
Mines Safety and Inspection Laws in Western Australia

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Abstract

The legislation dealing with mines safety laws in Western Australia changed quite dramatically in the 1990's. This article provides an overview of the *Mines Safety and Inspection Act 1994* (WA) and describe the main features of the current legislation and some of the legal cases that have arisen from it.

Introduction

Legislation dealing with safety in mines in Western Australia can be traced back to the *Mines Regulation Act 1895*. Before the current Act was introduced, the laws on mine safety were consolidated into the *Mines Regulation Act 1946* and the *Coal Mines Regulation Act 1946*. These Acts were amended from time to time and remained in force until safety laws dealing with all mining was covered by the *Mines Safety and Inspection Act 1994* (the Act). Despite being passed by parliament in 1994, the main provisions in the Act came into effect on 9 December 1995 after incorporating significant amendments made in 1995.

Much of the *Mines Safety and Inspection Act 1994* (W.A.) is modelled on legislation in the U.K. and the Eastern States. The Act is based upon a style of legislation, often referred to as "Robens legislation". Robens was the chairperson of a committee in the U.K. that first suggested a general duty style of legislation to cover workplace safety and health issues. The Act covers mines,¹ quarries and exploration² in the mining industry and contains some similar general duty obligations to those found in the *Occupational Safety and Health Act 1984* (W.A.). Thus litigation on that Act, and indeed litigation on any of the legislation based upon the Robens approach, is a useful guide to the understanding of this Act.

One of the aims of the Robens approach is to remove previous safety legislation that concentrated upon specific detailed legal obligations that are inflexible and could become outdated, with more durable, yet flexible general duties. Legislation such as the previous *Mines Regulation Act 1946* was seen to be too prescriptive as many of the specific safety requirements were previously found in numerous detailed regulations rather in general obligations. The current Act imposes the 'general duties' suggested by Robens, but the regulations made under the Act also impose some more specific duties.

The objectives of the legislation are set out in section 3 of the Act (s.3). They provide for: securing safety and health of people in the industry; assisting employees and employers to reduce hazards; protecting employees against risks, by elimination of risks and imposing effective controls. These objects also promote fostering co-operation between employees and employers; involving people in the formulation of standards and optimum practices; and allow for people to contribute to the development of legislation and administration of the legislation.

Administration

Most legislation cannot be effective, unless some type of administrative infrastructure is in place to implement the objectives in the Act. The Act does this by creating a Mines

¹ A discussion of the definition of mining operations to include accommodation and recreational facilities on mining tenements is found in: C Stedman, "Editorial", *Minesafe*, June 1997, Vol 8, No 12, p. 3.

² Further discussion on the application of the Act to exploration is found in an article "Exploration comes in from the cold", *Minesafe*, March 1996 Vol 7, No 1, p 4.

Occupational Safety and Health Advisory Board to advise the Minister of Minerals and Energy on occupational safety and health matters (s.90). The Board's most significant activity has been to produce a report on fatalities in the mining industry.³ The Department of Minerals and Energy is given responsibility for the administration of the Act. Inspectors working for that department undertake the actual day to day implementation of the Act, and the monitoring of safety and health policy (ss 16-20).

The General Duties

The legislation places some important general duties are upon certain categories of people, in relation to work associated with mining. Specifically the duties are imposed upon employers; employees; self-employer persons; principal employers; managers of a mine; and certain designers, manufacturers, importers and suppliers.

A characteristic of many of these general duties, is that they reflect identical standards of behaviour that have long been expected by employers and employees by the courts. The courts have identified these general duties when implementing common law obligations in negligence cases. The major distinction between cases brought under this Act, from cases based upon common law negligence, is that criminal penalties arise out of the breach of the duties under this Act. In contrast, at common law the emphasis has been upon the victim's rights to claim damages and attain appropriate compensation, if some one has breach their legal duty of care.

