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15 April 2015

Mr Peter J McHugh
Clerk of the Legislative Assembly
Attention: Ms Liz Kerr, Clerk Assistant
Parliament House
PERTH WA 6000

Dear Mr McHugh,

**EDUCATION & HEALTH STANDING COMMITTEE – FLY IN FLY OUT WORKERS**

**Instructions**

By letter of the Clerk of the Legislative Assembly dated 30 March 2015, my opinion has been sought on four questions:

1. Does employees' accommodation (provided by employers on mining tenements) fit within the definition of a mine/mining operation for the purposes of section 9 of the *Mines Safety Inspection Act 1994* ("MSI Act")?

2. Do the duties imposed on employers by section 9 of the MSI Act (or by any other section of the MSI Act) apply to employees who are 'off shift' and using the facilities solely for accommodation purposes?

3. If a death in an accommodation facility is not classed as a death 'in the workplace', is there a requirement for the death to be reported to or investigated by the Department of Mines and Petroleum (DMP)? If so, does this apply equally to non-fatal suicide attempts? If a suicide or suicide attempt occurs in an accommodation facility provided by an employer on a mining tenement, would that suicide/suicide attempt be covered by the reporting requirements provided by section 76 of the MSIA?

4. Would FIFO work practices[1] constitute, for the purposes of section 9(1)(a) of the MSIA, a 'system of work' that creates duties for an employer using that system of work?

**Mines Safety Inspection Act 1994**

**Objects of MSI Act**

The objects of the MSI Act will assist in the interpretation of its provisions (see s 18 *Interpretation Act*). The objects expressed in s 3 are:

a) to promote, and secure the safety and health of persons engaged in mining operations; and

b) to assist employers and employees to identify and reduce hazards relating to mines, mining operations, work systems and plant at mines; and

c) to protect employees against the risks associated with mines, mining operations, work systems at mines, and plant and hazardous substances at mines by eliminating those risks, or imposing effective controls in order to minimize them; and

d) to foster and facilitate cooperation and consultation between employers and employees, and associations representing employers and employees, and to provide for the participation of those persons and associations in the formulation and implementation of safety and health standards and optimum working practices; and

e) to provide procedures for employers and employees to contribute to the development and formulation of safety legislation for mines and mining operations and to consult regarding its administration.

From s 3, the objects of the Act are variously confined to "mining operations", "mines", "work systems" and "plant at mines" and "plant and hazardous substances at mines". Some of those terms are defined in s 4.

**Definitions for MSI Act**

"Mining Operations" means "any method of working by which the earth or any rock structure, coal seam, stone, fluid, or mineral bearing substance is disturbed, removed, washed, sifted, crushed, leached, roasted, floated, distilled, evaporated, smelted, refined, sintered, pelletized, or dealt with for the purpose of obtaining any mineral or rock from it for commercial purposes or for subsequent use in industry, whether it has been previously disturbed or not," and includes a list of mostly unremarkable activities, and a

[1] References to FIFO "work practices" mean the requirement for workers to regularly leave their usual residences and be accommodated by employers in facilities under the employer's control adjacent to the location of the work, and typically on the same mining tenement as the mine itself, for extended and regular periods of time. The Committee's discussion paper provides additional information about the features of FIFO work practices, in particular at chapter 3.

list of exclusions.

Included in the definition is "(k) *operation* of residential facilities and recreational facilities and the ground used for that purpose, where such facilities are located on a mining tenement and are used solely in connection with mining operations;".

Excluded from the definition is "(s) [the *operation* of] residential facilities or recreational facilities and the ground used for the purpose where such facilities are not located on a mining tenement and directly associated with mining operations;".

Paragraph (k) refers to the "operation" of the facilities, rather than to their use, which means that only the cleaning, maintenance and repairs etc. are relevant, not their use for sleeping etc. Paragraph (k) requires the residences to be both on the tenement and used solely in connection with (other) mining operations. The definition includes the kind of accommodation usually associated with FIFO, provided the accommodation is on the tenement (see footnote 1 above).

