SUPREME COURT OF QUEENSLAND

CITATION:	*Construction, Forestry, Mining and Energy Union v Oaky Creek Coal P/L* [2003] QSC 033
PARTIES:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** (applicant) **v** **OAKY CREEK COAL PTY LTD** ACN 010 202 936 (respondent)
FILE NO/S:	11408/02
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	16 December 2002
JUDGE:	Fryberg J
ORDER:	**Application dismissed**
CATCHWORDS:	MINING LAW – Statutory regulation of conduct of mining operations – Regulation of industrial conditions – Whether industry safety and health representative had right to participate in review pursuant to s 64 *Coal Mining Safety and Health Act* 1999 *Coal Mining Safety and Health Act* 1999 (Qld), s 64, s 118, s 119 *Coal Mining Safety and Health Regulation* 2001 (Qld), s 10, s 42
COUNSEL:	M P Amerena for the applicant J E Murdoch SC for the respondent
SOLICITORS:	Hall Payne Lawyers for the applicant Allens Arthur Robinson for the respondent

[1] For a number of years the respondent ("Oaky Creek") has operated a coal mine at Tieri in central Queensland. The applicant union represents most, but not all, of the workers at the mine. On 11 December last year a dispute developed at the mine. Workers in some sections of the mine went out on a sudden 48-hour strike. This threatened significant disruption to Oaky Creek's operations. At 10 pm it came to Court seeking injunctive relief. It told the union in advance, and union

representatives attended with counsel. Two witnesses gave evidence: Mr Payne, Oaky Creek's general manager; and Mr Dalliston, a union district inspector. After that, the parties had some discussions and reached an agreement. The union did not oppose what was (in effect) a return to work order. Oaky Creek did not oppose an order granting the union all necessary abridgments of time to list on short notice an application for declarations under the *Coal Mining Safety and Health Act* 1999. At 3.15am on 12 December I made those orders and adjourned the proceedings until the following Monday, when they were overtaken by the present application.[1]

[2] The principal order sought in the application is:

> "1. An order declaring that pursuant to the *Coal Mining Safety and Health Act* 1999 ("the Act") Stuart Vaccaneo as an industry safety and health representative had, or further or alternatively an industry safety and health representative has, a statutory entitlement:-
>
> (a) to participate in consultation pursuant to section 42(5) the Coal Mining Safety and Health Regulation 2001 ("the Regulation"); and
>
> (b) to receive the copy of the draft standard operating procedure prepared by the Senior Site Executive in accordance with section 10(1)(b) of the Regulation pursuant to consultation referred to in paragraph (a) hereof and comment upon that draft to the Senior Site Executive; and
>
> (c) to participate in any further consultation pursuant to section 10(d)(ii)B of the Regulation about information and advice obtained pursuant to section 10(d)(ii)A of the Regulation by the Senior Site Executive concerning that draft standard operating procedure; and
>
> (d) to receive a copy of any further draft standard operating procedures prepared by the Senior Site Executive pursuant to section 10(d)(ii)B of the Regulation and comment upon that further draft to the Senior Site Executive;
>
> in respect to the change to the safety and health management system at the Oaky Creek Coal Mine, such change being more particularly the current review of the fitness provisions that provide for the things mentioned in section 42(2) of the Regulation or further or alternatively the current review of the standard operating procedure relating to fatigue policy at the Oaky Creek Coal Mine."

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[1] The parties adopted the evidence in the earlier application for the purposes of this application.

The *Coal Mining Safety and Health Act 1999*

[3] By 1999, deficiencies in the regulatory regime covering safety and health in coal mines[2] were widely recognised.[3] That regime "concentrate[d] on telling industry how things must be done rather than the standards of safety which must be achieved while doing the task."[4] The *Coal Mining Safety and Health Act 1999* "focuses on the standards of safety and health that must be met and allows the mine operator to use the most appropriate methods and technology to achieve these standards"[5]. It is intended to "provide a modern legislative framework for the safety and health of those involved with Queensland's most important industry"[6]. Its objects 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."[7]

[4] It specifies eleven methods by which those objects are to be achieved. Among them are:

> "(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) …
> (e) providing for safety and health representatives to represent the safety and health interests of coal mine workers; … "[8].