Duties on Employers

The Act imposes a major duty to provide and maintain a working environment in which employees are not exposed to hazards. The obligation only goes 'so far as is reasonably practicable' (s.9). The word 'practicable' is defined in the Act to mean reasonably practicable. Regard is to made to such factors as: the severity of potential injury or harm; the state of knowledge of injury or harm; the state of knowledge of risk of injury or harm; the state of knowledge about means of removing or mitigating the risk or harm; and the availability, suitability and cost of removing or mitigating the risk or harm (s.4(1)). The issue of 'reasonably practicable' was given close

attention by the Supreme Court of Western Australia in a case involving the prosecution of an employer, when structural damage to an iron ore reclaimer caused the death of the operator.⁴

There are some specific examples given in the legislation of this obligation. They include a duty to provide: safe premises; safe plant; a safe system of work; information; instruction; training; supervision; consultation with safety and health representatives; personal protective clothing; protective equipment; that employees are not exposed to hazards in relation to various dealings relating to plant and substances (s.9(1)).

Section 9 tends to be the section which is most often used by inspectors under the Act, because it is relatively direct and employers are usually in the best financial position and position of authority to make changes to improve safety and health in the workplace. Prosecutions have been instigated against a numbers of employers, for example in the iron ore industry,⁵ the nickel mining industry⁶ and the gold mining industry.⁷

There is also a duty on the employer to ensure that the safety and health of a person not being his or her employee, is not adversely affected as a result or the work that his or her employees are engaged. The obligation only goes 'so far as is reasonably practicable'. This duty appears to apply to visitors and to contractors (s.12(1)(b)). If the employer is an individual person, then there is also a duty on that employer to take care towards himself or herself (s.12(1)(a)).

There are also specific obligations placed upon employers in relation to contractors and subcontractors, designed to impose legal obligations that are similar to those placed upon employees (s.9(3)).⁸ These legal duties cannot be simply

³ See: "Report on the Inquiry into Fatalities in the Western Australian Mining Industry", *Minesafe*, March 1998 Vol 9, No 1, p. 4.

⁴ *Hamersley Iron Pty Ltd v Robertson* SC(WA), Steytler J, No 980573, 2 October 1998, unreported.

⁵ *Hamersley Iron Pty Ltd v Robertson* SC(WA), Steytler J, No 980573, 2 October 1998, unreported. See also: "Hamersley Iron Prosecuted", *Minesafe*, March 1998 Vol 9, No 1, p. 2.

⁶ *WMC Resources* case; see: W. Pryer, "Mining firm faces deaths counts", *The West Australian*, 3/11/98, p.8.

⁷ *Meiklejohn v Central Norseman Gold Corp Ltd* SC(WA), Walsh, Anderson and Owen JJ, No 980236, 5 May 1998, unreported and *Forrestania Gold* case; see: "Miner faces deaths charges", *The West Australian*, 13/11/98, p.34.

⁸ For a detailed discussion of the legal duty towards contractors see: K. G. Brown "Contracting Out by Western

abrogated by requiring contractors to sign deeds of indemnity.⁹

Duties on Employees

The Act also imposes a duty on an employee to take reasonable care to ensure his or her own safety and health at work (s.10(1)(a)). There is also a duty on an employee to take reasonable care to avoid adversely affecting the health or safety of any other person at work (s.10(1)(b)). It would seem that this last duty applies to visitors or people authorised to be at the workplace such as other employees or contractors.

The legislation provides some specific examples of these obligations. They include: failing to comply with instructions; failing to use protective clothing; failing to use protective equipment; misusing or damaging safety or health equipment; underground workers failing to report on the state of the works; failing to report¹⁰ any potentially serious occurrence (ss.10(2) and 11).

Duties on Management and Managers of a Mine

A general duty of duty of care is imposed on the principal employers and the managers of mines to ensure that a mine and the means of entry and exit do not expose persons to hazards (s.13). Principal employers are defined in the Act to mean the employer who is the proprietor, lessee or occupier of the mine and who has overall control and supervision of the mine. Managers of mines are people registered as such under s.33. Managers of a mine are also given other responsibilities under the Act, such as providing written duty statements for people (s. 44)¹¹ reporting certain events to the Inspectorate (ss. 78-79).¹²

Australian Government Departments and the Implications Applicable to Safety and Health Related Issues”, *Journal of Contemporary Issues in Business and Government*, November 1995, Vol. 1, No. 1, p. 41.

