SUPREME COURT OF QUEENSLAND

CITATION:	*CFMEU v Anglo Coal (Dawson Management) P/L* [2007] QSC 382
PARTIES:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** (applicant) **v** **ANGLO COAL (DAWSON MANAGEMENT) PTY LTD** ACN 006 746 701 (respondent)
FILE NO/S:	BS 7534 of 2007
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	11 October 2007
JUDGE:	Martin J
ORDER:	**Declare that on the proper construction of s 42(7) of the *Coal Mine Safety and Health Regulation 2001* (Qld) the criteria for assessment in MOP 63 Fitness for Work Procedure and MOP 51 Fitness for Work – Drugs were not validly established as at:** **(a) 4 January 2007, or** **(b) 10 October 2007**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – OTHER MATTERS – where ballot conducted at minesite – where ballot allegedly conducted improperly – whether criteria for assessment by employees were properly established – proper construction of s 42(7) of the *Coal Mining Safety and Health Regulations 2001* – meaning of "agreement" *Coal Mining Safety and Health Act 1999* (Qld) *Coal Mining Safety and Health Regulation 2001* (Qld), s 42 *Industrial Relations Act 1999* (Qld) *Workplace Relations Act 1996* (Cth) *Annetts v McCann* (1990) 170 CLR 596, considered *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334, considered *CFMEU v Oaky Creek Pty Ltd* [2003] QSC 33, considered

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421, considered
Ibeneweka v Egbuna [1964] 1 WLR 219, considered

COUNSEL: B G Docking directly briefed by the applicant
J E Murdoch SC with A Horneman-Wren for the respondent

SOLICITORS: The applicant appeared on their own behalf
Blake Dawson Waldron for the respondent

[1] The applicant seeks declarations as to the proper construction of s 42(7) of the *Coal Mining Safety and Health Regulation 2001* (Qld) ("the Regulation") and that certain actions by the respondent did not comply with the requirements of s 42(7).

[2] The applicant is an industrial organisation registered under the *Workplace Relations Act 1996* (Cth). Many of the persons who work in coal mines are eligible to become members of it. The respondent is the operator of the Dawson Mines which are open cut coal mines situated to the east of Moura and to the north of Theodore in central Queensland.

The application

[3] At the hearing, the applicant sought, and was given leave, to amend the application. The amended application seeks the following orders:

1. A declaration that on the proper construction of section 42(7) of the *Coal Mining Safety and Health Regulation* 200l (Qld) ("the *Regulation*"), as at 4 January 2007, the Anglo Coal (Dawson Management) Pty Ltd Fitness for Work Programme Ballot conducted at the Dawson Minesite, Dawson Highway, via Moura, did not constitute a senior site executive validly establishing the criteria for the assessment in agreement with a majority of the workers at the mine, in that:
   (a) Workers who were absent on leave on the mornings of 18, 19 and 20 December 2006 were not afforded an opportunity to vote; and/or
   (b) The number of workers who voted in the affirmative on each question on the mornings of 18, 19 and 20 December 2006 did not constitute a majority of the workers at the mine.
2. A declaration that on the proper construction of section 42(7) of the *Coal Mining Safety and Health Regulation 2001*, the criteria for the assessment in MOP 0063 Fitness for Work Procedure and MOP 0051 Fitness for Work – Drugs were not validly established as at:
   (a) 4 January 2007,
   (b) 10 October 2007, or
   (c) both.

Coal Mining Health & Safety Act

[4] The *Coal Mining Safety and Health Act 1999* (Qld) ("the Act") and the Regulation have been the subject of consideration by this Court on a number of occasions. In *CFMEU v Oaky Creek Pty Ltd* [2003] QSC 33, Fryberg J said this about the Act:

"[3] By 1999, deficiencies in the regulatory regime covering safety and health in coal mines[1] were widely recognised.[2] 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."[3] 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"[4]. It is intended to "provide a modern legislative framework for the safety and health of those involved with Queensland's most important industry"[5]. 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.'[6]

[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; … '[7].

[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—

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1 Primarily the *Coal Mining Act 1925.*

2 *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).

3 Hon. T McGrady, Minister for Mines and Energy (24 March 1999): *Queensland Parliamentary Debates*, Vol. 349 at p 734.

4 *Ibid*.

5 *Ibid* p 733.

6 Section 6.

7 Section 7.

(i) the election of site safety and health representatives under part 7; and

(ii) the process of involving coal mine workers in the management of risk.'[8]

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.[9] 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.[10] The third method is implemented by provisions permitting the Minister to make recognised standards for safety and health[11]. 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[12]; and for the union to appoint industry safety and health representatives ("ISHR") and for the definition of their functions and powers[13].