[5] The Act seeks co-operation to achieve its objects:

> "Cooperation is an important strategy in achieving the objects of the Act and is achieved –
> (a) at an industry level by -
> (i) the establishment of the coal mining safety and health advisory council under part 6; and
> (ii) the appointment of industry safety and health representatives under part 8; and
> (b) at coal mine level by—
> (i) the election of site safety and health representatives under part 7; and

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2 Primarily the *Coal Mining Act 1925.*
3 *Explanatory Notes*, p 2 (p 920 in *Queensland Explanatory Notes for Bills Passed During the Year 1999*, Vol. 1, Office of the Queensland Parliamentary Counsel, 1999).
4 Hon. T McGrady, Minister for Mines and Energy (24 March 1999): *Queensland Parliamentary Debates*, Vol. 349 at p 734.
5 *Ibid*.
6 *Ibid* p 733.
7 Section 6.
8 Section 7.

(ii) the process of involving coal mine workers in the management of risk."[9]

Many of the subsequent provisions of the Act reflect that strategy.

[6] The first method referred to above for achieving the Act's objects is the imposition of safety and health obligations on just about everyone at a coal mine, from the workers upward. Depending upon the circumstances, breach of these obligations can result in imprisonment for up to two years.[10] The second method is providing for safety and health management systems to manage risk effectively. The relevant provisions deal with management personnel, safety and health management systems and the records and reporting requirements.[11] The third method is implemented by provisions permitting the Minister to make recognised standards for safety and health[12]. There is no particular standard relevant in the present case. Lastly (for present purposes), provision is made for workers at a coal mine to elect two of their number to be site safety and health representatives and for the definition of their functions and powers[13]; and for the union to appoint industry safety and health representatives ("ISHR") and for the definition of their functions and powers[14].

[7] There is considerable interaction among the sections providing these four methods. A coal mine operator is obliged to appoint a site senior executive ("SSE") and to ensure that the executive develops and implements a safety and health management system for the mine[15]. An SSE is the most senior officer employed by the operator who is located at or near the mine and who has responsibility for it[16]. Mr Payne was the SSE at Oaky Creek's mine. A statutory obligation was imposed upon him to develop and implement a safety and health management system for the mine[17]. A safety and health management system is one "that incorporates risk management elements and practices that ensure safety and health of persons who may be affected by coal mining operations"[18]. It "must be an auditable documented system that forms part of an overall management system that includes organisational structure, planning activities, responsibilities, practices, procedures, processes and resources for developing, implementing, achieving, reviewing and maintaining a safety and health policy"[19].

[8] The safety and health management system is of central importance in both the operation and interpretation of the Act. It constitutes a primary method by which the objects of the Act are to be achieved, as I have already observed. A coal mine operator must provide adequate resources to ensure its effectiveness and

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9 Section 32(2).
10 Section 34.
11 Part 4.
12 Section 72.
13 Part 7.
14 Part 8. The Act defines "union" to mean "the Construction Forestry Mining and Energy Union - Mining and Energy Division Queensland District Branch" (Schedule 3), but it was not suggested that the application was brought by the wrong legal entity.
15 Section 41(1).
16 Section 25.
17 Section 42(c).
18 Section 62(1).
19 Section 62(2).

implementation[20]. Obligations of leaseholders, owners, contractors and workers are defined by reference to it[21]. It must

> "provide for the following basic elements-
> (a) risk identification and assessment;
> (b) hazard analysis;
> (c) hazard management and control;
> (d) reporting and recording relevant safety and health information and data."[22]

However its contents are not exclusively mandated in that section. Some requirements appear in the Act. Of present relevance, the system must include principal hazard management plans and standard operating procedures[23]. But the vast majority of topics for which provision must be made in a system are set out in the Regulation[24]. One of them, provision for controlling the risks associated with personal fatigue[25], is of particular importance. It is set out below.[26]

The dispute

[9] Oaky Creek coal mine (or more accurately, mines - the difference does not matter for present purposes) has been in operation for a number of years; it antedates the Act by a wide margin. At all material times it had in place a safety and health management system. Part of the system, document 00031, was the Fatigue Management Policy. That document dealt with hours of work, breaks, rotational workforce and other matters relating to fatigue management. Until some time in 2002 it provided for the mine workers to work 12 hour shifts containing two breaks of half an hour's duration after 5 hours and 9½ hours work respectively.