⁹ See: “Conditions of Entry to Minesites - Deeds of Indemnity”, *Minesafe*, September 1998, p.13.

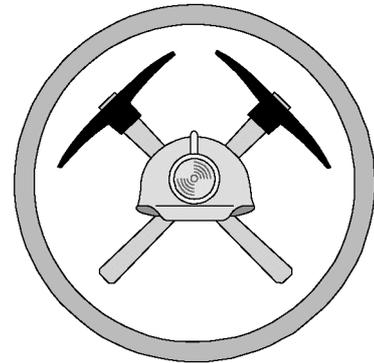
¹⁰ See: “Reporting Dangerous Situations and Occurrences”, *Minesafe*, December 1996 Vol 7, No 4, p.4.

¹¹ See: “Duty Statement: What Duty Statement?”, *Minesafe*, March 1997 Vol 8, No 1, p. 4.

¹² See: “Did You Know?”, *Minesafe*, March 1996 Vol 7, No 1, p. 2.

Duties on Designers, Manufacturers, Importers Suppliers and Constructors of Buildings or Structures

There are general duties on designers, manufacturers, importers and suppliers in relation to plant and substances.¹³ One practical implementation of these duties is the requirement of supplies to provide Material Safety Data Sheets (MSDSs). A general duty is also imposed on persons who design or construct buildings or structures for use at a mine to ensure that the design and construction does not expose people to hazards (s.14).



Duties on Directors and Managers

Section 100 of the Act provides for situations where a director or manager of a company commits an offence. This occurs when it is proved that when a company commits an offence under the Act, the offence occurred with that person’s consent or connivance or was attributable to any neglect on the part of that person.¹⁴

Criminal Penalties

An important aspect of the general duties in sections 9-14, is that they create criminal consequences in the form of a penalty which can be up to \$200,000 in the event that there is a death or serious harm to a person. The fine is up to \$100,000 in other situations. If an employee is charged under s.10, the fines are up to \$20,000 in the event that there is a death or

¹³ See: “Manufacturers, Designers, Importers, Suppliers: How the Act and Regulations Affect You”, *Minesafe*, March 1996 Vol 7, No 1, p. 12.

¹⁴ Some discussion of the responsibility of mine owners and board members is found in an article by C. Stedman, “Proclamation of the Mines Safety and Inspection Act”, *Minesafe*, March 1996 Vol 7, No 1, p. 3.

serious harm to a person. The fine is up to \$10,000 in other situation. Other offences in the Act impose other penalties.

Resolution of Safety and Health Issues at the Workplace

The legislation provides that 'issues' that relate to occupational safety and health, should be attempted to be resolved by 'the relevant procedure'. This procedure is agreed between the employers and employees, or in the event of no agreement, in accordance with a prescribed regulation. It is an offence not to follow this procedure. In the event of no resolution by this procedure, then there is an obligation on a safety and health representative (if there is one) to refer it to the safety and health committee (if there is one). It is an offence not to refer such an issue (s.70).

Involvement by an Inspector

Either the employer or the safety and health representative or the employee involved can notify an inspector where there is a risk of imminent and serious injury (or harm to health) of any person. The inspector can then take those steps that he thinks are appropriate (s.71).

Refusal to Work

The Act gives a legal right to an employee to refuse to work if there is a risk of imminent and serious injury or harm to the health of him or any other person (s.72). Note that the employer may give that employee reasonable alternative work (s.73) but that the employee is entitled to same pay and benefits that he would have been entitled to had he continued with his usual work (s.74). The Act provides in s.72(1a) an explanation of whether the employee has reasonable grounds for holding the belief that there is a risk of imminent and serious injury or harm. Section 72(2a) makes it an offence for the employee to leave the mine altogether without the employer's permission.

