

**Registry:** Brisbane

**File No:** Mag-00188705/21(9)

Mag-00188647/21(9)

**Applicants:** Marek Romanski  
and  
Dennis Black

**Respondent:** Mark Douglas Stone – Resources Safety and Health Queensland

### **Reasons and Orders in the Applications for Stay of operations of decisions**

#### **Introduction**

A consent order issued 11<sup>th</sup> January 2022, had each of the matters before the Court joined for the purposes of the hearing of the appeals and the hearing of the stay applications. The consent order also contained directions for the filing of materials with respect to the stay applications and importantly, a direction that all evidence-in-chief in that proceeding be by way of affidavit.

Each of the parties filed their materials consistent with those directions<sup>1</sup>.

Both Applicants are seeking orders that the decisions of the Respondent dated 11<sup>th</sup> October 2021 be stayed pending the outcome of appeals filed in respect to both matters.<sup>2</sup>

The Respondent opposed the stay applications, and those matters came before the Court for hearing on 9<sup>th</sup> March 2022.

The decisions appealed against were issued by the Respondent, Mark Douglas Stone on 11<sup>th</sup> October 2021.

Mr Stone is the Chief Executive Officer of Resources Safety and Health Queensland (**RSHQ**).<sup>3</sup>

His decisions were made under s197D of the *Coal Mining Safety and Health Act 1999* and were to respectively cancel:

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<sup>1</sup> An issue arose during the hearing with respect to affidavits filed by the Respondent which went to allegations against Mr Romanski; Mr Romanski objected to the affidavits and I will return to that issue later in my reasons.

<sup>2</sup> Mr Romanski's Application for Stay was filed 8thDec'2021; Dr Black's Application for Stay was filed 10<sup>th</sup> Jan2022

<sup>3</sup> Affidavit of Mark Douglas Stone filed 18<sup>th</sup> Feb 2022 (**Stone Affidavit**)

- (a) Mr Marek Roman Romanski's First Class Mine Manager's Certificate of Competency and Site Senior Executive's Certificate of Competency;

and

- (b) Dr Dennis Black's First Class Mine Manager's Certificate of Competency and Second Class Mine Manager's Certificate of Competency.

The decisions followed investigations by RSHQ regarding a spontaneous combustion event that took place at North Goonyella coal mine in around September 2018.<sup>4</sup> At that time, Mr Romanski was the Underground Mine Manager and Dr Black was the Ventilation Officer.

While no one was injured during the incident, the spontaneous combustion event was not able to be contained and ultimately the North Goonyella mine was lost.<sup>5</sup>

### Legislative provisions

The stay applications are brought pursuant to s 239 of *The Coal Mining Safety and Health Act 1999* (the **Act**)-

#### *239 Stay of operation of decisions*

- (1) *An Industrial Magistrates Court may stay a decision appealed against to secure the effectiveness of the appeal.*
- (2) *A stay—*
  - (a) *may be given on conditions the court considers appropriate; and*
  - (b) *has effect for the period stated by the court; and*
  - (c) *may be revoked or amended by the court.*
- (3) *The period of a stay given by the court must not extend past the time when the court decides the appeal.*
- (4) *An appeal against a decision does not affect the operation or carrying out of the decision unless the decision is stayed.*

Each of the parties to the applications submit that, while this provision has not previously been judicially considered, the matters relevant to the exercise of the court's discretion to grant a stay of disciplinary decisions are well established.<sup>6</sup>

Before turning to discuss those matters, it is important to view the two applications before the Court in the context of the statutory framework that regulates people who hold senior positions within coal mines.