Paragraph (s) is also confined to the "*operation of*" residential facilities, not the use of them for residing. The reason paragraph (s) does not exclude residential use (for sleeping, eating TV etc.) is that those uses are not in the definition in the first place, not being part of (k). The point of paragraph (s) appears to be to exclude the operation of residences that are both off-tenement and not directly associated with (other) mining operations, such as local hotels, motels and private billeting.

One effect of paragraphs (k) and (s) is that, to the extent that "operations" in respect of residences are within "mining operations", the operations are included only if the residences are on the tenement. This means, for example, that a village built and operated by a mining company exclusively for FIFO, but off-tenement, is not within "mining operations", which appears anomalous. It is likely that it was a realisation of this anomaly that led to the 2004 addition of s 15D MSI Act (see below).

In any event, it is clear that "mining operations" do not include residential use of any residences, whether off-tenement or on-tenement, whether solely or partly devoted to mining employees.

"Mine" means a place at which mining operations are carried on ...; and "***to mine***" includes to carry on any manner or method of mining operations;".

This means that on-tenement residences and recreational facilities, for use by mining employees, are also "mines" and the operation of those residential and recreational facilities is "mining", but the residential use of them is not "mining". Hence, "work systems at mines" includes work systems in residential and recreational facilities on the tenement. Similarly, "plant and hazardous substances at mines" includes plant and hazardous substances in residential and recreational facilities on the tenement. But, to repeat, that does not make residential use of residences "mining operations".

The expression "workplace" is not within the list of the MSI Act objects, but appears elsewhere. It is defined in s 4 as follows:

> *"Workplace" in relation to a mine, means a place, whether or not in a vehicle, building, or other structure, where employees or self-employed persons work or are likely to be in the course of their work, but does not include catering, residential, or recreational facilities for employees or self-employed persons except in the case of persons who are employed to service and maintain those facilities.*

In summary, an on-tenement residence is a "mine", and maintaining/cleaning the residence is "mining", and people working on residences (cleaners, maintenance crews) are at their workplace on a mine, but people living in the residences are not "mining" and are not at their "workplace".

Therefore, my answer to the first question is as follows: employees' accommodation (provided by employers on mining tenements) is within the definition of a "mine" and the operation of the accommodation is within the definition of "mining operation", including for the purposes of section 9 MSI Act. However, that question and answer do not much assist in deciding the precise obligations of mining employers in respect of FIFO workers.

There are three further expressions used in the MSI Act, which are undefined. These must take their full meaning from their ordinary meaning, from the context in which they are used and from the objects of the MSI Act. The clear object behind the definition of "mining operations" is influential, but not definitive. The three expressions are "working environment"; "system of work"; and "occupational".

Because of the definitions in s 4, a reference in the MSI Act to a "working environment" is likely to be a reference to the environment in a workplace; not the environment at places where mining operations are conducted. This means that "working environment" will include the environment in a residence where the subject matter is work ("operations") at the residence, but will not include the environment at a residence in respect of residential uses (eating, sleeping and watching TV). In other words, an on-tenement residence will be a working environment for cleaners etc., but not a working environment for residents.

This becomes important because some duties of an employer are confined to the employees' workplace, and some are not.

The word "work" as used in the MSI Act is clearly a reference to the carrying out of mining operations. A "system of work" means a system for carrying out mining operations, and will include, for example, long shifts that might cause fatigue. But it does not extend to a system for residing in a residence away from home.

Therefore, the answer to the fourth question is that FIFO work practices (essentially the practices of living away from home in employer-provided accommodation for extended periods) do not constitute a "system of work" as that expression is used in the MSI Act.

Use in the MSI Act of "occupational" is always within the expression "occupational safety and health". In that context, it is clear that "occupational" is confined to matters relating to work, and does not include residential activity.