[10] During 2002 Oaky Creek achieved less than budgeted coal output from its "long wall". As a result, it decided to reduce shift lengths for some of its employees from 12 hours to 10 hours. It seems[27] that under the policy the employees remained entitled to the two half-hour breaks. That effectively shortened the shift to one of 9 ½ hours with only one break. That was a state of affairs which was popular with the workers affected.[28] However both the union and Oaky Creek became concerned that the policy was somehow creating difficulties. On 26 September 2002 Mr Andrew Vickers, District President of the union, wrote to Mr Payne outlining his concerns. That letter elicited a response on 10 October not from Mr Payne but from Mr Percy Camden, the Principal Adviser - Industrial Relations for Oaky Creek's parent company, MIM Holdings Ltd:

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20 Section 41(1)(f).
21 Sections 40(2), 41(1)(d)-(f), 43, 39(1)(a).
22 Regulation 6.
23 Section 62(d).
24 There are many sections. It is unnecessary to list them.
25 Regulation 42. (To distinguish sections of the Regulation from sections of the Act I shall refer to the former as "regulations".)
26 Paragraph [21].
27 Unfortunately a copy of the policy was not tendered.
28 It is not clear from the evidence whether this was because they preferred the shorter shifts or because they saw them as a bargaining chip in the battle to restore the more remunerative 12 hour shifts.

> "Thank you for providing us with a copy of a letter dated 26 September 2002, addressed and forwarded to Mr A Payne, General Manager, Oaky Creek Coal Pty Ltd in which you outlined your concerns with the above mentioned Policy.
>
> We agree that the Policy is confusing and poses questions in relation to its application.
>
> It is quite clear that the Policy, in its current form, neither meets the requirements of Section 42.1 of the "Coal Mining Safety and Health Regulation 2001" (QLD) nor does it compliment the expressed intent of Certified Agreements entered into between the Company (Oaky Creek Coal Pty Ltd) and relevant Unions.
>
> As a consequence of the above we now formally advise that as of today, Thursday 10 October 2002, that the Oaky Creek Coal 00031 Fatigue Management Policy will have no further application to either the Company (Oaky Creek Coal Pty Ltd) or its employees.
>
> We will endeavour to initiate prompt action to formulate and implement an alternate policy which will meet all requirements."

[11] That provided the trigger for Oaky Creek to initiate a general review of the Fatigue Management Policy. It sought volunteers from a cross-section of its employees at the site to help carry out a risk assessment on fatigue, but none was forthcoming. It then nominated a committee of about eight persons, including management representatives and a representative of an on-site contractor. Mr Payne himself did not participate. The employees nominated for the committee included two site safety and health representatives (Messrs Parker and Hill) and a local union official, the Lodge president, Mr Goodwin.

[12] The committee met on Tuesday 10 December. It seems that management representatives sought agreement on a new draft policy. The workers' representatives had requested Mr Stuart Vaccaneo, one of the three ISHRs, to assist them in the review. Mr Vaccaneo went to the meeting, but shortly after his arrival Mr Andrew Mifflin, the underground operations manager, told him that Oaky Creek would not allow him to participate in it. He said that the company did not consider Mr Vaccaneo to be a coal mine worker for the mine under s 64 of the Act and that on its interpretation of the legislation, Mr Vaccaneo's only ability was to review a procedure under s 118(1)(b). He said that on Oaky Creek's legal interpretation Mr Vaccaneo "was not allowed to participate in the development or review of an SOP etc". Mr Mifflin informed the meeting of the company's stance and Mr Vaccaneo left the mine.