[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[14]. 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[15]. 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[16]. 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'[17]. It 'must be an auditable

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8 Section 32(2).
9 Section 34.
10 Part 4.
11 Section 72.
12 Part 7.
13 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.
14 Section 41(1).
15 Section 25.
16 Section 42(c).
17 Section 62(1).

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'[18].

[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 implementation[19]. Obligations of leaseholders, owners, contractors and workers are defined by reference to it[20]. 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.'[21]

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[22]. But the vast majority of topics for which provision must be made in a system are set out in the Regulation[23]. One of them, provision for controlling the risks associated with personal fatigue[24], is of particular importance. It is set out below.[25]

The Regulation

[5] At 4 January 2007, s 42 of the Regulation provided:

> "**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;
>
> *Example of other physical or psychological impairment—*
> an impairment caused by stress or illness
>
> (c) the improper use of drugs.

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18 Section 62(2).
19 Section 41(1)(f).
20 Sections 40(2), 41(1)(d)-(f), 43, 39(1)(a).
21 Regulation 6.
22 Section 62(d).
23 There are many sections. It is unnecessary to list them.
24 Regulation 42. (To distinguish sections of the Regulation from sections of the Act I shall refer to the former as "regulations".)
25 Paragraph [21].

(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.

(3) The system must provide for protocols for other physical and psychological impairment for persons at the mine.

(4) The system must provide for the following about drug consumption or ingestion for persons at the mine—
(a) an education program;
(b) an employee assistance program;
(c) an obligation of a person to notify the site senior executive for the mine of the person's current use of medication that could impair the person's ability to carry out the person's duties at the mine;
(d) an obligation of the site senior executive to keep a record of a notification given to the site senior executive under paragraph (c).

(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.

(7) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1), the site senior executive must establish the criteria for the assessment in agreement with a majority of workers at the mine.

(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)."

[6] Section 42 was amended with effect from no later than 20 April 2007. The amended parts of s 42 now read:

"…
(4) …
(e) **the following assessments to decide a person's fitness for work—**
(i) voluntary self-testing;
(ii) random testing before starting, or during, work;
(iii) testing the person if someone else reasonably suspects the person's ability to carry out the person's duties at the mine is impaired because the person is under the influence of drugs.

…
(7) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(c), the site senior

executive must **make a reasonable attempt to** establish the criteria for the assessment in agreement with a majority of workers at the mine.

(7A) **If the majority of workers at the mine disagree with the criteria for the assessment under section (7), the criteria for assessment stated in a recognised standard apply until an agreement is reached**.

…"

Background

[7] By the end of June 2006, David O'Rourke (the Site Senior Executive of the Dawson Mines – "the SSE") had developed two fitness provisions. They were: "MOP 63 Fitness for Work Procedure", and "MOP 51 Fitness for Work – Drugs". Between June and August 2006 the fitness provisions were discussed with a cross-section of workers in accordance with s 42(5) and s 10 of the Regulation.

[8] From September to December 2006, the respondent held a number of information sessions with the workers about MOP 63 and MOP 55.

[9] In December 2006 the respondent sought to implement part of its safety and health management system to control risks at the Dawson Mines associated with Fitness for Work as required by the Regulation. The relevant "fitness provisions" as referred to in s 42(8) are found in "MOP63 Fitness for Work Procedure" and "MOP0051 Fitness for Work – Drugs". The "criteria for assessment" sought to be used by the respondent for the purposes of the fitness provisions were:

(a) OSPAT, which is a computer based technology system used to determine a person's fitness for work by measuring their ongoing hand-eye coordination at the start of each shift and comparing their results to a personal profile of recent assessments, and

(b) urine testing for drugs.

[10] On 18, 19 and 20 December 2006 the Australian Electoral Commission ("AEC") conducted a ballot on behalf of the respondent. The ballot contained two questions:

Q.1: "Do you accept OSPAT as the primary tool of assessment for measuring Fitness for Duty?"

Q.2: "Do you accept urine as the second tool of assessment for Fitness for duty?"

[11] The AEC set up ballot boxes at the workplace for the three days in question. No arrangements were made for postal votes and approximately 80 workers at the Dawson Mines were not present at work at any time during the vote. At that time the relevant number of coalmine workers was 1,240. That number was made up of 629 employees of the respondent and 611 contractors or employees of a contractor. Those in the latter category are regarded as coalmine workers pursuant to the definition of that term in Schedule 3 of the Act.

