

# Industrial Relations and Employment Alert

October 2005

## Landmark OHS Court of Appeal Decisions in NSW

In our *Safety Matters Special Edition of June 2005 (Safety Matters - Special Edition)*, we reported on a number of key decisions of the Industrial Relations Commission of New South Wales in Court Session (NSW IRC) in the coal mining industry, and we discussed some appeals to the New South Wales Court of Appeal which had been lodged by a number of coal mining employers and individuals arising from the NSW IRC decisions.

On 11 October 2005, the New South Wales Court of Appeal handed down its much anticipated judgments in the appeals lodged by Powercoal Pty Limited and Mr Peter Foster, and Coal Operations Australia Ltd. In unanimous decisions, the Court of Appeal dismissed both appeals concluding that there was no basis for intervention in either matter.

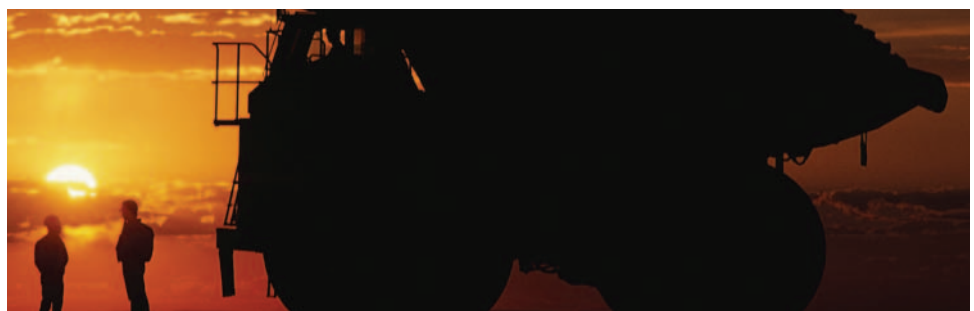
### ***Coal Operations Australia Limited v Industrial Relations Commission of NSW & Morrison***

On 5 July 1998 at 11:00pm, a team of five miners commenced their shift, mining coal from a seam of coal known as the Great Northern Seam at the Wallarah Colliery. Shortly after 1:00am on 6 July 1998, the miners encountered a geological fault in the coal seam which was reported to the night shift Undermanager. The Undermanager attended the area and conducted a visual inspection, as well as sounding the roof. The Undermanager concluded the roof

had a "good ringing sound" and "sounded very competent", however, he instructed the miners to erect extra support on the roof.

Some of the miners took a break at this time, and the drilling and bolting process was commenced by the remaining miners while the Undermanager remained at the site. A rock fall occurred in the area of the face just prior to the Undermanager leaving the site.

During the drilling and bolting process, the miners noticed a number of occurrences which suggested the roof was unstable. When the other miners returned from their break, they received reports of water flowing from the newly-drilled holes and instances of the drill steel in the bolter jamming. The miners returning from their break took over the drilling and bolting of the roof. A problem with the air supply to the bolter was identified and whilst the miners were inspecting the air hosing, a second rock fall occurred.



Once again, the roof was sounded and found to be competent. The two miners continued with the drilling and bolting process until the drill steel jammed in a hole which was being drilled in the roof. One of the miners attempted to dislodge the jammed drill steel from the hole when the roof fell. One of the miners was fatally injured, while the other miner was pinned by the legs and suffered multiple fractures.

### The decision of Justice Peterson of the NSW IRC at first instance

The NSW Department of Mineral Resources (**DMR**, now the Department of Primary Industries, **DPI**) commenced a prosecution against Coal Operations Australia Limited (**Coal Operations**) arising from the incident. The charges in the prosecution related to the failure by Coal Operations to ensure a safe system of work in respect of the erection of roof support, and failure in respect of the manner in which the roof was assessed for stability.