[13] That evening Mr Vaccaneo received further requests from the coal mine workers for his presence. In consequence he again attended the site on 11 December and was again refused access to the meeting. Mr Mifflin offered to suspend the review to allow him to consult with the coal mine workers on the committee, which he did. He was unable to press his claim however, as he was called away urgently to another mine. In the meantime he had arranged for the issue to be referred to the Chief Inspector of Mines at Brisbane where a meeting was arranged. Mr Hill and Mr Goodwin sought suspension of the review pending the outcome of that meeting.

Mr Mifflin refused to suspend the meeting. The workers responded by informing him that they would no longer participate in the review. Later that afternoon a stop work meeting was called at which the following resolution was passed:

> "Due to the total disregard shown to the ISHR by OCC considering his experience and knowledge in regards to fatigue management & because of OCC's poor safety performance, this meeting believes that the company should have welcomed the input that he would have provided. We believe that this is showing a very poor commitment to the health and safety of the workforce and that a 48 hr stoppage take place immediately."

[14] Meanwhile the meeting took place in Brisbane. Mr Payne, Mr Dalliston (also an ISHR) and the Chief Inspector were present. It is unnecessary to describe it in detail. It was not an acrimonious meeting but some sort of misunderstanding seems to have developed between Mr Payne and Mr Dalliston as to what the former had agreed to. It seems that Mr Dalliston decided that the way to break the deadlock was to exercise his statutory powers under s 119(1)(f) of the Act. He gave Mr Payne a notice suspending operations in any part of the mines which did not have a fatigue management policy in place. Mr Payne responded by agreeing to reinstate the previous policy. I take it that this has been done.

[15] Mr Mifflin's attitude to Mr Vaccaneo was not something dreamed up on the spur of the moment. Mr Payne knew of it in advance and was, I infer, its instigator. Mr Payne professed the belief that "it's more appropriate to have our employees involved in the generation of those things up front". He explained that belief:

> "I have issues at site in relation to people taking ownership of the procedures and of the processes at site from a cultural perspective. What I'm aiming towards is involving our people in developing those processes, developing those SOPs and taking those – taking ownership of those things independent of external stakeholders."

He insisted that Mr Vaccaneo's presence would inhibit this process. Asked to explain that statement he said:

> "I guess at present from a cultural perspective at Oaky Creek there is some mistrust or distrust, if you like, between the management and the work force at Oaky Creek. My aim is to try and build that trust through those communities and their generation of those procedures. In relation to people like Mr Vaccaneo becoming involved, by his involvement the other people that are participating in the – in the review tend to tuck in behind the industry safety and health representative's view and follow that view. That's my opinion."

He told the court his view of what would happen if outside people, particularly Mr Vaccaneo, were involved in the process:

> "Part of those committees and part of the process involved in those people determining the direction that they take or the controls for those sorts of hazards is about them in fact identifying those things based on the information that might be provided to them externally.

> So that they're actually in fact discovering that information for themselves. It's not being told to them. It's not being – they're not being directed to follow it and all I'm saying is with the involvement – and it would be the same as if I was sitting on the same – on the same meeting. You wind up with a person in a position that people hold a certain way that says, "If this guy is there then the management team tuck in behind me and if Stuart is there those guys tuck in behind Stuart." It's not a reflection on the individual, it's just a reflection on the culture of the operation as it presently stands. That's why I'm not sitting on the site safety – in on the committee. It's that I want those people to have that ownership, have that participation in open dialogue between all the participants, not necessarily one or two".

[16] On the other hand, in Mr Payne's view, it was not simply a matter of the workers owning the process; it was also a question of who owned the workers:

> "What has influenced me is our need to get ownership of our workforce in relation to the development of these procedures and moving forward and changing the safety culture of our operation."

[17] I am satisfied that these passages truly reflect Oaky Creek's position in relation to the participation of any of the three ISHRs, not just Mr Vaccaneo.

[18] Not surprisingly, the union takes the opposite view. Mr Dalliston said:

> "The three of us industry safety and health representatives have got a fair knowledge in occupational health and safety, including fatigue management shifts. We've probably got more information than most mining people in Queensland. And the people that work at the site, while knowing what they want, haven't got a lot of knowledge in what type of breaks they should be able to have and when, and fatigue management issues, so that's what they used us for as a resource".[29]

[19] Although there was some suggestion that Mr Payne had some personal concerns regarding Mr Vaccaneo arising out of an unrelated incident, there is, in my judgment, a genuine dispute between the parties relating to the right of Oaky Creek to exclude not only Mr Vaccaneo, but all three ISHRs from the meeting.

