**GROSVENOR MINE INQUIRY SUBMISSION FINDING 1**

**There are unintended negative consequences from the amendment of Section 59 of the CMSHA 1999.**

**REASONS**

**There are unintended negative -consequences from the amendment of Section 59 of the CMSHA 1999 for full time permanently employed OCE at BMA Coal Joint Venture Mines.**

**FULLTIME PERMANENTLY EMPLOYED BMA OCE’s have been told that due to the LEGISLATION CHANGE they can NO LONGER BE EMPLOYED UNDER THE CURRENT PRODUCTION and ENGINEERING WORKPLACE AGRREEMENT .**

**A new POSITION has been created called OPEN CUT OVERSEER.**

**An OVERSEER is commonly defined as “*a person who supervises others, especially workers”.***

**The definition of Overseer does not mandate ensuring safety and health it says “supervises.”**

**Definition. SUPERVISE is a *transitive verb: to be in charge of: superintend, oversee supervise a large staff supervised the ship's daily operations.***

**BMA EA EMPLOYEE Q&A CMSH Act DUTIES RESTRUCTURE**

***1. What changes are Occurring at BMA mines?***

***The State Government recently passed the Minerals and Energy Resources and other Legislation Amendment Act 2020 (Old) (MERLA Act). The MERLA Act made changes to the Coal Mning Safety and Healthy Act 1999 (QId) (CMSH Act).***

***These changes include requiring the Coal Mine Operator (CMO) to ensure that persons who carry out certain safety and health responsibilities and duties prescribed under the CMSH Act (CMSH Act duties) are only appointed if they are employees of the CMO.***

***The CMO for BMA mines is BM Alliance Coal Operations Pty Ltd and BHP Coal Pty Ltd is the employer of employees who are covered by the BMA Enterprise Agreement 2018 (BMA EA 2018).***

***The CMO has decided and advised BHP Coal Pty Ltd how it will implement changes required by the State Government and the MERLA Act. It has also decided on the employment arrangements it will use.***

***As a result of the decisions by the State Government and the CMC). BHP Coal Pty Ltd has determined that from 19 November 2021. BHP Coal will no longer employ persons performing CMSH Act duties***

***2. What Is the change made by the CMO?***

***The CMO will become the employer of all employees performing CMSH Act duties. These changes must be completed by the CMO no later than 19 November 2021.***

***This includes any person performing duties of an Open Cut Examiner.***

***As part of these changes the CMO has decided to create a new staff position — the Open Cut Overseer (OCO) — which will perform the statutory OCE duties.***

***The decision also affects employees, contractors and labour hire workers who are currently performing CMSH Act duties as part of another role such as Superintendents. Shift Compliance Coordinators and some managers.***

**BACKGROUND**

**The \*State Development, Natural Resources and Agricultural Industry Development Committee’s examination of the Mineral and Energy Resources and Other Legislation Amendment Bill 2020.**

**This Report in Section 2.3 states that the requirement that the Statutory Office Holders that are required to be employees of the operator are the**

1. **Site Senior Executive and** **those appointed to be appointed in their absence.**
2. **Underground Mine Manager and their alternate.**
3. **First and Second Class and Deputies appointed to be responsible for the control and management of underground activities when the manager is not in attendance at the mine.**
4. **Ventilation Officer those appointed to be appointed in their absence.**
5. **Persons holding a first or second class certificate of competency or a deputy’s certificate of competency to have control of activities in one or more explosion risk zones;**
6. **Persons with appropriate competencies appointed to control and manage the mechanical and electrical engineering activities of the mine;**
7. **persons holding an open cut examiner’s certificate of competency appointed to carry out the responsibilities and duties prescribed under a regulation in surface mine excavations;**

**\*State Development, Natural Resources and Agricultural Industry Development Committee’s examination of the Mineral and Energy Resources and Other Legislation Amendment Bill 2020.**

**Section 2.3.2 “The inability of contract statutory office holders to make safety complaints” goes for just under 4 pages of the Report.**

**Even though the requirement to be employed by the Operator to the seven categories, all the issues discussed about being subject to reprisals and adverse treatment relate to OCE’s and Mine Deputies.**

**None of the other categories are even mentioned in Section 2.3.2.**

***2.3.2 The inability of contract statutory office holders to make safety complaints***

***The committee heard that currently contract or labour hire OCEs are subject to reprisals and adverse treatment when they raise safety concerns:***

