



## Decision and Reasons for Decision

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**Application Number:** 310164

**Applicant:** D Godwin

**Respondent:** Department of Employment, Economic Development and Innovation

**Decision Date:** 17 January 2011

**Catchwords:** **FREEDOM OF INFORMATION – section 42(1A) of the *Freedom of Information Act 1992 (Qld)* – whether the information was given under compulsion under an Act that abrogated the privilege against self-incrimination – section 159 of the *Coal Mining Safety and Health Act 1999 (Qld)***

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## REASONS FOR DECISION

### Summary

1. The applicant applied to the Department of Employment, Economic Development and Innovation (**DEEDI**) for documents relating to a mining accident which occurred on 7 December 2008.
2. The only information remaining in issue are the final three pages of an interview transcript<sup>1</sup> (**Relevant Information**). DEEDI found that the entire transcript:
  - comprises information given under compulsion under section 159 of the *Coal Mining Safety and Health Act 1999* (Qld) (**CMSHA**)—a provision under which an interviewer can compel an interviewee to answer questions and abrogate an interviewee's privilege against self-incrimination
  - is exempt from disclosure under section 42(1A) of the *Freedom of Information Act 1992* (Qld) (**FOI Act**).
3. This Office advised the applicant and DEEDI of its preliminary view that the Relevant Information (but not the rest of the transcript) is exempt from disclosure under section 42(1A) of the FOI Act as it was obtained under compulsion under section 159 of the CMSHA which abrogated the interviewee's privilege against self-incrimination.
4. DEEDI accepts the preliminary view.<sup>2</sup> However, the applicant submits that the Relevant Information was '*not elicited in full compliance with s 159*' of the CMSHA and accordingly, was not '*given under compulsion under an Act that abrogated the privilege against self-incrimination*', is therefore not exempt and should be released.
5. Information will qualify for exemption from disclosure under section 42(1A) of the FOI Act if the following two requirements are satisfied:
  - the information consists of information given in the course of an investigation of a contravention or possible contravention of the law<sup>3</sup> and
  - the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.
6. Given the applicant's submissions, the issue for determination in this review is whether the second requirement for exemption under section 42(1A) of the FOI Act is satisfied in the circumstances.
7. After carefully reviewing all relevant information, I find that:
  - the second requirement for exemption is satisfied in the circumstances; and
  - DEEDI's decision should be varied as only the Relevant Information qualifies for exemption from disclosure under section 42(1A) of the FOI Act.

### Decision under review

8. The decision under review is DEEDI's internal review decision dated 5 March 2010.

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<sup>1</sup> That is, pages 23 to 25 of the 25 page transcript, except for the first line on page 23 and the last 4 lines on page 25.

<sup>2</sup> On the basis that this Office consult with a specified third party. Such consultation occurred.

<sup>3</sup> This first requirement is clearly satisfied and is not an issue in contention in this external review.

## Evidence relied upon

9. In reaching this decision, I have taken the following into account:

- the application and submissions made by the applicant
- the decisions issued by DEEDI
- the information provided by the applicant and DEEDI
- the information sought by the applicant
- relevant decisions
- provisions of the FOI Act and the CMSHA.

## Interview Transcript

10. Pages 2 to 22 of the interview transcript set out the questions put to an interviewee by DEEDI officers and the responses volunteered by the interviewee.

11. Subsequent to this voluntary exchange (which concludes approximately halfway down page 22 of the interview transcript), the following exchange is recorded:

[Officer] *Alright ..., what I'm going to do under the [CMSHA], section 159 of that Act allows me to require you to answer some questions ...*

[Interviewee] *Yeah.*

[Officer] *Okay. I'm – in actual fact, under this Act I have the power to compel you to answer these questions ...*

[Interviewee] *Yeah.*

[Officer] *...so at this stage I'm going to enforce that section and require you to answer these questions but in doing so I just advise you that anything you do say will be inadmissible in Court and can't be used against you. Do you understand that:*

[Interviewee] *Yeah.*

[Officer] *What do you understand that to mean?*

[Interviewee] *What I'm saying now, you can't use it in Court.*

[Officer] *That's right. But you have to answer my questions?*

[Interviewee] *Yeah.*

[Officer] *Okay. Alright then...*

[Another Officer] *I think it's worth pointing out that if you do lie in any of the answers to the questions you could be prosecuted for that.*

[Interviewee] *Righto.*

[Officer] *That's the only thing you could be prosecuted for is for lying.*

[Interviewee] *Yeah well I can't – what have I got to lie about – for?<sup>4</sup>*

[my underlining]

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<sup>4</sup> As DEEDI no longer claims that this part of the transcript is exempt information, section 87(3) of the FOI Act does not prevent me from including this extract.