The role of the ISHR

[20] On behalf of the union, Mr Amerena relied principally on ss 118 and 119 of the Act, and regs 42 and10. Section 118 provides:

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[29] Mr Dalliston's opinion, different from that of the workers at the site, was that the second break should occur before the end of the shift.

"**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;

(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".

[21] It must be read with s 119:

"**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."

[22] The terms of the first declaration sought by the union assume that "the current review" was taking place under or in accordance with reg 42. So far as material that section provides:

> "**42 Safety and health management system for personal fatigue and other physical and psychological impairment, and drugs**
>
> **(1)** A coal mine's safety and health management system must provide for controlling risks at the mine associated with the following –
>
> (a) personal fatigue;
> (b) other physical or psychological impairment;
> (c) the improper use of drugs.
>
> **(2)** The system must provide for the following about personal fatigue for persons at the mine –
>
> (a) an education program;
> (b) an employee assistance program;
> (c) the maximum number of hours for a working shift;
> (d) the number and length of rest breaks in a shift;
> (e) the maximum number of hours to be worked in a week or roster cycle.
>
> …
>
> **(5)** The site senior executive must consult with a cross-section of workers at the mine in developing the fitness provisions.
>
> **(6)** In developing the fitness provisions, the site senior executive must comply with section 10, other than section 10(1)(a) and (d)(ii)(C), as if a reference in the section to a standard operating procedure were a reference to the fitness provisions.
>
> …
>
> **(8)** In this section –
>
> **"fitness provisions"** means the part of the safety and health management system that provides for the things mentioned in subsections (2) to (4)".

[23] Regulation 10 provides:

> "**10 Developing standard operating procedures**
>
> **(1)** The site senior executive must ensure the following steps are taken in developing standard operating procedures for managing and controlling hazards at the mine –
>
> …
>
> (b) the site senior executive must prepare a draft standard operating procedure and give a copy of it to

the coal mine workers with whom the site senior executive consulted;

(c) if the coal mine workers agree with the draft standard operating procedure, the site senior executive must prepare it as the final standard operating procedure;

(d) if the coal mine workers do not agree with the draft standard operating procedure –

(i) for a disagreement that is not about a legal or technical matter – the site senior executive must decide the disagreed matter and prepare the final standard operating procedure; or

(ii) for a disagreement that is about a legal or technical matter – the site senior executive must –

(A) obtain further information or advice, including, for example, from a person having the necessary qualifications and experience to give the advice or from a recognised text on the matter; and

(B) after consulting with the workers about the information or advice, prepare a further draft standard operating procedure and give a copy of it to the workers; and

(C) if the workers disagree with the further draft – decide the disagreed matter and prepare the final standard operating procedure;

(e) the site senior executive must include the final standard operating procedure in the mine's safety and health management system.

(2) The site senior executive must ensure –

(a) the final standard operating procedure accords with –

(i) all matters agreed, under this section, between the site senior executive and coal mine workers; and

(ii) the site senior executive's decision, under this section, on any disagreed matters; and

(b) a record is kept of the disagreed matters.

(3) In developing the standard operating procedure, the site senior executive must –

(a) use a risk assessment process recognised by the mining industry as an acceptable process for identifying and controlling hazards; and

(b) have regard to the methods of controlling the hazard stated in the database kept by the chief executive under section 280(1)(a)(i) of the Act.

[24] Mr Amerena submitted that nothing in reg 42(5) prohibited workers therein referred to from being represented in the consultation by the ISHR; that s 7(e) of the Act expressly provides for him to represent the workers' safety and health interests; that the consultation necessarily involved the review of what was admittedly a defective fatigue management policy; and that by participating in the consultation meeting Mr Vaccaneo would have been performing the functions assigned to him under paras (b), (c), (d) and (f) of s 118(1). It followed, he submitted, that the ISHR had a statutory right to participate in the consultation process.