Justice Peterson held that Coal Operations had made out a defence under section 33(2) of the *Occupational Health and Safety Act 1983* (NSW) (the **1983 OHS Act**) in respect of both charges. Section 33(2) of the 1983 OHS Act provides a person:

*"is not guilty of an offence ... in respect of any act or omission which is expressly required or permitted to be done or omitted by or under the associated occupational health and safety legislation."*

Justice Peterson decided that the charges had not been made out beyond reasonable doubt, and Coal Operations was acquitted of both charges.

### The NSW IRC Full Bench appeal decision

The DMR appealed the decision of Justice Peterson to a Full Bench of the NSW IRC. An appeal from an acquittal for an offence under OHS legislation is available under section 197A of the *Industrial Relations Act 1996* (NSW).



A Full Bench of the NSW IRC (comprising the President Justice Wright, and Justices Boland and Staunton), rejected the first instance conclusions of Justice Peterson. The Full Bench found both charges were proved and concluded that Coal Operations had breached its obligations under the 1983 OHS Act.

The Full Bench held the roof support charge was made out as Coal Operations had exposed the miners to risks which, in respect of the condition of the roof at the time, were foreseeable. It went on to say that the charge relating to the assessment of the stability of the roof was proven as the system of work which was employed did not oblige the miners to cease working in such conditions.

The Full Bench imposed a penalty of \$200,000 against Coal Operations in relation to both charges.

For full details about the Full Bench's reasoning in the NSW IRC appeal decision, please refer to our June 2005 *Safety Matters – Special Edition*.

### The Court of Appeal decision

In what was an unprecedented step in an OHS matter, Coal Operations lodged an application with the New South Wales Court of Appeal seeking

orders to quash the findings made by the Full Bench of the NSW IRC. Coal Operations petitioned the Court of Appeal through the Court's supervisory jurisdiction.

The Coal Operations matter was heard concurrently with the Powercoal matter (summarised below) before Chief Justice Spigelman, President Mason and Justice Handley over the course of four days in July 2005. The decision of the Court of Appeal was handed down on 11 October 2005.

Coal Operations ran four separate arguments before the Court of Appeal as follows:

- the Commonwealth Constitution did not allow the NSW IRC to be granted criminal jurisdiction. Namely, that the arbitral functions exercised by the NSW IRC precluded it from exercising functions in the criminal jurisdiction;
- the Full Bench of the NSW IRC did not apply the correct standard of proof. In criminal matters, the Court must ensure a matter is proven beyond reasonable doubt (being the criminal standard of proof) before a party is convicted of an offence;

- the NSW IRC did not find an error in Justice Peterson's decision, but simply substituted its views for those expressed in the first instance decision, in breach of section 191(3) of the *Industrial Relations Act 1996* (NSW); and
- the Full Bench did not properly consider the defences under section 53 of the 1983 OHS Act, and that this constituted an error of law on the face of the record or a jurisdictional error.

In its decision of 11 October 2005, the Court of Appeal rejected all of the arguments outlined above and held there was no reason for the Court of Appeal to intervene in the matter as decided by the Full Bench of the NSW IRC.

In relation to each of Coal Operations' four arguments, the Court of Appeal decided:

- the Commonwealth Constitution did not prevent the conferral of criminal jurisdiction on the NSW IRC. It went on to say that the fact the functions are not "strictly separated does not impair the institutional integrity of the court";
- the NSW IRC applied the criminal standard of proof correctly;
- The NSW IRC did properly identify errors in the first instance judgment of Justice Peterson, and considered the facts before making its findings;
- the NSW IRC did properly consider the defences under section 53 of the 1983 OHS Act.

### **Powercoal Pty Ltd & Foster v Industrial Relations Commission of NSW & Morrison**

On 17 July 1998, the roof of the Awaba Colliery collapsed during the mining of stook X. The collapse extended beyond the goaf to the place where a miner was operating a continuous miner. Rocks which were dislodged in the roof collapse struck the miner who was fatally injured.

The DMR (now the DPI) brought charges against Powercoal and the mine manager, Mr Foster, under the 1983 OHS Act alleging that:

- Powercoal failed to provide or maintain an adequate system of assessing the stability of the roof;
- Powercoal failed or omitted to implement an adequate system of recording and notification to employees of roof problems and roof history; and
- Mr Foster, as a "person concerned in the management of the corporation" was deemed liable for the offences committed by Powercoal under section 50 of the 1983 OHS Act (now section 26 of the 2000 OHS Act).