12. The Relevant Information then records the questions put to the interviewee and his responses to those questions.

### **Applicant's submissions**

13. The applicant submits<sup>5</sup> that:

...

*Section 42(1A) of the FOI Act provides that the matter is exempt if it consists of information given in the course of an investigation of a contravention or possible contravention of the law and the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.*

*It is understood that the exemption is said to arise pursuant to the interviewer's reference to s 159 of the [CMSHA]. ...*

*The following points with regard to s 159 of the [CMSHA] are noted:*

*... [Section 159 of the CMSHA] only applies if a person refuses to answer a question ...*

*If the officer requires the person to answer the question, the officer must advise the person of the following:*

- i. that if the answer might incriminate [the] person, the person may claim before ... giving the answer that giving the answer might incriminate the person; and*
- ii. the effect of making the claim on the admissibility of the answer and any information, document or other thing obtained as a direct or indirect result of the person giving the answer as evidence in the proceeding against the person.*

*... the following is noted with regard to the interview with [the interviewee]:*

- a. [the interviewee] did not refuse to answer any question ... .*
- b. The officer was required pursuant to ... 159(2) to advise [the interviewee] that before giving the answer he could claim that giving the answer might incriminate him. It is noted that this is nowhere done.*

*Therefore it cannot be maintained that the information the subject of the purported exemption was given under compulsion under an Act that abrogated the privilege against self-incrimination; the reason being that the information was not properly given under the compulsion deriving from s 159 of the [CMSHA].*

*In order for the answers to be given under compulsion under an Act that abrogated the privilege against self-incrimination, they need to be elicited in full compliance with s 159 of the [CMSHA]. It is contended for the above reasons and therefore the information was not properly given pursuant to the Act. Therefore the exemption under section 42(1A) of the [FOI Act] does not apply.*

*It is, therefore, [the applicant's] submission that [the relevant information] which is purported to be the information given in response to the purported invocation [of] s159 [of the CMSHA] should be released to [the applicant] as it is not exempt.*

14. Further, the applicant submits<sup>6</sup> that:

- section 159(2) uses the word 'must' in setting out the matters that an officer is required to advise an interviewee, if the officer requires the interviewee to answer a question

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<sup>5</sup> By facsimile dated 3 September 2010.

<sup>6</sup> By telephone on 5 October 2010.

- the requirements of section 159 of the CMSHA should be interpreted strictly as the section takes away an important common law right
- this approach is supported by the recent decision of *Kirk v Industrial Relations Commission (Kirk)*<sup>7</sup>
- notwithstanding the decision of *Project Blue Sky v Australian Broadcasting Authority (Project Blue Sky)*,<sup>8</sup> 'must' means 'must' for the purpose of section 159(2).

15. On account of the applicant's submissions, I will now consider the requirements of section 159 of the CMSHA, the manner in which the Relevant Information was obtained and the effect of the *Kirk* and *Project Blue Sky* decisions.

### Section 159 of the CMSHA

16. Section 159 of the CMSHA provides that:

**159 Person must answer question about serious accident or high potential incident**

- (1) *This section applies if a person refuses to answer a question about a serious accident or high potential incident asked by an inspector.*
- (2) *If the inspector requires the person to answer the question, the inspector must advise the person of the following—*
  - (a) *that if the answer might incriminate the person, the person may claim, before giving the answer, that giving the answer might incriminate the person;*
  - (b) *the effect of making the claim on the admissibility of the answer and any information, document or other thing obtained as a direct or indirect result of the person giving the answer as evidence in any proceeding against the person.*
- (3) *The person must answer the question, unless the person has a reasonable excuse.*

*Maximum penalty—40 penalty units.*
- (4) *It is not a reasonable excuse to fail to answer the question that answering might tend to incriminate the person.*
- (5) *Subsection (6) applies if an answer might incriminate the person and the person claims, before giving the answer, that giving the answer might incriminate the person.*
- (6) *Neither the answer nor any information, document or other thing obtained as a direct or indirect result of the person giving the answer is admissible in any proceeding against the person, other than a proceeding in which the falsity or misleading nature of the answer is relevant.*

### Manner in which the Relevant Information was obtained

17. After carefully considering all of the information available to me including the part of the interview transcript set out above, I am satisfied that:

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<sup>7</sup> [2010] HCA 1.