**This is two address two categories of OCE’s it seems in particular, and Mine Deputies.**

1. **Contract OCE/Deputy employed on a casual basis non-permanent basis.**
2. **OCE/Deputy employed by a Mining Contactor carrying out mining activities at the Mine the SSE has been appointed to by the Operator**

**THE OCE and the MINE DEPUTY are the front line Statutory Officials who on a continuous basis every shift are monitoring, measuring and assessing and deciding on whether the work are they are in charge of poses an acceptable or an unacceptable level or risk to Coal Mine Workers in the area of the Mine they are responsible for.**

**They are appointed by the SSE and they are obliged to.**

1. **Apply the Coal Mine Act and Regulations at the Mine on behalf of the SSE.**
2. **Follow and apply whatever the Mines Safety and Health System mandates, so long as it achieves an acceptable level of risk.**
3. **Applying their Recognised experience and knowledge to be able to form opinions and if necessary apply controls in excess of the minimum required under the Legislation and Site Procedures; so to ensure the risk to coal mine workers is as low as achievable and within acceptable limits.**

**If all or any of the above occur, they are obligated to.**

1. **Remove mine workers from that area of the mine.**
2. **Erect physical barriers and signage to prevent mine workers entering and working in the unsafe area of the mine. The only exception being for entering and working to bring the risk within acceptable limits in that area of the mine.**
3. **Inform the next Senior Statutory of the situation**
4. **If it is within his resources, responsibilities, and ability, bring the risk in the area within acceptable limits.**
5. **If not ensure (b)**

**There are unintended negative consequences from the amendment of Section 59 of the CMSHA 1999 for full time permanently employed OCE at BMA Coal Joint Venture Mines.**

**FULLTIME PERMANENTLY EMPLOYED BMA OCE’s HAVE BEEN TOLD DUE TO THE LEGISLATION CHANGE THEY CAN NO LONGER BE COVERED BY THE CURRENT PRODUCTION and ENGINEERING WORKPLACE AGRREEMENT.**

**They are then told that there is a new position created as a STAFF position employed under the STAFF Agreement.**

**They are then told that because it is a “NEW POSITION” they will not be automatically offered the New Position with the Requirement to sign a new Staff Contract.**

**There will be a new external and internal recruitment process. All the existing OCE’s are promised is an interview if they want one.**

**They are then informed that they cannot be a full time OCE unless they are successful in the Recruitment Process.**

**If they either do not apply or are not successful in being offered and accepting the STAFF CONTRACT they will no longer be a full time OCE.**

**They will just go back to Production and Engineering Jobs (Likely Short Haul Truck Driver or Coal Fleet) and at best will be used when there are not enough STAFF OCE’s on shift due to illness.**

**The Unintended Consequence for the BMA OCE’s seems to be directly related to the likely Corporate Structure, as the diagram from Mr McFarlane from the QRC submission to the State Development, Natural Resources and Agricultural Industry Development Committee’s shows.**

**In a joint venture like the at the different Joint Ventures BMA Coal has with different joint venturers at different Mines.**

1. **The joint ventures appoint the Operator in Company A.**
2. **The Production and Engineering Employees are employed in Company B**
3. **All the Management and Staff are employed by Company C**

**All that happens from an employment point of view is that the company the are employed under changes to the one that Employs the Staff on Individual Employment Contracts**

**This appears to be using the complicated corporate structure to stop current fulltime OCE’s they do not like from continuing in the job.**

**The QRC MacFarlane Diagram**

***Mr Macfarlane noted:***

***… is not an issue of permanency of employment—these people are permanently employed—it is an issue of who are they employed by In the complexities of corporate structures … companies operate in the coal industry on the basis that they are in joint ventures, they have partners and they have structures within individual companies.***

***You have heard from some companies today who are in joint ventures where the joint venture does not actually employ the person but the person is in permanent employment.***

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***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.***

**The QRC diagram does not**

1. **Shows that the Production and Engineering Employees employment is as direct as that for the Staff Management Employees, it just uses a Different Company and the Workforce Company uses a P and E employment Collective Agreement**
2. **State or show how the Operator employs or otherwise the Site Senior Executive or even if they employed under the Staff Employment Company.**
3. **There is nothing to show that any Management and Staff are directly employed by the same entity as the SSE.**
4. **Even though the SSE is the most senior Officer employed by the Operator, there is nothing to state that under Staff Employment Company C that those Management Report directly to the SSE.**
5. **Would allow the illegal arrangement found by the DNRME Investigation into the Daniel Springer Fatality to exist. That is the SSE was not the most Senior Person on site appointed by the Operator.**