### **The NSW IRC decisions**

At first instance, Justice Peterson acquitted both Powercoal and Mr Foster of all charges. The prosecution appealed the acquittal to a Full Bench of the NSW IRC.

The NSW IRC unanimously held that Powercoal had failed to ensure the safety of employees at the Awaba Colliery, and imposed a penalty totalling \$200,000. The NSW IRC also held that Mr Foster was a "person concerned in the management" of Powercoal with responsibilities in respect of mine safety. Accordingly he was found personally liable for Powercoal's offences, however no penalty was imposed.

### **The Court of Appeal decision**

Powercoal and Mr Foster, the Applicants, brought appeal proceedings in the New South Wales Court of Appeal seeking that the NSW IRC decision be quashed. As section 179 of the *Industrial Relations Act 1996* (NSW) states that a decision of the Full Bench is final and cannot be subject to an appeal (this is a "privative clause"), the grounds on which the appeal could be brought were strictly limited.

The Applicants appealed on the following grounds (some of these grounds overlap with the grounds of appeal in *Coal Operations*):

- the NSW IRC lacked jurisdiction to hear and determine proceedings for an offence under the 1983 OHS Act because the NSW IRC was incapable of being granted criminal jurisdiction;
- the NSW IRC had failed to apply the criminal standard of proof (that is, "beyond reasonable doubt");
- the NSW IRC's findings were not supported by the evidence;
- the NSW IRC erred in its construction and interpretation of the 1983 OHS Act.





The DMR challenged the appeal on the basis that the privative clause prevented an appeal from the NSW IRC to the Court of Appeal.

The Court of Appeal unanimously rejected the appeal on each ground. While the Court of Appeal recognised a limited right to appeal from the NSW IRC in circumstances where the NSW IRC has failed to adhere to "inviolable restrictions and restraints" upon its jurisdiction, they concluded that no jurisdictional error occurred in this case.

The Court of Appeal decided as follows:

- the NSW IRC was entitled to make findings in relation to criminal liability;
- the NSW IRC applied the correct standard of proof (ie the criminal standard of proof beyond a reasonable doubt) in reaching its decision;
- the NSW IRC was entitled to make findings of fact and did, in fact, make clear findings which were supported by the evidence.

## Personal liability issues

In the appeal, Mr Foster submitted that section 50 of the 1983 OHS Act applies only to those persons at the

highest levels of the corporate structure who are involved in the overall management of the corporation. In support of this submission he drew an analogy between section 50 and a provision of the *Corporations Act 2001* which also refers to "management of the company". He argued that there was a line of authority interpreting the *Corporations Act* provision as referring to central management of the company, and not to persons who manage specific company assets.

The Court rejected this analogy, stating that the provisions of the *Corporations Act* are inapplicable because they have a substantially different purpose to the provisions of the 1983 OHS Act.

The Court interpreted the application of section 50 of the 1983 OHS Act very broadly, commenting that it is not limited to "higher" or "central" management. Instead the Court held that section 50 applies to management who have a significant role in any aspect of operations of the company which raise safety considerations. In particular, the Court found that section 50 applies to managers, such as Mr Foster, whose supervisory position meant that they could have taken steps to ensure that the objects of the 1983 OHS Act were achieved.

## Conclusion

The decisions of the New South Wales Court of Appeal in *Coal Operations* and *Powercoal* confirm the strict obligations placed on employers in relation to occupational health and safety issues. The decisions also confirm the constitutional validity of the exercise of criminal powers by the NSW IRC in occupational health and safety matters.

## Gretley

As mentioned in our June 2005 edition of *Safety Matters*, an appeal has also been lodged to the New South Wales Court of Appeal in respect of the decision in the Gretley Colliery case [see our Special Edition of *Safety Matters November 2004*]. This matter has not yet been heard by the Court of Appeal.

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