<sup>8</sup> (1998) 194 CLR 355.

- After asking the interviewee at length about the circumstances surrounding the relevant accident, the interviewing officers invoked section 159 of the CMSHA in order to compel the interviewee to answer further questions.
- While the interviewee did not expressly state that he refused to answer questions prior to the interviewing officers invoking section 159 of the CMSHA, the officers may have reasonably construed that the interviewee's answers effectively amounted to a refusal to fully answer their questions.
- The interviewing officers explained the operation of section 159 of the CMSHA to the interviewee (a crane operator who was unrepresented in the interview) in a manner which the interviewee demonstrated he understood by restating that he was now required to answer questions, but that his answers would be inadmissible in Court and could not be used against him.

### **Project Blue Sky**

18. In *Project Blue Sky*, the majority of the High Court stated:<sup>9</sup>

*An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.*

[emphasis added, citations omitted]

19. Accordingly, it is necessary to determine whether a legislative purpose to invalidate any act that fails to strictly comply with the requirements of section 159 of the CMSHA can be discerned.
20. In accordance with *Project Blue Sky*, I have considered 'the language of the [CMSHA], its subject matter and objects'<sup>10</sup> and note that:
- the objects of the CMSHA include 'to protect the safety and health of persons at coalmines and persons who may be affected by coal mining operations' and 'to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level'<sup>11</sup>
  - the CMSHA also sets out various mechanisms by which risks associated with coal mining operations can be managed to achieve the protection of the health and safety of persons at coal mines.
21. The applicant correctly points out that section 159(2) of the CMSHA states that 'If the officer requires the person to answer the question, the officer **must** advise the person ...'

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<sup>9</sup> Above n 8 at 388-389 per McHugh, Gummow, Kirby and Hayne JJ.

<sup>10</sup> Ibid.

<sup>11</sup> Section 6(a) and (b) of the CMSHA.

22. I have reviewed recent cases that have applied *Project Blue Sky* in considering provisions containing the word 'must' and note that depending on the circumstances of each matter some conclude that strict compliance is required,<sup>12</sup> while others conclude that it is unnecessary<sup>13</sup> to do so.
23. I also note that the Explanatory Notes to the *Coal Mining Safety and Health Bill 1999* (Qld) (which resulted in the CMSHA)<sup>14</sup> state:<sup>15</sup>

***It is necessary to strike a balance between the rights of persons not to be endangered by the actions of others and the rights of the individual. In this case there has to be some compromise on FLPs [fundamental legislative principles] to ensure the safety of others.***

...

*All sectors of the industry recognise that failure to establish the causes of serious accidents and high potential incidents have [sic] the potential to allow a situation to continue or reoccur that may endanger the lives of many persons.*

*In addressing these concerns, it was determined that the most effective method to establish causes of serious accidents is to provide Inspectors with the power to require answers to questions relating to serious injuries or high potential incidents with appropriate safeguards to prevent this evidence being used against the person providing the answers. ...*

*DME technical officers are of the opinion that the effectiveness of the legislation will be severely compromised without these power [sic].*

*All parties agree that the causes of major accidents and incidents must be discovered to ensure proper remedial action can be taken to eliminate the occurrence of a similar situation.*

**Specifically, the FLP issues are:**

#### **Requirement to answer to questions**

*The proposed legislation includes powers for Inspectors when interviewing persons in connection with a serious accident or a high potential incident to compel answers. It is not a reasonable excuse to refuse to answer because the answers may incriminate the person.*

*Persons who are compelled to answer questions must be advised prior to compulsory questioning that they may claim privilege if answering the questions may incriminate them. If privilege is claimed the information obtained under compulsion cannot be used in any proceedings against the person. Information and documents gained as a result of answers obtained under compulsion likewise cannot be used in any proceedings against the person and are not discoverable under FOI legislation.*

***The primary purpose of this power is to enable an Inspector to determine the nature and cause of accidents and incidents which may, if the underlying***

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<sup>12</sup> *SAAP v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 228 CLR 294 at paragraphs 68, 136, 173, 206; *Owners AP 46528 v Hall* [2009] NSWSC 278 at paragraphs 55-66; *Kerferd and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2009] AATA 148 at paragraphs 94-55; *Commissioner of the Australian Federal Police v Oke* [2007] FCAFC 94 at paragraphs 32-39; *SZFKF v Minister for Immigration* [2005] FMCA 1152 at paragraph 48.

