SUPREME COURT OF QUEENSLAND

CITATION:	*Construction, Forestry, Mining & Energy Union v BM Alliance Coal Operations Pty Ltd & Ors* [2011] QSC 381
PARTIES:	**CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** (applicant) **v** **BM ALLIANCE COAL OPERATIONS PTY LTD (ACN 096 412 752)** (first respondent) **BHP COAL PTY LTD (ACN 010 595 721)** (second respondent) **MICHAEL NUCIFORA** **(**third respondent) **BM ALLIANCE COAL OPERATIONS PTY LTD (ACN 096 412 752)** (first applicant) **BHP COAL PTY LTD (ACN 010 595 721)** (second applicant) **MICHAEL NUCIFORA** **(**third applicant) **v** **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION** (respondent)
FILE NO/S:	BS9863 of 2011 BS10122 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2011
JUDGE:	Martin J
ORDER:	**1. In BS9863 of 2011, application dismissed.** **2. In BS10122 of 2011, application dismissed.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL PRINCIPLES – where

the *Coal Mining Safety and Health Act* 1999 (Qld) ("the Act") establishes a regime that involves the election of Site Safety and Health Representatives ("SSHRs") – where there are two applications before the court concerning the process for electing SSHRs at the Gregory Mine in Central Queensland – where on the first application, the Construction, Forestry, Mining and Energy Union ("CFMEU") seeks declarations that the election process it proposes complies with the Act, and that the respondents are not entitled to interfere with that process – where the respondents BM Alliance Coal Operations Pty Ltd, BHP Coal Pty Ltd and Michael Nucifora ("BMA") apply by cross-application for a declaration that conduct of the election of SSHRs is vested in the site senior executive ("SSE") of the coal mine, and that the electoral procedure proposed by BMA satisfies the requirements of the Act – where the Act fails to prescribe any method for conducting an election or any guidance as to who might call or conduct an election for SSHRs - whether the election process proposed by the CFMEU complies with the Act – whether the electoral procedure proposed by BMA satisfies the requirement of the Act

Acts Interpretation Act 1954 (Qld), s14A, s32CA
Coal Mining Safety and Health Act 1999 (Qld) s6, s7, s25, 28, s32, s41, s42, s62, s92, s93, s94, s95, s96, s97, s98, s99, s100, s101, s102, s103, s104, s105, s106, s107

Bropho v Western Australia (1990) 171 CLR 1, cited
CFMEU v Oaky Creek Coal Pty Ltd [2003] QSC 33, considered
IW Applicant v City of Perth (1997) 191 CLR 1, considered
Kingston v Keprose Pty Ltd [1987] 11 NSWLR 404, cited
Minister Administering the Crown Lands Act v NSW Aboriginal Land Council (2008) 237 CLR 285, cited
R v Young (1999) 46 NSWLR 681, considered
Ravenscroft v Nominal Defendant [2008] 2 Qd R 32, considered
Saraswati v The Queen (1991) 172 CLR 1, cited
Sevmere Pty Ltd v Cairns Regional Council [2010] 2 Qd R 276, considered
Waugh v Kippen (1986) 160 CLR 156, cited
Wentworth Securities v Jones [1980] AC 74, considered

COUNSEL: R Gotterson QC and C Hartigan for the applicant/respondent
P Roney SC for the respondent/applicant

SOLICITORS: Hall Payne for the applicant/respondent
Blake Dawson for the respondent/applicant

[1] The *Coal Mining Safety and Health Act* 1999 (Qld) ("the Act") establishes a regime which has, as one of its objects, the protection of the safety and health of persons at

coal mines and persons who may be affected by coal mining operations[1]. One of the elements of the regime involves the election of Site Safety and Health Representatives ("SSHRs").

[2] There are two applications before the court concerning the process for electing SSHRs at the Gregory Mine in Central Queensland. In the first application the Construction, Forestry, Mining and Energy Union ("CFMEU") seeks declarations that:

(a) The election process it proposes complies with the Act; and
(b) The respondents are not entitled to interfere in that process.

[3] The respondents to the CFMEU application are BM Alliance Coal Operations Pty Ltd (the coal mine operator at Gregory), BHP Coal Pty Ltd (the employer of labour at Gregory) and Michael Nucifora (the Site Senior Executive (the SSE) at Gregory). I will refer to those parties jointly as BMA.