Penalty for Refusing to Work

Section 74 A provides that it is an offence to pay or receive pay, when any person (other than a person who qualifies under s.72), refuses to work on the grounds that to do so would involve a risk of injury or harm to any person. The section is aimed at preventing employees being paid by employers when they go on strike over a safety and health issue. This is sometimes called an offence of making or receiving 'strike pay'. The section does not appear to apply to payments made by unions to workers who go on strike.

Safety and Health Representatives

The Act encourages employees to identify safety and health issues to an employer and electing a representative to act on their behalf. Employees can request the employer at a mine to instigate the process for conducting elections for safety and health representatives (s.54-56). Amendments made in 1995 took away the administration of the elections for safety and health representatives, from unions. The functions of these safety and health representatives are to inspect the workplace, investigate accidents and to generally be involved in the interest of safety and health at the workplace (s.53).

Safety and Health Committees

An employer can decide to create these committees (s.65(3)) or an employee can request one (s.64(1)). These committees are a mechanism for employees and employer representatives to formally meet and consider safety and health issues that arise in that particular workplace (s.63).

Inspectors

The legislation allows for different categories of inspectors including district inspectors, special inspectors, employee's inspectors and assistant inspectors. District and special inspectors are given wide powers of entry, search and questioning under that Act (s.21). The powers of employee's inspectors are a little more limited. In 1996 the Mining Inspectorate announced that it was moving towards an auditing approach when carrying out its functions under the Act.¹⁵

Directions in Writing

Inspectors are given wide powers to give directions in writing under the Act. The directions may require steps to be taken in the event of hazards, including the power to direct work at a mine stop until a hazard is removed (s.22).

Prosecutions

The Act allows district or special inspectors to instigate and conduct prosecutions (s.21(1)(m) and s.96). As the legislation give rise to criminal sanctions, one successful appeal by a

¹⁵ See "Mining Inspectorate Safety Audits", *Minesafe*, September 1996, Vol 7, No 3, p 7.

defendant employer was based on the lack of clarity of the charges laid.¹⁶

Department of Mineral and Energy produced some guidelines in 1996.¹⁹

Codes of Practice

The Act allows for Codes of Practice to be made. The purpose of these codes of practice is to identify practices that are considered appropriate and in some cases inappropriate. The legal significance of these codes of practice are that they may be used in evidence to assist in establishing what is 'reasonably practicable' for the purposes of assessing the general duty offences in the legislation (s.93).

Regulations

There are many detailed regulations made under the Act in the Mines Safety and Inspection Regulations 1995. They canvass many detailed issues and in many cases are quite prescriptive in nature.¹⁷ The penalties for their breach are not as high as in the Act. Most have a maximum of \$5,000 for individuals and \$25,000 for corporations.

Overview

The legislation purports to provide a balance between encouraging employers and employees at mines to identify and correct issues relating to safety and health, together with an opportunity for government to sanction those who breach their significant duty of care obligations. Improving safety and health practices in the mining industry will remain a difficult balance of prosecution policy between prosecution and assisting the participants to understand and implement their legal obligations. Many of the legal obligations in the Act are similar to those found in the *Occupational Safety and Health Act 1984* (WA). Thus many of the legal issues raised by the legislation can be found in discussions of that legislation.¹⁸ For readers seeking further information about the Act, the

¹⁶ *Meiklejohn v Central Norseman Gold Corp Ltd* SC(WA), Walsh, Anderson and Owen JJ, No 980236, 5 May 1998, unreported.

¹⁷ For example regulations 10.28 and 13.8 dealing with geotechnical considerations in underground and open pit mines (see, "Mining Geotechnical Consideration", *Minesafe*, June 1996 Vol 7 No 2, p 13.

¹⁸ See K. G. Brown, *Occupational Safety and Health: Western Australia*, Butterworths, Sydney, 1998 (continuous updating service).

¹⁹ Department of Minerals and Energy Western Australia, *Guidelines to the Mines Safety and Inspection Act No 62 of 1994*, April 1996.