[12] On 4 January 2007 the AEC issued its declaration of results. Out of 1,240 persons entitled to vote, 792 did. The results were:

Question	**Yes**	**No**	**Informal**	**Total**
1	541 (43.63%)	239 (19.27%)	12	792
2	474 (38.22%)	306 (24.68%0	12	792

[13] In his first affidavit, Mr O'Rourke gave evidence as to his belief about whether or not there had been approval by a majority of coal mine workers of the proposed criteria. He said:

> "While only 792 persons from a roll of 1,240 voted, I formed the view that the ballot was strongly indicative of the approval by a majority of coal mine workers at the Dawson Mines of the use of OSPAT and urine testing in relation to the improper use of drugs. My colleagues and I had developed the fitness for work procedures and discussed OSPAT and urine testing with workers over many months. The ballot from 18 to 20 December 2006 was well publicised and the achievement of a clear majority of the workforce that participated in the ballot strongly indicated to me that I had the agreement of a majority of workers in relation to the use of OSPAT and urine testing."

[14] Objection was taken to this and other passages which set out his opinion, on the basis that his opinion was irrelevant and that the test for determining whether the requisite approval existed was objective rather than subjective. I did not strike out all of the passages to which objection was taken, on the basis that they would be admitted to explain the conduct of the respondent. For reasons which I deal with later, the opinion of Mr O'Rourke on this matter is irrelevant.

[15] In his second affidavit Mr O'Rourke says that, following the commencement of the application by the CFMEU in this matter, he decided that it would be worthwhile surveying the workers at the Dawson Mine "in order to provide them with an opportunity to comment again on the criteria for the assessment that was the subject of a ballot between 18 and 20 December 2006". In that affidavit he provides details of how he set about undertaking the survey. In summary, he caused a letter to be sent to all the workers for whom the respondent had both names and addresses. The letter contained the following:

> "Due to some queries [about people on leave not voting] which have been raised about the December vote, I would like to give everyone the opportunity in accordance with s 42 of the *Coal Mine Safety and Health Regulation* to confirm agreement with the criteria for assessment which is contained in the policy.
>
> If you accept the criteria for assessment as set out in the policy, ie. OSPAT and urine as explained at the time of the December vote or induction), then you do not need do anything. I will take it that if you do not respond, you accept."

[16] The survey was then conducted in the form of a postal ballot. The results of the ballot were as follows:

(a) 130 returns,
(b) 74 indications of acceptance,
(c) 52 indications of objection, and
(d) 4 informal.

[17] Mr O'Rourke took this result as "confirmation of the agreement of the majority of workers at the Dawson Mines to the criteria for assessment that was the subject of a ballot between 18 and 20 December 2006".

Applicant's arguments

[18] The first declaration sought by the applicant focuses solely on the December 2006 ballot and whether that, alone, constituted the establishment of criteria in accordance with s 42(7) of the Regulation.

[19] The second declaration sought casts the net wider. It raises the issue of whether there was the requisite agreement in all the circumstances existing at January 2007 or October 2007 or at both times.

[20] In advancing its arguments in favour of the declarations, the applicant contended that the "agreement" referred to in s 42(7) must comprise:

(a) a mutual agreement or conjunction of the mind of the SSE and a majority of the minds of the relevant coal mine workers; or

(b) a legally binding contract or arrangement between the SSE and a majority of the relevant coal mine workers; or

(c) both (a) and (b).

[21] Further, the applicant argued that whether or not there was an agreement reached for the purposes of s 42(7) is to be "determined by the rules of offer and acceptance or, in other words, the rules employed by the law in deciding when parties have reached an agreement".

[22] The "relevant coal mine workers" referred to above are, in the applicant's submissions, all the coal mine workers employed at the mines.

[23] The applicant also argued that the role of the SSE in establishing criteria under s 42(7) is akin to that of a public official. Reference was made to the reasons of Mason CJ, Deane and McHugh JJ in *Annetts v McCann* (1990) 170 CLR 596 where, at 598, they said:

> "It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment …"

[24] Using that as the base for its argument the applicant then contends that the SSE was required to afford, on natural justice grounds, to those workers who were absent on leave, an opportunity to accept or reject the criteria.

[25] With respect to the second declaration sought, the applicant relies upon its arguments with respect to the first declaration and says, further, that at neither of the times referred to in the second declaration is there any evidence of the requisite external manifestation of assent to the criteria by a majority or of acceptance of the criteria by a majority communicating acceptance to the SSE.