[4] BMA has made a cross-application in which it seeks declarations that:

(a) Responsibility for the conduct of the election of SSHRs is vested in the SSE of the coal mine; and
(b) Adoption of the electoral procedure proposed by BMA is not unlawful and otherwise satisfies the requirements of the Act.

[5] In the alternative, BMA seeks a declaration as to who bears responsibility for the conduct of an election for SSHRs at a coal mine under the Act.

The Act

[6] A useful summary of the pertinent features of the Act was given by Fryberg J in *CFMEU v Oaky Creek Coal Pty Ltd*:[2]

> "[3] By 1999, deficiencies in the regulatory regime covering safety and health in coal mines were widely recognised. 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.' 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'. It is intended to 'provide a modern legislative framework for the safety and health of those involved with Queensland's most important industry'. 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.'
>
> [4] It specifies eleven methods by which those objects are to be achieved. Among them are:

[1] Section 6(a) of the Act.
[2] [2003] QSC 33.

> ‘(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; …’.

[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
> (ii) the process of involving coal mine workers in the management of risk.’

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. 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. The third method is implemented by provisions permitting the Minister to make recognised standards for safety and health. 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; and for the union to appoint industry safety and health representatives (“ISHR”) and for the definition of their functions and powers.

[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. 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.

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. 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'. 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'.

[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. Obligations of leaseholders, owners, contractors and workers are defined by reference to it. 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.'

However its contents are not exclusively mandated in that section. Some requirements appear in the Act. … "

[7] The general parts of the Act and the definitions which are relevant to these applications are as follows:

"7 How objects are to be achieved

The objects of this Act are to be achieved by—

…

(b) providing for safety and health management systems at coal mines to manage risk effectively; and

…

(e) providing for safety and health representatives to represent the safety and health interests of coal mine workers; and

…

(h) requiring management structures so that persons may competently supervise the safe operation of coal mines;

…"

"25 Meaning of site senior executive

(1) The ***site senior executive*** for a coal mine is the most senior officer employed or otherwise engaged by the coal mine operator for the coal mine who—

(a) is located at or near the coal mine; and
(b) has responsibility for the coal mine.

…"

"28 Meaning of *site safety and health representative*

A ***site safety and health representative*** for a coal mine is a coal mine worker elected under section 93 by coal mine workers at the coal mine to exercise the powers and perform the functions of a site safety and health representative mentioned in part 7 division 2."

"32 Cooperation to achieve objects of Act

(1) This Act seeks to achieve cooperation between coal operators, site senior executives and coal workers to achieve the objects of the Act.

(2) 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 committee 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

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

"41 Obligations of coal mine operators

(1) A coal mine operator for a coal mine has the following obligations—

(a) to ensure the risk to coal mine workers while at the operator's mine is at an acceptable level, including, for example, by providing and maintaining a place of work and plant in a safe state;

…

(g) to provide adequate resources to ensure the effectiveness and implementation of the safety and health management system."

"42 Obligations of site senior executive for coal mine

A site senior executive for a coal mine has the following obligations in relation to the safety and health of persons who may be affected by coal mining operations—

…

(c) to develop and implement a safety and health management system for the mine;"

"62 Safety and health management system

(1) A safety and health management system for a coal mine is a system that incorporates risk management elements and practices that ensure safety and health of persons who may be affected by coal mining operations.

…

(3) The safety and health management system must be adequate and effective to achieve an acceptable level of risk by—

(a) defining the coal mine operator's safety and health policy; and
(b) containing a plan to implement the coal mine operator's safety and health policy; and
(c) stating how the coal mine operator intends to develop the capabilities and support mechanisms necessary to achieve the policy; and
(d) including principal hazard management plans and standard operating procedures; and
(e) containing a way of—
(i) measuring, monitoring and evaluating the performance of the safety and health management system; and
(ii) taking the action necessary to prevent or correct matters that do not conform with the safety and health management system; and
(f) containing a plan to regularly review and continually improve the safety and health management system so that risk to persons at the coal mine is at an acceptable level; and
(g) if there is a significant change to the coal mining operations of the coal mine—containing a plan to immediately review the safety and health management system so that risk to persons is at an acceptable level."