[25] On behalf of Oaky Creek, Mr Murdoch submitted that regs 42 and 10 applied only to the implementation of a new scheme under the Act, not to the review of a procedure already in place. The consultation in question related to the latter process, so did not fall under those sections. In the alternative, he submitted that ss 118 and 119 do not empower an ISHR to insist on participating at a meeting held under reg 42. In support of the first argument, Mr Murdoch drew attention to s 64 of the Act. He submitted that it applies to consultation in respect of a review of an existing system. If regs 42 and 10 were not restricted to the review of an existing system, the obligation to consult under s 64(2) would, he submitted, be redundant. He found support for the submission in the wording of s 64 and of cl 12 of Schedule 2 to the Act.

[26] Section 64 of the Act provides:

"**64 Review of principal hazard management plans and standard operating procedures**

(1) This section applies if –
(a) a safety and health management system has been developed for a new coal mine; or
(b) it is proposed to change a safety and health management system at an existing coal mine.

(2) The site senior executive must review the principal hazard management plans and standard operating procedures in consultation with coal mine workers affected by the plans and operating procedures.
Maximum penalty – 200 penalty units

(3) The review under subsection (2) must take place –
(a) for a new coal mine – as soon as practicable after the operations; or
(b) for a change at an existing coal mine – before the change happens".

[27] Before considering the various arguments referred to above it is desirable to note the position as it was at the time Mr Vaccaneo was refused the right to participate in the meeting. On 10 October 2002, Oaky Creek terminated the application of its Fatigue Management Policy 00031. At that time, it admitted that the policy did not "meet

the requirements of s 42.1"[30] of the Regulation. That deficiency did not authorise Oaky Creek to terminate the policy without complying with the requirements of the Act and Regulation. The policy was part of the safety and health management system[31]. A proposal to change it meant that Mr Payne was obliged to comply with s 64 of the Act. If he did not do so, he was liable to a penalty; and he appears to have made no attempt to do so. Moreover, from the time the policy was withdrawn, the system certainly failed to comply with reg 42. However none of that means that the withdrawal was legally ineffective. Mr Amerena submitted that it was a nullity, but I do not accept that submission, for which no authority was cited. The Act clearly leaves the power to make, implement and change the system in the hands of the mine operator and the site senior supervisor. I see nothing in its terms which would have the effect contended for by Mr Amerena.

[28] In these circumstances there is no scope for the application of Mr Murdoch's argument in relation to so much of the application as seeks a declaration as to the position of Mr Vaccaneo on 11 December. Mr Payne was undertaking the development of a new policy. He was therefore obliged to "consult" with a cross-section of workers at the mine. "Consultation" with coal mine workers is defined by the Act to be "discussion between the site senior executive or supervisors and affected coal mine workers about a matter with the aim of reaching agreement about the matter"[32]. It was Mr Payne's perception that the meeting on 10-11 December was to fulfil that obligation. Whether those attending constituted a cross-section of affected workers might be questioned, but the union did not do so and there is no evidence before me on the point. I assume (as did the parties) that they did. Mr Payne did not attend the meeting; he sent at least one supervisor. At first sight, this would seem to be a breach of his obligation under the Regulation[33]. Again, that point was not raised. In the absence of argument, and with some hesitation, I assume that the course taken by Mr Payne was justified by s 13.

[29] Before I consider Mr Amerena's submission, it is convenient to dispose of two other aspects of the argument for Oaky Creek. In addition to the declaration regarding Mr Vaccaneo, the application seeks a declaration in relation to the present entitlement of an ISHR. The Fatigue Management Policy has now been reinstated. Does reg 42(5) apply in these circumstances? In my judgment, it does. Oaky Creek is proposing to change or replace the policy. It is formulating its proposals in writing in draft form and discussing them with affected workers. This is a process which is comfortably described as "developing" the fitness provisions within the meaning of that section. Nothing in reg 42 suggests that "develop" means only "create" out of nothing. That is the meaning which Mr Murdoch's submission would attribute to the word and its derivatives. Nor do s 64 and cl 12 of Schedule 2 of the Act support such a meaning. Development may be an ongoing process in the ordinary sense of the word. That is the sense in which it is used in this legislation.