Respondent's arguments

[26] The respondent argues that there is no utility in making the first declaration sought because it has never suggested that the ballot, of itself, constituted the SSE establishing the criteria in agreement with a majority of the workers. Further, it was submitted that such a ballot is only a means of ascertaining the level of agreement

(and disagreement) in the relevant class or group. There is, therefore, on the respondent's case, no controversy and, hence, a declaration would have no point.

[27] It is the respondent's case that the SSE can use the majority affirmative vote (of those who voted) to gauge whether there is agreement of the majority of workers at the mines to the criteria. Those criteria, it says, were established, so far as OSPAT is concerned, on 18 January 2007 and, so far as urine tests are concerned, on 19 February 2007.

[28] The requirement for "agreement with a majority of the workers" is satisfied, the respondent says, by the following:

(a) a lengthy consultation process with a representative group of the workforce;
(b) widespread communication and explanation of the proposed criteria to substantial numbers within the workforce;
(c) personal involvement by the SSE in the process; and
(d) the ballot, being an appropriate means of gauging the extent to which workers at the mines were in agreement with the criteria.

[29] With respect to the second declaration sought, the respondent says that if the criteria were not validly established after the December 2006 ballot, they were after September 2007. The respondent says that the survey and the steps which preceded it constituted a "reasonable attempt" to establish criteria in agreement with the majority of workers.

What is in issue?

[30] It is argued by the respondent that there is no utility in making a declaration in the form of the first declaration sought by the applicant. It would, the respondent says, serve no useful purpose. There is, it seems clear, no dispute between the parties as to whether or not the ballot conducted at the Dawson Mine site could constitute a senior site executive validly establishing the criteria for the assessment in agreement with a majority of the workers at the mine. It is not the respondent's case that the ballot did constitute such a set of circumstances.

[31] In the absence of a dispute as to the effect, by itself, of the ballot then a declaration should not be made.

[32] In *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 Gibbs J (at 438) approved the words of Viscount Radcliffe in *Ibeneweka v Egbuna* [1964] 1 WLR 219:

> "…the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration."

[33] Thus, a declaration should not be granted in relation to an abstract or theoretical question. Recently, the High Court confirmed that it is not the function of courts to give advisory opinions. In *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said at [45]:

> "The purpose of a judicial determination has been described in varying ways. But central to those descriptions is the notion that such a determination includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy."

[34] There is, on this point, no controversy and I will not, therefore, make any declaration in the form contained in declaration 1 as sought.

[35] There is, though, a clear controversy with respect to the subject of the second declaration. The applicant says that the criteria for assessment have not been validly established at either of the dates referred to in the declaration sought in contrast to the respondent's contention that the criteria were validly established in January 2007 but, if they are wrong in that contention, then the criteria were established in October 2007. The latter date is complicated to this extent – the provisions of s 42 were amended and took effect after January 2007. I will deal with that later.

What does s 42(7) require?

[36] The respondent argues that s 42(7) has been satisfied because of the events which had occurred at the mine. In the respondent's words:

> "There had been a process of consultation between the SSE and a cross section of the coalmine workforce. There were also rounds of information sessions at which the SSE and other senior management addressed groups of workers on the procedures, including the testing criteria."[26]

[37] The respondent argues that the activity of management and, in particular, the SSE, allow the SSE to form the view that a majority of coalmine workers were in agreement with the criteria. That view was, the respondent says, confirmed by the results of the ballot conducted in December 2006.

[38] How should s 42(7) be read? "The golden rule of statutory interpretation … is that the grammatical and ordinary meaning of the words is to be given unless it results in an absurd result."[27] It must also be remembered that "statutory interpretation is not merely a linguistic or semantic exercise and that the context of the words used and the purpose of the statutory provisions must be borne in mind".[28]

[39] The words of s 42(7) are quite plain. To establish the criteria "there must be agreement with a majority of workers at the mine". Two questions arise:

1. what will constitute an "agreement" for the purposes of the section, and
2. what satisfies the description: "a majority of workers"?

[40] It was contended for the applicant that whether or not an agreement is reached for the purposes of s 42(7) should be determined in accordance with the rules of offer and acceptance which apply to contracts. The context in which "agreement" appears does not require such a strict construction of the term. In ordinary life, and in the ordinary scheme of employment, persons can agree with each other about a myriad of things without the necessity for such agreement to be enforceable as a contract. In

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26 Paragraph 27 of the respondent's submissions.

27 *Grice v State of Queensland* [2005] QCA 272, per McMurdo P at [9]

28 *Amos v Brisbane City Council* [2005] QCA 433, per Muir J at [13]

the terms of this section, "agreement" should be construed as a coincidence or concurrence of opinion between the SSE and an individual worker.