[8] The term "coal mine worker" is defined in Schedule 3 of the Act as meaning:

"an individual who carries out work at a coal mine and includes the following individuals who carry out work at a coal mine—
(a) an employee of the coal mine operator;
(b) a contractor or employee of a contractor."

[9] The term "union" is defined in Schedule 3 of the Act as meaning "the Construction Forestry Mining and Energy Union—Mining and Energy Division Queensland District Branch".

[10] Part 7 of the Act provides:

"Part 7 Site safety and health representatives
Division 1 Purposes of part
92 Purposes of pt 7
The main purposes of this part are to provide for the election of site safety and health representatives and to state their functions and powers.

Division 2 Site safety and health representatives
93 Election of site safety and health representatives
(1) The coal mine workers at a coal mine may elect up to 2 of their number to be site safety and health representatives for the mine for the term decided by the coal mine workers.
(2) If there is more than 1 site senior executive at a coal mine, the coal mine workers in each part of the mine for which a

site senior executive has responsibility may elect 2 coal mine workers to be site safety and health representatives for each part for the term decided by the coal mine workers.

(3) A person elected under subsection (1) or (2), becomes a site safety and health representative only if the person holds the appropriate safety and health competencies accepted by the committee for a site safety health representative.

(4) When performing functions or exercising powers under this part, a site safety and health representative is taken to be performing part of the coal mine worker's duties as a coal mine worker.

94 Further election if site safety and health representative not available

(1) If a site safety and health representative is not available when a coal mine operation is considered unsafe by affected coal mine workers, coal mine workers at the mine or part of the mine may elect 2 coal mine workers who are practical miners to inspect the coal mining operation.

(2) A person elected under subsection (1) is taken to be a site safety and health representative for the period—

(a) a site safety and health representative is not available; and

(b) the coal mining operation is considered unsafe by affected coal mine workers.

95 Person must be qualified to act as site safety and health representative

(1) A person must not act as a site safety and health representative unless the person holds the competencies mentioned in section 93(3).
Maximum penalty—40 penalty units.

(2) Subsection (1) does not apply to a person elected under section 94.

(3) A site safety and health representative must perform the functions and exercise the powers of a site safety and health representative under this Act for safety and health purposes and for no other purpose.

Maximum penalty for subsection (3)—40 penalty units.

96 Ceasing to be a site safety and health representative

A coal mine worker stops being a site safety and health representative if the worker—

(a) tells the site senior executive that the worker resigns as site safety and health representative; or

(b) stops being a worker at the mine; or

(c) is removed from office by a vote of coal mine workers.

97 Removal from office by Minister

(1) The Minister may remove a site safety and health representative from office by notice if the Minister considers

the representative is not performing the representative's functions satisfactorily.

(2) The notice must contain the Minister's reasons for removing the site safety and health representative from office.

98 Election after removal from office

If a site safety and health representative is removed from office by the Minister, another site safety and health representative may be elected under this division.

(2) However, another person must not be elected to be a site safety and health representative until after—

(a) the time for filing an appeal under part 14, division 1 has ended; or

(b) if an appeal against the Minister's decision has been filed—an Industrial Magistrates Court has confirmed the Minister's decision to remove the site safety and health representative.

(3) The provisions of this division apply to the election.

99 Functions of site safety and health representatives

(1) A site safety and health representative for a coal mine has the following functions—

(a) to inspect the coal mine to assess whether the level of risk to coal mine workers is at an acceptable level;

(b) to review procedures in place at the coal mine to control the risk to coal mine workers so that it is at an acceptable level;

(c) to detect unsafe practices and conditions at the coal mine and to take action to ensure the risk to coal mine workers is at an acceptable level;

(d) to investigate complaints from coal mine workers at the mine regarding safety or health.

(2) The site senior executive and supervisors at the coal mine must give reasonable help to a site safety and health representative in carrying out the representative's functions.
Maximum penalty—40 penalty units.

(3) The site senior executive or the site senior executive's representative may accompany the site safety and health representative during an inspection.

(4) A site safety and health representative who makes an inspection of the coal mine must—

(a) make a written report on the inspection; and

(b) give a copy of the report to the site senior executive; and

(c) if the inspection indicates the existence or possible existence of danger, immediately—

(i) notify the site senior executive or the responsible supervisor; and

(ii) send a copy of the report to an inspector.