**DANIEL SPRINGER FATALITY DNRME INVESTIGATION REPORT FINDINGS**

***Site Senior Executive***

***The investigation revealed evidence to suggest that the appointed SSE at Goonyella Riverside mine was not the most senior officer employed who has responsibility for the coal mine as required by section 25 of the Coal Mining Safety and Health Act 1999.***

***Evidence given by the maintenance manager showed that he did not report to the SSE but to the General Manager of Goonyella Riverside mine.***

***Since the SSE did not appear to manage the maintenance manager’s routine individual development and performance review process, he could not ensure that he had the competencies required to carry out his responsibilities, and that he was effectively carrying his responsibilities as stated in the management structure.***

***This is contrary to section 55 of the Coal Mining Safety and Health Act 1999, which states that the SSE for a mine must develop, implement and maintain a management structure that helps ensure the safety and health of persons at the mine.***

**Page 22 Other Related Findings**

***The mine’s SSE did not appear to be the most senior person employed or otherwise engaged by the coal mine operator who had responsibility for the mine as required by section 25 of Coal Mining Safety and Health Act 1999.***

***The committee was informed that for many mine operations across Queensland the employing entity of workers is different to the entity operating the mine.***

***Peabody staff at some mines may not currently employed by the CMO.***

 ***They are employed by another Peabody company that employs our staff across our Australian business and mines. I would expect that others in the industry are also structured this way.***

***Anglo American Site Senior Executives noted in their submissions:***

***This is a complex area where there has been no consultation with the industry to understand the likely implications, including a shortage of statutory positions in Queensland that cannot be filled under the current system. The requirement would also necessitate changes to hundreds of contractual arrangements for mining services, which apart from the compliance burden, may also have other unintended consequences for our operations that we have not yet had the opportunity to consider.***

**State Development, Natural Resources and Agricultural Industry Development Committee’s examination of the Mineral and Energy Resources and Other Legislation Amendment Bill 2020.**

***59 Additional requirements for management of surface mines***

1. ***A site senior executive must appoint a person holding an open cut examiner’s certificate of competency to carry out the responsibilities and duties prescribed under a regulation in 1 or more surface mine excavations. Maximum penalty—200 penalty units.***

***(2) The coal mine operator for the surface mine must ensure that the site senior executive appoints a person under subsection (1) only if the person is an employee of the coal mine operator. Maximum penalty—500 penalty units.***

***Consequences for mining operations and the mining workforce***

***A number of mine operators and submitters argued that the requirement for statutory office holders to be employed by coal mine operators was an oversimplification of contemporary corporate structures and introduces a significant and onerous restriction on the way in which mines operate across Queensland.***

 ***QRC noted that the requirement for all statutory position holders at a coal mine to be employed by the coal mine operator represents an unreasonable and unjustified regulatory burden which was not subjected to consultation with industry or a regulatory impact assessment. Additionally, QRC stated that the proposal may breach Queensland’s fundamental legislative principles.***

***.***

**COMMITTEE RECOMMENDATION**

***Given that submitters highlighted that a transitional period of just one year will not allow sufficient time to make the necessary corporate and contractor arrangements in relation to the appointment of statutory office holders, the committee recommends extending this period from twelve months to eighteen months.***

**The true intent of this legislative change (only if the person is an employee of the coal mine operator) was to ensure that Statutory officials like OCE’s had direct employment, not employed by a contractor, not employed by a service provider or under some other 3rd party arrangement so they could comfortably make the safety related decision that are required to be made without fear of reprisal.**

**The Amendment appears to flow from**

**Minerals Industry Safety and Health Centren8 November 2019 Expert Legal Assessment CMSHA, CMSHR and Recognised Standards**

***6.1.27 Section 105, Open-cut examiner's responsibilities and duties-general***

***The assessment team received considerable feedback on the role of open cut examiners. These***

***included suggestions that:***

***1. All OCEs should be employed by CMOs on the basis that contract OCEs are allegedly fearful of speaking up about safety concerns.***

***2. OCEs should have similar powers to SSHRs including the capacity to stop operations.***

***3. OCEs should report directly to the SSE given their important safety related role, with no other persons in the management structure being able to give an OCE direction.***