[41] Of course, s 42(7) requires that there should be agreement with a "majority of workers". This raises the issue of what constitutes a majority – and how is this to be assessed?

[42] There is no reason, after considering the plain words of s 42(7), their context, or the purpose of the Regulation, to construe "majority" as meaning anything other than 50% plus one of all the workers who come within the subsection. That raises the problem of how, in practice, an SSE might ever be able to obtain such a majority when the Regulation imposes no duty on workers to signify in any particular way whether they agree or disagree. Obviously, a ballot could demonstrate that a majority does exist where the requisite number votes in favour – but that number is a majority of all workers not just those who vote.

[43] Similar problems have been addressed in other legislation. For example, in the *Industrial Relations Act 1999* (Qld), a valid majority for the purposes of the certification of an agreement is defined in Schedule 5 as "a majority of the relevant employees who cast a valid vote to give an approval, after the employer has given the employees a reasonable opportunity to decide whether they want to give the approval."

[44] The respondent argues that the section can be satisfied in this case by the informed opinion of the SSE. The words of s 42(7), though, do not permit a subjective view as the determinant of whether or not the relevant criteria were established. The only way to read s 42(7) is one requiring an objective test to be applied to determine whether or not the criteria were properly established. The section is silent as to how that objective test might be satisfied. No doubt, there will be a number of alternative methods available to satisfy such a test, depending, at least to some extent, on the number of employees at a mine and the issue involved. Merely because the SSE thinks that a majority of workers has agreed on the establishment of the criteria does not mean that they have, in fact, so agreed.

[45] In the circumstances of this case, even if a subjective test is applied, it would not follow that the respondent could be said to have satisfied that test. A subjective test must be applied reasonably and it could not be said that the SSE had dealt with sufficient of the employees to form any view that a majority was in agreement. The SSE did not consult with the employees of contractors. They numbered some 611 or nearly half of the total number of coalmine workers.

[46] The respondent also argues that concurrence can be inferred from conduct and that, by working to such criteria after their introduction (following the consultation, balloting and so on), concurrence should be inferred. As pointed out by Windeyer J in *Brickworks Ltd v Warringah Corporation* (1963) 108 CLR 568 at 576: "Whether or not a person consented to something is a question of fact". It may be proved by showing an express consent or by showing conduct evidencing consent: *Booton v Clayton* (1948) 48 SR (NSW) 336, at pp 339, 340.

[47] In this case, the evidence as to the actual knowledge of workers is sparse, if not non-existent. Consent by conduct cannot be inferred unless all the relevant facts are known. For example, did a majority of the workers know what the criteria were and that they had been imposed? In these circumstances, given the near total absence of

contact with the employees of contractors, the answer to both must be "no". Without knowledge of the issue upon which conduct is being assessed, no inference can be drawn that conduct indicates consent.

What effect does the amended s 42(7) have in this case?

[48] Section 42(7) provided (from 20 April 2007 and, at least, until 10 October 2007):

> "If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(c), the site senior executive must **make a reasonable attempt to** establish the criteria for the assessment in agreement with a majority of workers at the mine." (amendment in bold)

[49] It was not suggested by either party that the amendment to s 42(7) had any retrospective operation.

[50] The relevant actions of the respondent since the amendment to s 42(7) are set out in [15] – [17] above.

[51] Whatever the intention of the amended s 42(7) is, it is not possible to categorise the conduct of the survey, or its results, as demonstrating "a reasonable attempt". The letter which was sent to workers was expressed as being "an opportunity in accordance with s42 of the Regulation to confirm agreement with the criteria for assessment which is contained in the Policy." That does not accurately represent the requirements of s 42(7). Although there is no requirement that an indication of agreement under s 42(7) should be anonymous, the fact that the survey form required those who did not agree with the criteria to identify themselves may have led to some people not being willing to take part. Further, the survey assumes that a non-response is acceptance of the proposal. Silence can not, in these circumstances, be construed as acceptance.

[52] The respondent also argued that the criteria could be imposed as part of the policies of the employer. As the declarations sought concerned only the Regulation, I make no comment on that contention.

Declarations

[53] For the reasons given above, I decline to make the first declaration sought. The provisions of s 42(7), in either form, have not been satisfied. I will, therefore, make the following declaration:

> On the proper construction of section 42(7) of the *Coal Mining Safety and Health Regulation 2001* (Qld) the criteria for the assessment in MOP0063 Fitness for Work Procedure and MOP0051 Fitness for Work – Drugs were not validly established as at:
> (a) 4 January 2007, or
> (b) 10 October 2007.

[54] I will hear the parties as to costs.