(5) If a site safety and health representative believes a safety and health management system is inadequate or ineffective, the representative must inform the site senior executive.

(6) If the site safety and health representative is not satisfied the site senior executive is taking the action necessary to make the safety and health management system adequate and effective, the representative must advise an inspector.

(7) The inspector must investigate the matter and report the results of the investigation in the mine record.

100 Powers of site safety and health representative

A site safety and health representative for a coal mine has the following powers—

(a) to enter any area of the coal mine at any time to carry out the functions of the site safety and health representative, if reasonable notice is given to the site senior executive or the site senior executive's representative;

(b) to examine any documents relevant to safety and health held by the site senior executive under this Act, if the site safety and health representative has reason to believe the documents contain information required to assess whether procedures are in place at the coal mine to achieve an acceptable level of risk to the coal mine workers.

101 Stopping of operations by site safety and health representatives

(1) This section applies if a site safety and health representative reasonably believes a danger to the safety or health of coal mine workers exists because of coal mining operations.

(2) The safety and health representative may, by written report to the site senior executive stating the reasons for the representative's belief, order the suspension of coal mining operations.

(3) If the site safety and health representative reasonably believes there is immediate danger to the safety and health of coal mine workers from coal mining operations, the representative may—

  (a) stop the operations and immediately advise the supervisor in charge of the operations; or

  (b) require the supervisor in charge of the operations to stop the operations.

(4) The site safety and health representative must give a written report to the site senior executive about the action taken under subsection (3) and the reasons for the action.

102 Effect of report

If the site senior executive receives a report under section 101(2), the site senior executive must stop the coal mining operations mentioned in the report.

Maximum penalty—200 penalty units.

103 Site senior executive not to restart operations until risk at an acceptable level

The site senior executive must ensure that the coal mining operations stopped under section 101 are not restarted until the risk to coal mine workers from the operations is at an acceptable level.

Maximum penalty—200 penalty units.

104 Site safety and health representative not to unnecessarily impede production

A site safety and health representative must not unnecessarily impede production at a coal mine when exercising the functions.

Maximum penalty—200 penalty units.

105 Protection of site safety and health representatives performing functions

A coal mine operator, site senior executive, contractor or other supervisor must not—

(a) prevent or attempt to prevent a site safety and health representative from performing his or her functions; or

(b) penalise a safety and health representative for performing his or her functions.

Maximum penalty—200 penalty units.

106 Site senior executive to tell site safety and health representatives about certain things

(1) A site senior executive for a coal mine must tell a site safety and health representative at the mine about the following things—

(a) an injury or illness to a person from coal mining operations that causes an absence from work of the person;

(b) a high potential incident happening at the coal mine;

(c) any proposed changes to the coal mine, or plant or substances used at the coal mine, that affect, or may affect, the safety and health of persons at the mine;

(d) the presence of an inspector or inspection officer at the coal mine if the representative is at the mine;

(e) a directive given by an inspector, inspection officer or industry safety and health representative about a matter.

Maximum penalty—40 penalty units.

(2) For subsection (1), the site senior executive must tell each representative as soon as practicable after the thing comes to the site senior executive's knowledge.

107 Site senior executive to display identity of site safety and health representatives

(1) A site senior executive for a coal mine must display a notice as required by subsections (2) and (3) advising the identity of each site safety and health representative for the mine.

Maximum penalty—40 penalty units.

(2) The site senior executive must display the notice within 5 days after the site senior executive is notified of the representative's election.

(3) The site senior executive must display the notice in 1 or more conspicuous positions at the mine in a way likely to come to the attention of workers at the mine."

History

[11] Until this year, elections by way of secret ballot for the position of SSHR at the Gregory Mine had been undertaken by the Gregory Lodge of the CFMEU. This year the CFMEU embarked on a similar process but, for the first time, BMA denied that the CFMEU had the right to do that and BMA commenced a parallel election process.

[12] As a result, both the CFMEU and BMA have sought and received nominations and both now await the determination of these applications before proceeding further.

The case for the CFMEU

[13] The CFMEU, while accepting that the Act does not specify who is to conduct the election, argues that the provisions of Part 7 point strongly towards those persons who are entitled to vote, or their representative entity, as having that responsibility.