[30] An argument was advanced on behalf of Oaky Creek that construing ss 42 and 10 as applying to a review of an existing safety and health management system would render the obligation to consult under s 64(2) of the Act redundant. However a provision is not redundant merely because in a particular set of circumstances it imposes an obligation which is similar or identical to one imposed by another

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30 This was probably a misprint for s 42(2).
31 Section 42(1).
32 Section 13.
33 Section 42(5).

provision. Assuming (as did the parties) that s 64 applies to the case, no ridiculous consequence follows from its concurrent application with regs 42 and 10. The existence of s 64 is not a ground for not applying those sections to the case.

[31] Regulation 42(6) required Mr Payne to comply with reg 10, with certain exceptions, as if the reference in that section to a standard operating procedure were reference to the fitness provisions, a term which includes the provisions for controlling risks associated with personal fatigue. The steps required by reg 10 are plainly intended to take place after the mandatory consultation with the coal mine workers. The first step after consultation is for the SSE to prepare a draft fatigue provision and give a copy of it to the workers whom he consulted. As I understand the evidence in the present case, Mr Payne did not wait until after the consultation to prepare his draft. It was prepared before the meeting and placed before the workers at the meeting. Whether the Regulation impliedly prohibits that course was not argued. It does seem that this was at the heart of the problem which arose on 10 and 11 December. The workers apparently did not want to assent to or dissent from the draft in the absence of the ISHR, Mr Vaccaneo.

[32] That attitude is understandable. It is true that reg 10 requires that once Mr Payne has prepared the draft he must give a copy of it to the workers whom he consulted for them to decide whether they agree or disagree with it. It is also true that, in the course of this process, they are at liberty to consult Mr Vaccaneo, who would be entitled to copy the draft (and any earlier draft for that matter) at any time[34]. Nonetheless, it would be more difficult for the workers to disagree with a provision in the draft if they had already agreed to it during the consultation. In that sense, the process adopted by Mr Payne was potentially embarrassing. On the other hand, the presence of the draft would focus the discussions during the consultation process and could facilitate Mr Payne's objective of having the workers "own" the safety and health system. That objective has statutory support[35] and is reflected in the rationale for the Act stated in the explanatory notes:

> "In development of the legislation, it was recognised that modern safety management focuses on creating a concept of "on-site ownership" of safety and health issues, brought about by the introduction of duty of care principles. It was also a Recommendation of the Moura Inquiry that duty of care principles be included in coal mining legislation. This concept was adopted …."[36]

The question now, however, is not whether it would have been better for Mr Payne to have deferred production of a draft until after the consultation process. It is whether Mr Vaccaneo had a right to participate in that process.

[33] I reject the submission that such participation would have fallen within any of paras (c), (d) or (e) of s 118(1) of the Act. The wording of those paragraphs is simply inappropriate to cover the situation. I am satisfied that such participation could have been held in relation to an initiative to improve safety or health at the mine within the meaning of para (f). (It is unnecessary to decide whether the situation was

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34 Section 119(1)(d) of the Act.

35 Sections 32(2)(b)(ii), 33(1) and 39(1)(b), (c) of the Act.

36 *Explanatory Notes*, p 2 (p 920 in *Queensland Explanatory Notes for Bills Passed During the Year 1999*, Vol. 1, Office of the Queensland Parliamentary Counsel, 1999).

covered by para (b)). However the fact that participation would have been within the ambit of Mr Vaccaneo's functions does not mean that he had a right to participate. The submission on behalf of the union implied that merely by defining a function of the ISHR the Act conferred a right to participate upon him. This right, it was submitted, was independent of the wishes of the parties to the consultation and the location of the meeting.

[34] That submission cannot be right. Suppose the meeting were held away from the coal mine, in a private home, and the parties did not wish the ISHR to be present. It is in my judgment impossible to construe s 118 and s 119 as entitling the ISHR to force himself upon a private meeting. Even if the meeting were at the mine (so that s 119 (1)(b) applied), s 118 (1)(f) cannot be construed to mean that the ISHR has a right to insist upon participating in every initiative even if those involved in the initiative do not want his help.