<sup>13</sup> *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at paragraphs 26 and 40; *Ulan Coal Mines Limited v Minister for Mineral Resources and Anor* [2007] NSWSC 1299 at paragraphs 292-296; *Crawford v Police* [2007] SASC 373 at paragraphs 17-21; *Knaggs v Director of Public Prosecutions and Anor* [2007] NSWCA 83 at paragraph 53; *SZFIH v Minister for Immigration & Anor* [2005] FMCA 1847 at paragraph 57.

<sup>14</sup> Note—no changes were made to section 159 of the Bill prior to its enactment in the CMSHA.

<sup>15</sup> At pages 3-4.

***causes are not uncovered and remedied, lead to serious consequences involving fatalities or widespread destruction.***

...

[emphasis added]

24. Taking into account all of the matters set out above, I am satisfied that:

- the primary purpose of the power to compel answers under section 159 of the CMSHA is to enable determination of the nature and cause of serious accidents and high potential incidents which may, if the underlying causes are not uncovered and remedied, lead to serious consequences including fatalities or widespread destruction and
- section 159 of the CMSHA is intended to strike a balance between the rights of persons not to be endangered by the actions of others and the right of the individual answering questions, by providing appropriate safeguards to prevent answers being used against the person providing them under compulsion.

25. I have also considered *'the consequences for the parties of holding void every act done in breach of the requirements of [section 159]'*.<sup>16</sup>

26. If I accept the submission that section 159(2) of the CMSHA should be interpreted as requiring express advice by the officers and an express response by the interviewee in the manner proposed by the applicant, the consequences in the present circumstances would be that:

- the interviewee's answers would be deemed to have been given voluntarily, despite the parties' shared understanding that the interviewee was compelled to provide the answers and in doing so, was protected from prosecution (except for lying) and
- through no fault of his own, the interviewee would be denied the safeguard offered by section 159(6) of the CMSHA, despite answering questions under compulsion on the understanding that the safeguard was in place.

27. In considering this issue, I am particularly mindful of the objects of the CMSHA which include the protection of *'... the safety and health of persons at coalmines and persons who may be affected by coal mining operations'* and that:

*It is necessary to strike a balance between the rights of persons not to be endangered by the actions of others and the rights of the individual. In this case there has to be some compromise on FLPs [fundamental legislative principles] to ensure the safety of others.*<sup>17</sup>

28. On the basis of the matters set out above, I am unable to discern a legislative purpose to invalidate an act that fails to strictly comply with the requirements of section 159 of the CMSHA in the manner proposed by the applicant. Accordingly, I am satisfied that in the circumstances of this review, the discussion of section 159 of the CMSHA (as recorded in the interview transcript) is sufficient to abrogate the interviewee's privilege against self-incrimination under that section.

### **Kirk**

29. The applicant also raises the High Court case of *Kirk* in support of its submission that notwithstanding *Project Blue Sky*, section 159 of the CMSHA should be interpreted strictly because it takes away an important common law right.

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<sup>16</sup> Above n 9.

<sup>17</sup> As set out in the Explanatory Notes referred to above.



30. In *Kirk*, the parties agreed that the defendant would give evidence for the prosecution.
31. The High Court was then called upon to consider the relevant provision<sup>18</sup> which provides that [a] *defendant is not competent to give evidence as a witness*' in a criminal proceeding.
32. In *Kirk*, the majority stated that:<sup>19</sup>

*In the course of the hearing of the appeal, this Court directed the parties' attention to the fact that the reasons of Walton J recorded that the prosecution had called Mr Kirk as a witness. This Court was told that Mr Kirk's giving evidence for the prosecution was a course agreed upon by both sides.*