***4. The CMSHR should specify that all OCEs must be given sufficient time to carry out their safety related duties.***

***As may be observed, all but the last of these suggestions would require policy changes.***

***The CMSHR as it stands places responsibility on the SSE to ensure, as per s105(1)(a) that 'the main***

***responsibility of an open-cut examiner for the mine is the safety and health of persons…' We***

***believe that implicit in that obligation is a requirement that OCEs should be given the time and***

***opportunity to fulfil their 'main responsibility'.***

 ***CORRECT if the case on the ground at the mine***

***Some interviewees also queried why the inspections carried out by an ERZ controller are specified***

***in Schedule 5 of the CMSHR, but there is no companion schedule for the inspections carried out by***

***an OCE***

 ***The assessment team is of the view that the CMSHR currently takes an inconsistent approach to inspections; giving far more attention to delineating the inspections required***

***underground.***

***We are of the view that this imbalance should be addressed.***

***6.1.27.1 Recommendations***

***That CMSHAC further consider the policy issues raised in relation to OCEs.***

***In addition, that an additional Schedule 5A be appended to the CMSHR detailing the inspections***

***that must be undertaken by OCEs under the Regulation.***

***The true intent of this legislative change (only if the person is an employee of the coal mine operator) was to ensure that Statutory officials like OCE’s had direct employment, not employed by a contractor, not employed by a service provider or under some other 3rd party arrangement so they could comfortably make the safety related decision that are required to be made without fear of reprisal.***

**EXCERPTS OF REPORT**

***2.3.2 The inability of contract statutory office holders to make safety complaints***

***The committee heard that currently contract or labour hire OCEs are subject to reprisals and adverse treatment when they raise safety concerns:***

***I have personally worked alongside them and been one on a couple of occasions … being the contract OCE employed by a third party (labour hire company) is a horrid place to be, you don’t have protection from reprisal for making health and safety decisions, don’t for one minute try and say there’s protection under 274 or 275AA of the Act as history in that space will talk for its self, how many prosecutions have ever been laid under that section?***

***Many a Labour Hire OCE has been told your services are no longer required then moved onto the next mine, then when they have dig again, get the same again and again.***

***In Moranbah, Mr Brodie Brunker informed the committee:***

***I have witnessed firsthand the vulnerability of contract deputies being overruled by management even though the deputy is ultimately responsible for the area of the mine, but they know if they do not follow the instructions given, even though they do not agree with the decision, they will either be pulled into the office and reprimanded or, worse, shown the door. Having all critical safety roles employed on a permanent employment type will give the person the confidence to stop the job regardless of the circumstances and not fear for their job.***

***Similarly, Mr Steve Watts from the CFMMEU provided an example of the difficulty contract employees have in speaking out against unsafe practices:***

***In my previous job I was a permanent deputy at an underground mine. I had contract statutory officials make complaints through me as a union safety representative on site because they were too scared. Another example I have is that I was requested to do a job which I believed was unsafe so I refused to do the task. What did they do? They got a contract deputy to do the job on night shift. I found out that he had done it and when I saw him in the morning I said, ‘Mate, what made you do that?’ He said, ‘I just wanted a job.’***

***Mr Jason Meikle provided several examples which illustrated that permanency of employment did impact on an individual’s ability to call-out safety issues. Mr Meikle stated:***

***I have personally witnessed Open Cut Examiners employed by labour hire companies not being able to do their job as they are in fear of reprisals.***

***A large number of submissions expressed concern with the assumption that persons appointed to positions as employees of the coal mine operator would report safety and health issues more freely. Mr Darth Clemersen (Darth Clemerson is Development trade supervisor at Anglo Coal)***

***argued that:***

***The assumption that removing the ability for an individual contractor to hold a statutory position in a coal mine will relieve the anxiety of the coal mine worker to, “make safety complaints, raise safety issues, or give help to an official in relation to a safety issue without fear of reprisal or impact on their employment.”, seems to be based off an emotional response and subjective data…******It would be intellectually dishonest to suggest contract statutory holders of a coal mine are afraid to speak when the industries attitude and culture toward health and safety has had a significant change for the good.***

***As a statutory official it doesn’t make any difference to whom you are employed by. Statutory officials who are lazy, don’t speak up when required, and who don’t lead from the front with safety matters are a concern for the industry. Peabody Energy Australia argued:***

***Every worker at any Peabody site has the fundamental right to stop work, including production activities if they believe they or others are at risk. This right applies to all personnel working at a Peabody site, inclusive of Contractors.***