[14] Three main matters are relied upon in support of that contention. They are summarised below.

[15] First, the elected SSHR is a representative and represents only those who are eligible to vote for the SSHR[3]. This factor suggests that it is they, that is, those entitled to vote and who are to be represented by the SSHR, who are to have ultimate responsibility for the conduct of the election of the SSHR.

[16] Secondly, the election is by the coal mine workers at the coal mine. They decide who is to be elected and the term that the elected SSHR is to serve. It is difficult to imagine that some other person or entity would have the legal authority or responsibility to conduct the election to the exclusion of those entitled to vote in it.

[17] Thirdly, the functions and powers of the SSHR, including the very significant power to suspend or stop coal mining in specified circumstances[4] and the provision for assuring free exercise of functions and powers[5], imply a necessary independence from those whose interests might be adversely affected by the discharge of such functions or the exercise of such powers, for example, the coal miner or the SSE. That independence extends to independence from such interests in the electoral process for the SSHR.

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3 Section 7 of the Act.

4 Section 101 of the Act.

5 Section 105 of the Act.

The case for BMA

[18] BMA argues that the right to conduct and the responsibility for conducting an election falls to the SSE at a coal mine.

[19] The process of reasoning underlying that conclusion is as follows.

[20] Section 7 of the Act provides that the objects of the Act are to be achieved by, among other things, "(e) providing for safety and health representatives to represent the safety and health interests of coal mine workers".

[21] Section 32(1) of the Act establishes, as the basis for achieving its objects, cooperation between mine operators, SSEs and workers. Section 32 goes on to refer to cooperation being an important strategy in achieving the objects of the Act which, in turn, is achieved by:

(a) At an industry level – the establishment of a coal mining safety and health advisory committee and the appointment of industry safety and health representatives, and

(b) at coal mine level by – the election of SSHRs and the process of involving coal mine workers in the management of risk.

[22] BMA goes on to point out that there is a clear difference between Part 7 (which deals with SSHRs) and Part 8 (which deals with industry representatives). In Part 8 it is specifically provided in s 109 that the union may, after a ballot of its members, appoint up to three persons to be industry safety and health representatives ("ISHRs"). Further, s 111 provides that the union must fund the industry safety and health representative for the representative's term as an industry safety and health representative. Similarly, if an ISHR is unable to perform his or her functions, then s 114 provides that the union may appoint a substitute. There is, as BMA argues, no reference to the union in Part 7. This, it is argued, strongly supports the notion that it is not the union but someone else who should conduct the election.

[23] That "someone else" is, BMA argues, the SSE because it falls within the remnant responsibilities set out in s 42 of the Act.

[24] Section 42 provides that:

> "A site senior executive for a coal mine has the following obligations in relation to the safety and health of persons who may be affected by coal mining operations—
>
> …
>
> (c) to develop and implement a safety and health management system for the mine"

[25] The requirements of a safety and health management system are set out in s 62(3) of the Act[6].

[26] BMA argues that the SSE has the statutory responsibility to implement a management structure and provide for adequate planning and organisation on the site – see s 42(d) and (f) of the Act. This, it is said, must include the implementation of a procedure for the conduct of elections for officers who are a critical part of the safety management process on the mine site where no such procedure is otherwise

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6 See [7].

provided for in the Act. Further, in the absence of anything to the contrary, the fact that s 93 allows for all "coal mine workers" at a coal mine to elect the SSHRs, it would follow that any coal mine worker should be able to nominate. The definition of "coal mine worker" includes people who are members of the union, people who are not members of the union and people who may not be eligible to join the union. The term "coal mine worker" is wide enough to encompass persons in management, professional engineers and others.

Part 7 of the Act

[27] The dispute between the parties arises because Part 7 of the Act is inadequately drafted. It fails to prescribe any method for conducting an election or any guidance as to who might call or conduct an election for SSHRs.

[28] Section 92 of the Act says:

> "The main purposes of this part are to provide for the election of site safety and health representatives and to state their functions and powers."

[29] Section 93 then provides that coal mine workers at a coal mine may elect up to two of their number to be site safety and health representatives for the mine for the term decided by the coal mine workers.