*Section 163(2) of the [Industrial Relations Act 1996 (NSW) (IR Act)] provides that the rules of evidence applied to the Industrial Court. **Section 17(2) of the Evidence Act 1995 (NSW) was thus engaged. That sub-section provides that a defendant is not competent to give evidence as a witness for the prosecution. The provision made by s 17(2) could not be waived. Section 190 of the Evidence Act permits a court, if the parties consent, to dispense with some of the provisions of the Act, but the provisions made by Div 1 of Pt 2.1 of the Act (ss12-20) concerning the competence and compellability of witnesses may not be waived.***

*Although reference was not made in the proceedings in the Court of Appeal to this departure from the rules of evidence, it was not submitted that Mr Kirk and the Kirk company could not rely upon it in this Court. It was submitted by the second respondent that some distinction could and should be made about the competence of Mr Kirk to give evidence against the Kirk company and his competence to give evidence as a witness for the prosecution at his own trial. It is enough to say that where, as was the case here, Mr Kirk and the Kirk company were tried jointly, a distinction of the kind asserted by the second respondent cannot be drawn.*

*It may be that some departures from the rules of evidence would not warrant the grant of relief in the nature of certiorari. That issue need not be explored. The departure from the rules of evidence in this case was substantial. It was not submitted that either the nature of the departure, or the circumstances in which it occurred, were such as to warrant discretionary refusal of relief.*

*The ... failure to comply with the rules of evidence (by permitting a person accused of crime to give evidence on behalf of the prosecution) warranted, and in this case required, the grant of relief in the nature of certiorari to quash the conviction and sentence of each appellant.*

...

*[T]he Industrial Court misapprehended a limit on its powers by permitting the prosecution to call Mr Kirk at the trial. The Industrial Court's power to try charges of criminal offences was limited to trying the charges applying the laws of evidence. **The laws of evidence permit many forms of departure from the rules that are stated. Many, perhaps most, departures from the strict rules of evidence can be seen as agreed to by parties at least implicitly. But calling the accused as a witness for the prosecution is not permitted, even if the accused consents to that course.** The joint trial of Mr Kirk and the Kirk company was not a trial conducted in accordance with the laws of evidence. The Industrial Court thus conducted the trial of Mr Kirk and the Kirk company in breach of the limits on its power to try charges of a criminal offence.*

*For these reasons ... certiorari would lie in this case for jurisdictional error ...*

[emphasis added, citations omitted]

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<sup>18</sup> Section 17(2) of the *Evidence Act 1995* (NSW).

<sup>19</sup> Above n 7 at paragraphs 50-54 and 76-77 per French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ.

33. In contrast to the provision under consideration in *Kirk*, section 159 of the CMSHA:
- sets out a process by which officers can compel an interviewee to answer questions for the purpose of determining the nature and cause of a relevant accident or incident to prevent or minimise the risk of such an accident or incident occurring again
  - is intended to strike a balance between the rights of persons not to be endangered by the actions of others and the right of the individual answering questions, by providing appropriate safeguards to prevent answers being used against the person providing them under compulsion.
34. On account of the matters set out above, I am satisfied that:
- A clear legislative purpose to invalidate an act<sup>20</sup> that fails to comply with the relevant provision in *Kirk* is discernable from the words of that provision.
  - There is no discernable legislative purpose to invalidate an act that fails to strictly comply with section 159 of the CMSHA, taking into account the language of the CMSHA, its subject matter and objects, and the consequences of holding void every act done in breach of its requirements.
  - In the circumstances, a parallel cannot be drawn between the provision under consideration in *Kirk* and section 159 of the CMSHA, in the manner proposed by the applicant.

## Conclusion

35. On the basis of the matters set out above, I am satisfied that the requirements for exemption from disclosure under section 42(1A) of the FOI Act are made out in the circumstances as the Relevant Information was given:
- in the course of an investigation of a contravention or possible contravention of the law and
  - under compulsion under the CMSHA which abrogated the privilege against self-incrimination.

## DECISION

36. I vary the decision under review and find that the Relevant Information on the final three pages of the interview transcript is exempt from disclosure under section 42(1A) of the FOI Act.
37. I have made this decision as a delegate of the Information Commissioner, under section 90 of the FOI Act.

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**Assistant Commissioner Henry**

**Date: 17 January 2011**

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<sup>20</sup> Including an agreement between parties that a defendant could competently give evidence for the prosecution.