 118(1)(d) as if the function entitles an ISHR to be involved in every aspect of an investigation and to the fullest extent possible would be apt to delay and complicate an investigation. It should not be supposed that the function of participating in investigations entitles an ISHR to be involved in every part of an investigation process, for example, by accompanying the inspector at every stage of the investigation, reading every document the inspector has access to and being a party to every informal inquiry which the inspector conducts in the course of an investigation. Instead, a sensible and workable interpretation of s 118(1)(d) would oblige an inspector to involve an ISHR in the investigation so as to give real content to the function of participating. However, participation does not involve shadowing an inspector at every stage. It should not be supposed that an ISHR is entitled by virtue of s 118(1)(d) to accompany the inspector at every stage of an investigation and to be party to every aspect of formal or informal inquiries of witnesses. Such an interpretation should not be adopted simply because to do so would be to give s 118(1)(d) its fullest possible operation.
- [72] Section 118(1)(d) should not be interpreted in a manner which has the potential to impede rather than facilitate investigations. To interpret s 118(1)(d) so as to confer a power or right upon an ISHR to participate to the fullest possible extent in every aspect of an investigation, including the coercive questioning process under s 157, even where to do so prejudices an investigation, would be unreasonable. It would not advance the

³⁸ Section 181.

³⁹ Section 112.

purpose for which investigative powers, including the power under s 157, are conferred on inspectors in the public interest.

The applicant's other submissions

- [73] The applicant notes that the Parliament has not carved out any qualification to the s 118(1)(d) participation function by stating that it does not extend to participating in the s 157 process. However, the distinction between a function and a power is important. The Act permits an ISHR to participate in many aspects of investigations, either by exercising powers conferred by s 119 or by arrangements by which information is exchanged and an ISHR otherwise participates in investigations. This includes arranging for an ISHR to participate in the s 157 process if the inspector considers that such participation will not have adverse effects on the process or an investigation.
- [74] Given the potential for the presence, questioning and other participation of an ISHR to inhibit or otherwise prejudice the s 157 questioning process, one would expect the Act to expressly empower in s 119 an ISHR to attend and ask questions if the Parliament intended an ISHR to have such a power.
- [75] The applicant notes that under s 256 an ISHR (as well as an inspector and a site senior executive) may recommend to the commissioner that there be a prosecution for an offence against the Act. He submits that without being empowered to participate in the s 157 process an ISHR could not make any meaningful recommendation to prosecute under s 256. I disagree. First, a person who is authorised to make a recommendation may do so without having the full range of powers which an inspector enjoys. The site senior executive (who is the most senior officer employed or engaged by the coal mine operator) is such a person. Second, an ISHR's recommendation to prosecute may be informed by participation in an investigation, from facts ascertained as a result of a Board of Inquiry, from information obtained from an inspector or chief inspector and by the exercise of the ISHR's powers under s 119, including the power to examine documents. By these means the ISHR may ascertain the substance or even the detail of what emerged as a result of s 157 questioning. In any case, even without access to that information, the functions and powers of the ISHR enable an ISHR to make a recommendation under s 256. The interpretation for which the applicant contends is not necessary to give s 256 a practical operation.

Conclusion

- [76] The right for which the applicant contends, namely the right to attend, ask questions (including questions which have a tendency to incriminate) and otherwise participate in the process provided for by s 157, is not necessary to give s 118(1)(d) work to do.
- [77] The functions of an ISHR are facilitated by the conferral of specific and limited powers. The power (and corresponding right) to attend before an officer at which a person is required to answer questions is not one of those conferred powers.
- [78] The power to conduct a compulsory examination under s 157 is conferred upon an inspector or other officer. It is a significant power, conferred upon an independent

officer in aid of the officer's functions, so as to enable the officer to obtain information and conduct investigations.

- [79] The function of an ISHR participating in investigations may be served by arrangements being made by an inspector or other officer by which the ISHR is involved in the investigative process. It may include consultation, an inspector requesting the ISHR's advice or the provision of information to the ISHR. The function of participating in investigations also may be advanced by the exercise by the ISHR of the specific powers conferred upon him or her by s 119.
- [80] The legislature did not confer upon an ISHR an express power to attend, ask questions or otherwise participate in the process provided for in s 157 of the Act.
- [81] To read s 118 as impliedly conferring a power to do so is not necessary to achieve the purposes of the Act or the purposes of s 118(1)(d). To confer such a right or power upon an ISHR has the potential in some circumstances to impede, delay or otherwise prejudice the conduct of an examination of witnesses. To read s 118(1)(d) as if it impliedly confers such a power is a strong thing to do in circumstances in which the examination of a person under s 157 may require the person to give answers which are incriminating, or answers, the disclosure of which, may adversely affect the compulsory examination of other witnesses or the conduct of the investigation.
- [82] In circumstances in which the legislature has not provided expressly for the ISHR to have power to attend, ask questions and otherwise participate in the process under s 157, but might easily have done so, I am disinclined to interpret the Act as impliedly conferring such a power. Instead, the extent to which inspectors allow other persons to be present and participate in the process provided for by s 157 should be governed by the proper exercise by the inspector of his or her powers. This includes the exercise of a judgment about whether the presence of such a person is likely to facilitate or impede the process of investigation. Such a decision should accord fairness to the person who is under compulsion to attend and answer questions.
- [83] The interpretation which best advances the purposes of the relevant provisions and the Act as a whole is one which facilitates the conduct of compulsory questioning in aid of an inspector's investigation, whilst recognising the function conferred upon an ISHR to participate in investigations. The preferred interpretation is not one which confers a right upon an ISHR to attend a compulsory examination, ask questions at it and otherwise participate in a compulsory questioning process, particularly one in which the privilege against self-incrimination is abrogated. The purpose of the Act is best advanced by an interpretation which permits the inspector to make forensic decisions about who should be compulsorily examined under s 157 and who, if anyone, in addition to the inspector and the attendee, should be allowed to attend so as to facilitate the process.
- [84] The declaration sought would confer a right upon an ISHR to participate in the s 157 compulsory examination process and to ask questions in a manner or in a form over which the inspector could not exert practical control.
- [85] The legislature did not confer in s 119 the power or right for which the applicant contends. The Act does not require such a power to be read into the Act as a matter of necessary implication so as to give the s 118(1)(d) function a practical operation at

different stages of an investigation. The power or right for which the applicant contends is not necessary for the operation of s 118(1)(d).

- [86] Conferring by judicial declaration such a right would carry the potential to prolong, disrupt or otherwise prejudice the process provided for in s 157, to the detriment of the expeditious and fair exercise of investigative powers which are conferred upon an inspector in the public interest.
- [87] I decline to construe the Act as if it pursued the function in s 118(1)(d) to the fullest possible extent and in every aspect of an investigation, including a compulsory examination of an individual who is compelled to attend in private before an inspector. To confer a power or right upon an ISHR which the legislature did not confer in s 119 would not be consistent with the apparent intention of the Parliament.
- [88] For these reasons I decline to make the declaration sought.

Orders

[89] Subject to any submissions as to costs, the orders will be:

1. The application is dismissed.
2. The applicant pay the respondent's costs of and incidental to the application to be assessed on the standard basis.