[30] Sections 94 – 98 then make provision for:

(a) the necessary qualifications for an SSHR;
(b) a further election if an SSHR is not available;
(c) the circumstances in which an SSHR ceases to be an SSHR;
(d) the removal by the Minister of an SSHR; and
(e) a further election if an SSHR is removed.

[31] Sections 99 – 107 then set out:

(a) the functions and powers (including limits on those powers) of the SSHR; and
(b) the obligations of the SSE with respect to giving information to the SSHR.

[32] But there is no provision made for:

(a) who is to cause the election to occur; and
(b) who is to conduct the election referred to in s 92.

[33] I have examined both the Explanatory Notes and the Second Reading Speech for the *Coal Mining Safety and Health Bill* 1999. As is so often the case with these types of secondary materials, neither of them is of any assistance.

[34] Both parties have sought to argue their respective cases on the basis that the conclusion they seek can be reached through a process of drawing inferences from the provisions of Part 7 as understood within the context of the Act. The CFMEU also argues that it should be the entity charged with conducting the election because that is consistent with the SSHR being independent of the coal mine operator[7] or the SSE.

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[7] This term is defined in s 21 of the Act.

Consideration

[35] Before embarking upon a consideration of the arguments and individual sections of the Act two matters of general importance in the construction of this Act need to be borne in mind.

[36] First, that s 14A(1) of the *Acts Interpretation Act* 1954 (so far as is relevant) directs that:

> "(1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

[37] Secondly, that the Act can properly be classified as beneficial legislation[8] and, as such, is to be given a liberal construction. The relevant principle was expressed by Brennan CJ and McHugh J in *IW Applicant v City of Perth*[9]:

> "… beneficial and remedial legislation, … , is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural."

[38] Such an approach, though, has to be premised on the basic principle that if the words of a statute admit of only one meaning, then that is the meaning which must be used. If the words give rise to uncertainty or more than one meaning then the beneficial interpretation approach may be used.[10]

[39] In many cases these two principles will substantially, if not completely, overlap each other.

[40] The relevant purpose is set out in s 92. The objects of the Act – contained in s 3 – are expressed so broadly as to be of little assistance in this exercise.

[41] Section 93(1) contains the only requirements for an election referred to in s 92. They are:

(a) the coal mine workers are the electors;
(b) they "may" elect up to two of their number; and
(c) the person or persons elected are to be SSHRs for the term "decided by the workers".

[42] The use of the word "may" in s 93(1) was not the subject of submissions but it deserves some brief consideration. Section 32CA of the *Acts Interpretation Act* provides that:

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8 *Waugh v Kippen* (1986) 160 CLR 156.
9 (1997) 191 CLR 1 at 11.
10 *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 301.

> "(1) In an Act, the word ***may***, or a similar word or expression, used in relation to a power indicates that the power may be exercised or not exercised, at discretion."

[43] To read the word "may" in s 93(1) as applying to the word "elect" with the result that there might not be an election would defeat the clear intention of Part 7. It should be read as affording a discretion to elect either one or two SSHRs[11].

Should the CFMEU conduct the election?

[44] The first two limbs of the CFMEU's argument are essentially the same, namely, that those who do the electing should conduct the election. From that is drawn the conclusion that, because the CFMEU is entitled to enrol as members nearly all of the "coal mine workers" at a mine, it should be entitled to conduct the election. That conclusion does not necessarily follow. It overlooks a number of factors.

[45] First, the Act contemplates that, for the purposes of the Act, the SSHRs will represent the "safety and health interests of coal mine workers"[12] not the CFMEU.

[46] Secondly, the mere entitlement to enrol coal mine workers as members does not mean that the CFMEU will represent those workers at any particular mine. It is possible that no "coal mine workers" at a site might be members of the CFMEU. Thus, there would be no practical connection between it and the coal mine workers at such a site.

[47] Thirdly, the membership and rules of the CFMEU are subject to federal legislation not State legislation and, thus, its constituency might grow or shrink. Similarly, its role as a representative can be changed by federal legislation or decisions of Fair Work Australia.

[48] Fourthly, the Act gives the Construction, Forestry, Mining and Energy Union – Mining and Energy Division Queensland District Branch a specific role in Part 8 of the Act. Parliament could, had it wanted to, have given the CFMEU similar, identified responsibilities in Part 7 such as conducting the election. The fact that it has not done so does not support the CFMEU's case.