[35] In the alternative Mr Amerena submitted that where, as in the present case, Mr Vaccaneo's participation was requested by the workers, the right to participate arose. The submission did not identify how it arose, nor did it examine the nature of the right contended for. I am unable to see anything in the section which would make a request by some of the parties to the discussion a factor which would make any difference. The statutory consultation required by reg 42(5) must take the form of discussion between Mr Payne or supervisors and affected coal mine workers[37]. The description of the ISHR as provided "to represent the safety and health interests of coal mine workers"[38] does not go far enough to confer on him a right to represent the workers in such a discussion.

[36] It follows that, in my judgment, the argument based on ss 118 and 119 of the Act and regs 42 and 10 must fail.

[37] It was not argued for the union that the application could succeed on the basis of s 64 of the Act if it failed on the basis of regs 42 and 10. That omission was soundly based. Nothing in s 64 suggests the existence of a right in the ISHR to participate in the consultation therein referred to. Arguments based on ss 118 and 119 are covered by what I have already said about those sections in the context of regs 42 and 10. In addition, there is a question whether the Fatigue Management Policy was part of the principal hazard management plans (it seems unlikely to have been part of the standard operating procedures having regard to the definition of that phrase) and whether that fact affects the position. Neither the plans nor the policy was tendered; resolution of the former question might have strained the process of drawing inferences.

Section 64 of the Act

[38] Section 64 is a difficult section. Its complete elucidation would require much lengthier argument than could be advanced in the time available in this case. I draw attention to a number of the difficulties, not because all arise in the present case, but because they might usefully be addressed by Parliamentary Counsel if the section is reviewed. To understand them, one must bear in mind some definitions. Subsection (1) distinguishes between the terms "new coal mine" and "existing coal

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37 Section 13 of the Act.

38 Section 7(e) of the Act.

mine" and sub-s (3) suggests that they are intended to be mutually exclusive. Neither term is defined, but the definition of "coal mine" has the consequence that, with marginal exceptions, both must be places where activities are being carried on. (This has apparently been done in order to exclude an abandoned coal mine from the definition.) It is therefore necessary to remember that a new "coal mine" is an existing coal mine in the ordinary sense of that phrase.

[39] Subsection (2) imposes an obligation on the SSE to "review the principal hazard management plans and standard operating procedures in consultation with coal mine workers affected by the plans and operating procedures". The following questions arise:

- Can the site senior executive delegate the review process?
- Can any part of the review process be done outside the consultation?
- Where a safety and health management system has been developed for a new coal mine, why is only part of it (the principal hazard management plans and the standard operating procedures) the subject of review?
- Where it is proposed at an existing mine to change a part of the system not included in those plans or procedures, what is the point of reviewing the those plans and procedures and not reviewing the subject matter of the change?
- How many affected coal mine workers must be consulted? Two? All of them?
- Must the site senior executive consult all of the affected workers at once or can they be consulted one at a time?
- Is it enough to consult workers affected by the plans and procedures if they do not include workers affected by proposed changes?
- Where a new safety and health management system has been developed for an existing mine, which principal hazard management plans and standard operating procedures should be reviewed – the old ones, the new ones, or both?

Other matters

[40] The declarations sought by the union in para 1(a) of the application related to the rights of the ISHR, not to the rights of the workers. Their position was not the subject of any substantial argument before me. It is arguable that they are obliged to take part in the consultation process[39]. Whether they have the right to do so by an agent (for example, a solicitor or the ISHR) was not debated before me at any length. It is unnecessary for me to express a view on the point.

[41] As to paras 1(b)-(d) of the application, Mr Murdoch submitted that the matters dealt with were hypothetical. In my judgment that submission is correct. There is no evidence of any dispute relating to the matters the subject of the proposed declarations. On the contrary it seems likely that Mr Vaccaneo will be given copies of the documents referred to in (b) and (d). The situation referred to in s 10(1)(d)(ii)(B) of the Act may never arise.

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39 Section 39(1) of the Act.

[42] The application is dismissed.