**Section 9 MSI Act**

Under s 9(1)(a) MSI Act:

> *"An employer must, so far as is practicable, provide and maintain at a mine a working environment in which that employer's employees are not exposed to hazards, and, in particular but without limiting the generality of that general obligation, an employer must ...",*

and s 9(1) then sets out is a list of more particular obligations.

The obligation set out in this chapeaux is not expressly confined to the "workplace", but is expressly confined to the "working environment". My observations above about "working environment' apply here.

Therefore, an employer must provide a hazard-free working environment in and around on-tenement residences for the benefit of the cleaners, electricians etc who maintain and repair the residences, but it does not apply for the benefit of the residents.

That distinction would only cause a practical problem if some aspect of the environment was hazardous to residents but not to cleaners, electricians etc working on the residences. An example might be noise or light that caused sleep deprivation, and hence fatigue or mental health issues for residents, but no harm to the on-shift cleaners, electricians etc. In that example, such noise and light would not be a hazard in the working environment at all under s 9.

In other cases, the omission of obligation to residents may have little consequence. For example, a residence constructed with asbestos will be a "hazard" to the maintenance crew, and thus caught by s 9, and will be sealed or removed. While not a "hazard" under s 9 to the residents, they will be incidentally protected.

The first particular obligation in s 9(1) is to:

> *"(a) provide and maintain workplaces, plant, and systems of work of a kind that, so far as is practicable, the employer's employees are not exposed to hazards;".*

The obligation to provide a hazard-free *workplace* does not include providing a hazard-free residence for residents. And the obligation to provide a hazard-free "*system of work*" does not include providing a hazard-free system for residential use of a residence.

The second particular obligation is to:

> *"(b) provide such information, instructions and training to and supervision of employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards;".*

This does not apply to residents in a residence, because they are not then performing their work. In particular, s 9(1)(b) MSI Act does not oblige an employer to provide information etc. to employees in respect of hazards in the employees' sleeping quarters. There may be a common law duty to do so, but no duty under this provision of the MSI Act.

The third particular provision is to:

> *"(c) consult and cooperate with safety and health representatives, if any, and other employees at the mine where that employer's employees work, regarding occupational safety and health at the mine;".*

Because "mine" includes on-tenement residences, this obligation to consult etc includes consultation in respect of occupational safety and health in and about residences, but only insofar as the issues are "occupational". This means that consultation etc. is required for issues relating to the work of cleaners and electricians etc. at residences, but not to issues relating to residence in the residences.

The fourth particular provision is to:

> *"(d) where it is not practicable to avoid the presence of hazards at the mine, provide employees with, or otherwise provide for the employees to have, such adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees;".*

Because this is focussed on the "mine" it includes on-tenement residences, and because it is not otherwise confined it appears to include residential use of residences. However, the practical extent of the obligation will not address FIFO issues.

The fifth and final provision is to:

> *"(e) make arrangements for ensuring, so far as is practicable, that —*
>
> *(i) the use, cleaning, maintenance, transportation, and disposal of plant; and*
>
> *(ii) the use, handling, processing, storage, transportation, and disposal of substances,*
>
> *at the mine is carried out in such a manner that that employer's employees are not exposed to hazards."*

This also applies to residential use of residences. It will cover for example the maintenance of domestic appliances (see definition of "plant") and the storage of hazardous cleaning products or insecticides in an on-tenement residence. But this is of little utility in respect of the particular FIFO issues under consideration.

The answer to the second question is that some of the duties imposed on employers by section 9 of the MSI Act do apply, and some do not apply, for the benefit of employees who are 'off shift' and using the facilities solely for accommodation purposes.

**Other residences**

Section 15D MSI Act also applies to residences provided by a mining employer for mining employees. The operative provision is s 15D(2), which requires a mining employer, so far as is practicable, to maintain such residences "so that the employees are not exposed to hazards at the premises".