***2.3.3*** ***Consequences for mining operations and the mining workforce***

***A number of mine operators and submitters argued that the requirement for statutory office holders to be employed by coal mine operators was an oversimplification of contemporary corporate structures and introduces a significant and onerous restriction on the way in which mines operate across Queensland.***

 ***QRC noted that the requirement for all statutory position holders at a coal mine to be employed by the coal mine operator represents an unreasonable and unjustified regulatory burden which was not subjected to consultation with industry or a regulatory impact assessment. Additionally, QRC stated that the proposal may breach Queensland’s fundamental legislative principles.***

***The committee was informed that for many mine operations across Queensland the employing entity of workers is different to the entity operating the mine.***

***Peabody staff at some mines may not currently employed by the CMO. They are employed by another Peabody company that employs our staff across our Australian business and mines. I would expect that others in the industry are also structured this way.***

***Mr Macfarlane from the QRC provided an example of common company structures in the resources industry illustrating the arrangements for employing entities in mining operations (see Figure 1).***



***Mr Macfarlane noted:***

***… is not an issue of permanency of employment—these people are permanently employed—it is an issue of who are they employed by.***

***In the complexities of corporate structures … companies operate in the coal industry on the basis that they are in joint ventures, they have partners and they have structures within individual companies.***

***You have heard from some companies today who are in joint ventures where the joint venture does not actually employ the person but the person is in permanent employment. That is the first point.***

***The second point is that at no stage in any part of the Brady review was there any reference to casually employed SSEs, for want of a better word, having any worse a safety reporting system than a permanent employee.***

***Peabody Energy Australia argued that the proposed amendment was unworkable in the mining industry given the current corporate structures that are in place and would result in considerable administrative burdens for industry for no positive impact to safety culture in the mining industry:***

***Many of our statutory holders are employed by a Peabody subsidiary that employs Peabody staff across our Australian operations, not the relevant mine CMO***

***.***

 ***Some of our statutory holders may be employed by a mine specific subsidiary that employs our hourly workforce employees. These subsidiaries are not usually the CMO.***

***All are Peabody employees and have the absolute right (as is our expectation) to raise safety concerns no matter who their employer is on paper. Transferring all of these existing employees carries unnecessary administrative burdens and will have no positive impact on changing the safety culture***

***Issues will also arise in certain joint venture arrangements if the CMO is not the employing entity. Anglo American Site Senior Executives noted in their submissions:***

***This is a complex area where there has been no consultation with the industry to understand the likely implications, including a shortage of statutory positions in Queensland that cannot be filled under the current system.***

***The requirement would also necessitate changes to hundreds of contractual arrangements for mining services, which apart from the compliance burden, may also have other unintended consequences for our operations that we have not yet had the opportunity to consider.***

***Ms Liz Watts from the Queensland Coal Site Senior Executives Forum highlighted that the amendment would challenge staffing requirements in the industry:***

***We think that there are … misconceptions that exist in relation to the employment of statutory officials as contractors.***

***The first is that the legislation, as it is proposed, would simply mean that those employed currently as contractors could switch across to being employees.***

 ***However, this is not the reality of what would play out as the industry requirements are currently being met by contractors with statutory qualifications working to satisfy the current requirements across a number of operations.***

***In response to matters raised by stakeholders in relation to the provisions in the Bill requiring statutory office holders to be employees of the mine operator, DNRME stated:***

***… it is a matter of government policy to require that statutory office holders are employees of a mine operator. There will be a twelve-month transitional period before statutory officer holders will be required to be an employee of a mine operator.***

***The intent is to ensure that statutory office holders can make safety complaints and raise safety issues without fear of reprisal or impact on their employment.***

***Given that submitters highlighted that a transitional period of just one year will not allow sufficient time to make the necessary corporate and contractor arrangements in relation to the appointment of statutory office holders, the committee recommends extending this period from twelve months to eighteen months.***

**6.1.27 Section 105, Open-cut examiner's responsibilities and duties-general**

*The assessment team received considerable feedback on the role of open cut examiners. These*

*included suggestions that:*

1. ***All OCEs should be employed by CMOs on the basis that contract OCEs are allegedly fearful of speaking up about safety concerns.***
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***an OCE***. ***The assessment team is of the view that the CMSHR currently takes an inconsistent approach to inspections; giving far more attention to delineating the inspections required***

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6***.1.27.1 Recommendations***

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