[49] The third limb of the Union's argument is one which seeks to show that the SSE should not conduct the election rather than that the CFMEU should. It relies on what is described as the SSHR's necessary independence to demonstrate why the SSE should not be involved. The independence of the SSHR is prescribed by Part 7 in some detail. While it can be argued that a separation of the SSE from the process leading to the election of SSHRs might be wise, it does not follow from that that the CFMEU is necessarily the entity to conduct such an election.

[50] The arguments advanced might demonstrate some sound reasons for the CFMEU conducting the election, but not that the Act either allows or requires the Union to do so. While it might also be regarded as being consistent with the intent of the Act

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11 The phrase "up to 2" in s 93(1) would, for those who value precision of expression, also include the possibility of nobody being elected but that would, likewise, be contrary to the clear intention of Part 7.

12 Section 7(f) of the Act.

for the CFMEU to run the election, that is not enough to demonstrate that Parliament intended that to be so.

[51] Section 14A of the *Acts Interpretation Act* applies to the interpretation of a provision or provisions of a statute. If a provision of the Act made an oblique, ambiguous or unclear reference to the CFMEU as the body to conduct the elections then the matters advanced by the Union might conduce to the conclusion advanced. But there is no such provision. There is no reference to any entity conducting the election. This is not a case of unclear words but one of missing words.

[52] The construction advanced for the CFMEU is not supported by the provisions of the Act. It is not entitled to conduct the election and, so, the process it has put in place does not comply with the Act.

Should BMA conduct the election?

[53] The argument for BMA is more complex than that advanced for the CFMEU. It rests on the wide responsibilities cast upon an SSE by the Act and the requirement that the SSE develop and implement a safety and health management system for the mine.

[54] Any such system developed by an SSE would have to work within the broader safety regime established by the Act, and accommodate the positions created by the Act. That includes, of course, the SSHRs. In Part 7, the Act defines the functions and powers of the SSHR in some detail and there is nothing to suggest that those functions and powers might in any way be diminished or enlarged by any safety and health management system.

[55] The functions of an SSHR are beyond the confines of a safety and health management system. Indeed, one of those functions is to consider whether such a system is "inadequate or ineffective"[13]. The SSE cannot, whether by way of the safety and health management system or otherwise, vary the functions or powers of the SSHR. They remain as delineated in sections 99 - 103 of the Act. There is no necessary or implied connection between the duties of the SSE and the election by coal mine workers of the SSHRs.

[56] It is not a function of the SSE to cause an election to be held or to conduct an election or to make arrangements for a third party to conduct an election. It follows that the process proposed by BMA does not satisfy the requirements of the Act.

Who can call and conduct an election?

[57] BMA sought, in the alternative, a declaration as to who bears responsibility for the conduct of the election of SSHRs at a coal mine under the Act. No submissions were made identifying any other entity or person.

[58] A court will, ordinarily, be loath to reach a conclusion that there has been a failure in a statute to properly provide the necessary steps to allow one of the objects of the statute to be reached. Neither the CFMEU nor the SSE at Gregory Coal Mine are entitled to or have the power to call and conduct an election for an SSHR. That conclusion is reached reluctantly because it means that an election for an SSHR

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13 Section 99(5) of the Act.

cannot take place. Even adopting a purposive construction of Part 7 or a "fair, large and liberal" interpretation does not allow for either of the declarations sought by the parties. This is a case in which the problem identified by Spigelman CJ in *R v Young*[14] raises its head, that is, "What, if anything, should the courts do when it appears that Parliament has failed, apparently by inadvertence, to deal with an eventuality required to be dealt with if the purpose of a statute is to be achieved?"[15]

[59] The approach which should be applied is set out by Lord Diplock in *Wentworth Securities v Jones*[16]:

> "My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.* [I971] A.C. 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required-to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine that is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts."

[60] Courts in Australia have referred to that analysis in a number of instances.[17]

[61] In his examination of this area of construction in *R v Young*, Spigelman CJ said:

> "[11] The three conditions set out by Lord Diplock should not be misunderstood. His Lordship did not say, nor do I take any of their Honours who have adopted the passage to suggest, that whenever the three conditions are satisfied, a court is at liberty to supply the omission of the legislature. Rather, his Lordship was saying that in

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14 (1999) 46 NSWLR 681.