Section 15D(2) does not apply within the metropolitan area or a town or city and it does not apply if the employee's occupancy is pursuant to a landlord-tenant letting agreement.

Significantly, it does not apply to any residence that is covered by paragraph (k) of the definition of "mining operations". That part of s 15D is difficult to interpret, because paragraph (k) does not relate to the *place* of a residence, but to *operations*, so that a place of a residence is sometimes and for some purposes the place of an operation and sometimes is not. Nevertheless, in my view and despite that difficulty, the Legislature simply intended that s 15D is to apply to a residential place that is for mining but is not on the tenement.

Where it applies, s15D only touches upon "hazards"; it does not expressly extend to "work practices" or "systems of work". It will obviously, and intentionally, apply to the benefit of FIFO workers during residential use of residences.

In in light of ss 9 and 15D, the MSI Act intends to cover all mining-related residences other than in cities, towns and the metropolitan area. But it draws several distinctions between such residences, a justification for which is difficult to discern. In particular, the point of s 15D is to obligate the employer in respect of the *residential use* of a residence, whereas s 9, relying on the definitions, is not generally concerned with residential use, (although some provisions such as s 9(1)(e) do incidentally apply to residential use). In other words, it seems odd that the MSI Act provides more protection for residential use off-tenement, than for residential use on-tenement.

The Parliamentary Explanatory Memorandum[2] for section 15D reads as follows (with my emphases):

> ***"Duties of employers to maintain safe residential premises***
>
> *29. The Bill introduces new provisions requiring an employer to ensure*

[2] Mines Safety and Inspection Amendment Bill 2004, Explanatory Memorandum.

*that residential premises provided in connection with work are safe for the employee. The duty applies only in limited circumstances, that is, where the following three conditions apply:*

- *there is no alternative accommodation available;*
- *the accommodation is outside a city or town; and*
- *there is no written agreement containing terms that might reasonably be expected to apply to the letting of residential premises (such as a lease).*
- ***does not include residential facilities located on a mining tenement and that comes within the definition of "mining operations" under the MSI Act.***

30. *The application of the duty extends to land and outbuildings that are intended to be used in connection with the occupation of the premises. This is necessary to provide protection to employees undertaking the sorts of activities that would be expected as part of staying in the premises. For example it might apply to external toilets and laundries, and the pathways between them. Only where there is a clear nexus with the occupation of the premises will the duty extend to land and outbuildings.*

31. *Importantly, this duty, similar to existing duties in the Act, applies only "so far as practicable".*

32. *Penalties will apply in accordance with the penalty regime introduced later in the Bill.*

33. ***This new duty requiring an employer to maintain safe residential premises gives rise to some considerations not present in the case of existing duties. An employee in his or her own time is not subject to the same direction and control of the employer that he or she would be during work time****. Further, the duties on an employee under the MSI Act apply only when he or she is "at work". In recognition of these considerations, the Bill provides a defence in proceedings against an employer in cases of serious injury or death, if the employer proves that the serious injury or death would not have occurred if the employee had taken reasonable care to look after his or her own safety and health at the premises.*

The 2004 Explanatory Memorandum can't be used to explain the pre-existing legislation, but it can be used to assist with the intention behind the amendment.

The Memorandum makes clearer that s 15D was intended to apply only to residences off-tenement (see first emphasised passage). But it seems clear also that this was not because it was thought that on-site residences were already covered – see second emphasised passage.

The Memorandum thus tends to confirm the oddity of giving more protection to off-tenement residences than to on-tenement residences, and yet the Amendment did not remedy it. It also confirms that one should not rely on s 15D to interpret s 9 in a manner that gives equal protection to on-tenement residences.