15 At 685.

16 [1980] AC 74 at 105-106

17 *Kingston v Keprose Pty Ltd* [1987] 11 NSWLR 404; *Bropho v Western Australia* (1990) 171 CLR 1; *Saraswati v The Queen* (1991) 172 CLR 1.

> the absence of any one of the three conditions, the court cannot construe a statute with the effect that certain words appear in the statute.
> [12] As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the Parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based."

[62] The same issue was considered by Muir JA in *Ravenscroft v Nominal Defendant*[18]. His Honour referred, in some detail, to the various authorities on this point and concluded:

> "[52] The deficiencies in the Act can be overcome judicially only by a process of construction. And for that to be possible, to put it broadly, the court must conclude that its solution is the one Parliament would have adopted had it become aware of the deficiencies. Consequently, it would be appropriate, rarely if ever, to fill a perceived gap by interfering with the framework or scheme of an Act. Also there are cases in which it is desirable for the court to leave any remedy to Parliament. *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* is an example of such a case. In their joint reasons Gaudron and Gummow JJ, having identified problems with the legislation under consideration, said that such considerations:
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> > "... serve to emphasise the need for renovation of the New South Wales legislation, not by judicial grafting to it of tissue which it lacks, but upon detailed reconsideration by the legislature. Judicial interpretative techniques may come close to leaching the existing statutory text and structure of their content and, whilst answering that apparently hard case then before the court, unwittingly lay the ground for other hard cases."

[63] More recently, the Court of Appeal has referred to this issue again in *Sevmere Pty Ltd v Cairns Regional Council*[19]. In that case Holmes JA referred to the conclusion reached by Muir JA in *Ravenscroft*. In *Sevmere* the court held that the third limb of the Diplock test had not been satisfied because it was not obvious that the words proposed were those which the legislature would have inserted had it considered the matter.

[64] This, though, is not a case in which the parties have sought that the court "read in" words in order to arrive at a decision as to who might conduct the election. Each party has nominated itself as the responsible entity.

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18 [2008] 2 Qd R 32.
19 [2010] 2 Qd R 276.

[65] BMA's alternative application for a declaration "as to who bears responsibility for the conduct of an election of SSHRs at a coal mine under the Act" is effectively asking the Court to identify some other party which the Act requires to conduct the election. No other entity was nominated by BMA. In any event, I am not satisfied that it is obvious that any form of words would have been used by Parliament which would have identified such an entity.

The election process

[66] Each party also sought a declaration that the process it proposed was, in effect, appropriate. Even had I reached the conclusion that one or other of the parties was the appropriate party to conduct the election, I would not have made such a declaration.

[67] The word "election" is used with respect to three different circumstances in Part 7. First, it is used in s 93 for what appears to be the first and subsequent ordinary elections of SSHRs. Secondly, it is used in s 94 in circumstances where an SSHR is not available. Thirdly, it is used in s 98 in circumstances where the Minister has removed an SSHR.

[68] No provision is made for the process which should be used in any of those instances. One can imagine, though, that where an SSHR is not available, and a situation of perceived danger has arisen, that the need for urgent action would require that a different type of election take place under s 94 than would occur under s 93.

[69] The process sought to be engaged by the CFMEU contains within it provisions which find no basis in the Act. I will cite one example only. The electoral process of the CFMEU purports to create a "quorum" for the election of 75% of the coal mine workers at the Gregory Coal Mine. It also provides that the election does not conclude until that percentage is reached. There is nothing in the Act to support such a requirement.

[70] Similarly, the proposed process of the BMA contains a number of matters which have no support in the Act including the identification of ballot papers in a supposedly "secret ballot".

Conclusion

[71] This is a circumstance, fortunately rare, in which the deficiency in the legislation is one which cannot be cured by any acceptable means of construction. It should be left to Parliament to remedy the deficiency. It is a deficiency which may be remedied either by legislation or, perhaps, by way of regulation.[20]

[72] The application by the CFMEU is dismissed.

[73] The application by BMA is dismissed.

[74] I will hear the parties on costs.

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[20] The conduct of an election would fall within the ambit of the subject matter for regulations in Schedule 2 of the Act, in particular, "matters of an administrative nature".