**"Practicable"**

Further, other than under s 9(1)(d), the obligations in s 9(1) are imposed only "so far as is practicable". "Practicable" is defined in s 4 as:

> ***"practicable** means reasonably practicable having regard, where the context permits, to —*
>
> *(a) the severity of any potential injury or harm to health that may be involved and the degree of risk of such injury or harm occurring; and*
>
> *(b) the state of knowledge about —*
>
> *(i) the injury or harm to health referred to in paragraph (a); and*
>
> *(ii) the risk of that injury or harm to health occurring; and*
>
> *(iii) means of removing or mitigating the potential injury or harm to health;*
>
> *and*
>
> *(c) the availability, suitability, and cost of the means referred to in paragraph (b)(iii);".*

Therefore, even if, contrary to my opinion above, a "workplace" or a "system of work" included the FIFO system as it relates to residential use of residences in s 9(1)(a), nevertheless the section would not impose an obligation on an employer to provide a different system of work unless the different system were "practicable", as defined. That is a question of fact, to be examined case-by-case, but it seems a difficult hurdle to surmount for remote mines.

**Other provisions of the MSI Act**

Section 10 MSI Act deals with the correlative obligations of an employee for his/her own safety and health, and for others'. Section 10(1)(a) provides that:

> *"An employee at a mine must take reasonable care —*
>
> *(a) to ensure his or her own safety and health at work".*

This obligation is imposed for all places and all situations in the area that is the "mine", including on-tenement residences, but only while "at work". In other words, each employee is obliged to ensure his or her own health and safety in and around the residences only to the extent he or she is working on maintenance etc. on a residence, not in respect of residential or recreational use of the residence. This matches the employer's obligations, and supports the above interpretation of s 9.

**Reporting suicide and suicide attempts**

Section 11 deals with reporting obligations. Section 11(1) provides:

> *"(1) Every person working in a mine must report immediately to the person in immediate authority over that person —*
>
> *(a) any potentially serious occurrence that arises in the course of or in connection with that person's work; and*
>
> *(b) any situation at the mine that the person has reason to believe could constitute a hazard to any person,*
>
> *and a person receiving a report under this subsection must convey the information in that report immediately to the manager of the mine or to a person designated for the purpose by the manager."*

An attempted suicide is a "potentially serious occurrence". An attempt made during a residential use of an on-tenement residence will be within the geographical reach of s 11(1)(a) because a residence is part of the "mine". However, s 11(1)(a) is engaged only if an attempt occurs in the course of, or in connection with, the person's work. If the attempt is made during a residential use of an on-tenement residence, the attempt will not be in the "course of" the person's work.

It is possible that an attempted suicide during a residential use of an on-tenement residence is "*in connection with*" the person's work. That will be a matter of fact. If, for example, the attempt was on account of workplace bullying or intimidation or notice of dismissal or of disciplinary action, then it may be "in connection with" work. If, on the other hand, the attempt was because of marital disharmony arising from absence form home through FIFO arrangements, then the "connection" with the person's *work* is dubious. The section requires a connection with the person's "*work*", and it is not sufficient for s 11(1)(a) that the attempt be connected to the person's absence from home for the purposes of his/her work.

It has to be noted also that 11(1)(a) requires a report by a person of something that occurs in the course of ***that*** person's work. In other words, to apply s 11(1)(a) to suicide attempts appears to mean that the suicidal person is obliged to self-report his attempt, and face criminal sanction for failing to do so, which is unlikely to be the intention of the Legislature. Where another person discovers that a co-worker has attempted suicide in a residence, it is hard to see how that discovery would be in the course of or in connection with ***his*** work (even if it was in connection with the work of the suicidal person).

That difficulty arises because the principal focus of the MSI Act is to deal with physical and process dangers to health (including mental health), which are inherent in the workplace, and not principally with dangers from within an employees' mind or body. Nevertheless, while arguable, and despite that difficulty, I think that the s 11(1)(a) reporting obligations will require a co-worker to report an attempted suicide where the co-worker is aware the attempt was related to a work occurrence such as bullying.

More pertinent to the topic, I do not think there is any reporting obligation under s 11(1)(a) on a co-worker to report a suicide attempt arising from non-work causes, and I include as non-work the fact of living away from home.

Section 11(1)(b) is arguably more widely framed. It might arguably cover any situation at a mine that is believed could constitute a hazard to any person. This might cover clinical depression, or suicidal thoughts, whether within a residence or anywhere else on the "mine". However, in my view, a Court would not interpret s 11(1)(b) in that manner, for the following reasons.

First, under the definition in s 4, the word "hazard", "in relation to a person, means anything that may result in injury to the person or harm to the health of the person." It is not clear that a person's state of mind is "anything" for this purpose.

Second, the reporting obligations in OS&H legislation would usually extend only to the *working* environment, and within the employer's control, not the state of mind of a worker. In this case, s 11(3) requires the reporting of a suicide only if the death was in connection with *work* at the mine. The reporting provisions are intended to match the prevention obligations, so s 11(3) suggests that non-work related states of mind are not included in either type of obligation.

Third, s 11A MSI Act shows that the "situation" as reported has to be investigated and action has to be considered by the mine manager, which inclines against an interpretation that "situation" includes an employee's state of mind, unrelated to the working environment.

Last, and relevant to each point, s 11 is a penal provision, which will be used to prosecute individuals who breach its provisions. A tenet of statutory interpretation is that, where doubt fairly exits as to the extent of a penal provision, the doubt is resolved against extending the criminal category.[3] In this case, on the prosecution of a person for failing to report a co-worker's depressed state of mind in his/her sleeping quarters, a Court is unlikely to hold that s 11(1)(b) requires reporting of that as a "situation at a mine" within s 11.

The reporting obligations in s 11 are to report to the person's superior or to the mine manager. A mine manager is not a public servant: see s 33 MSI Act. Hence, s 11 does not include any obligation to report to an inspector.

Section 76 MSI Act deals with duties of a mine manager to report to the district inspector the occurrence of any "injury in an *accident* at a mine", which does not cover suicides or attempted suicides. Section 78 has similar reporting requirements in respect of a list of events, which do not capture suicide unless, incidentally, the suicide was effected by gas, poisoning or electric shock. Section 79 has similar reporting obligations for "any occurrence at the mine" that had the potential to cause serious harm, which

[3] *Beckwith v R* (1976) 135 CLR 569 at 576; *Deming No456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129 at 145.

textually may apply to an attempted suicide in a residence, particularly if related to events at work.

In the result, there is no directly expressed obligation to report attempted or successful suicides during residential use of a residence. And there is no general obligation on inspectors to investigate a suicide during residential use of a residence. The extent that there is an obligation to report and investigate, it is incidental and uncertain.

Suicides on a mine will be reported to the Coroner or a police officer, if the death is a "reportable death" under the *Coroners Act 1996*. A death will be reportable if it "appears to have been unexpected, unnatural or violent or to have resulted, directly or indirectly, from injury".

**Conclusions**

***Question 1***: Employees' accommodation (provided by employers on mining tenements) is within the definition of a "mine" and the operation of the accommodation is within the definition of "mining operation", including for the purposes of section 9 MSI Act.

***Question 2***: Some of the duties imposed on employers by the MSI Act do apply, and some do not apply, for the benefit of employees who are 'off shift' and using the facilities solely for accommodation purposes. Those that do apply do so incidentally.

***Question 3***: The answers to this question are complicated and uncertain, principally because the MSI Act is not concerned with suicides and attempted suicides unless they are work related. Where they are work-related, reporting obligations are likely to arise under ss 11(1)(a), 78 and 79.

***Question 4***: FIFO work practices (essentially the practices of living away from home in employer-provided accommodation for extended periods) do not constitute a "system of work" as that expression is used in the MSI Act.

Yours faithfully,

**K M Pettit**