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<sup>4</sup> Stone Affidavit *op. cit.* sets out in detail the chronology of events leading up to the decisions

<sup>5</sup> Outline of Submissions on behalf of Mr Romanski, filed 1<sup>st</sup> March 2022 (**Romanski Outline**) at page 1 para 2

<sup>6</sup> Romanski Outline *op. cit.* at page 4 para 20; Outline of Submissions on behalf of Dr Black, filed 1<sup>st</sup> March 2022 (**Black Outline**) at page 6 para 23; Outline of Submissions on behalf of the Respondent (Mr Stone) filed 3<sup>rd</sup> March 2022 (**Stone Outline**) at page 4 para 15 to 17

To that end, it is useful to review the objects of the **Act** and how those objects are to be achieved, as set out in Part 1 Division 3-

### **Division 3 Objects of Act**

#### **6 Objects of Act**

*The objects of this Act are—*

- (a) to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations; and*
- (b) to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level; and*
- (c) to provide a way of monitoring the effectiveness and administration of provisions relating to safety and health under this Act and other mining legislation.*

#### **7 How objects are to be achieved**

*The objects of this Act are to be achieved by—*

- (a) imposing safety and health obligations on persons who operate coal mines or who may affect the safety or health of others at coal mines; and*
- (b) providing for safety and health management systems at coal mines to manage risk effectively; and*
- (c) making regulations and recognised standards for the coal mining industry to require and promote risk management and control; and*
- (d) establishing a safety and health advisory committee to allow the coal mining industry to participate in developing strategies for improving safety and health; and*
- (e) providing for safety and health representatives to represent the safety and health interests of coal mine workers; and*
- (f) providing for inspectors and other officers to monitor the effectiveness of risk management and control at coal mines, and to take appropriate action to ensure adequate risk management; and*
- (g) providing a way for the competencies of persons at coal mines to be assessed and recognised; and*
- (h) requiring management structures so that persons may competently supervise the safe operation of coal mines; and*

- (i) *providing for an appropriate coal mines rescue capability; and*
- (j) *providing for a satisfactory level of preparedness for emergencies at coal mines; and*
- (k) *providing for the health assessment and health surveillance of persons who are, will be or have been coal mine workers.*

The objects clearly establish, *inter alia*, that the **Act** is focused on protecting the safety and health of people working at coal mines and other people who may be affected by coal mining operations. Further, the **Act** requires that any risk of injury or illness to anyone resulting from coal mining operations be at an acceptable level.

How these objects are achieved is set out in detail at s 7 and includes the imposition of safety and health obligations on persons who operate coal mines and a system of providing a way for competencies of persons at coal mines to be assessed and recognised.

It is within that context that the Court must consider those well-established matters relevant to the exercise of discretion to grant a stay application.

#### **Questions relevant to the grant of a stay in disciplinary proceedings**

It is common ground between the Applicants and the Respondent that the settled approach<sup>7</sup> in applications for a stay of a decision in disciplinary proceedings, requires an applicant to satisfactorily answer two questions-

- The first question is whether the applicant has an **arguable case** to be determined on appeal; and
- The second question is whether the **balance of convenience** favours the granting of a stay.

#### **An arguable case**

In the written outline and at the outset of the oral submissions with respect to these two applications, the Respondent conceded that in respect to each applicant, there was an arguable case, and the first question should be answered in the affirmative.<sup>8</sup>

To that end, it was urged upon the Court by the Respondent that it was unnecessary for any determination on that question.

Notwithstanding that submission, both counsel for the Applicants did make oral submissions on this aspect and used that as a means of further developing their arguments with respect to the second ground.

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<sup>7</sup> See footnote 5 above

<sup>8</sup> Stone Outline *op. cit.* at page 11 para 56 and page 20 para 104; Transcript at page 1-58 lines 44 to 47



As I indicated during the hearing, I am satisfied on all the materials before me, that each Applicant has demonstrated that there is an arguable case and as such, the first question for the Court to determine is answered in the affirmative.<sup>9</sup>

I will now turn to the second question for determination; that is, whether Mr Romanski and/or Dr Black have demonstrated to the Court, cogent reasons for the Court to find that the balance of convenience falls in their favour for the granting of a stay.

### **Balance of convenience**

In the unreported decision of the Federal Court in *Robb*<sup>10</sup> Finn J identified four factors to be properly taken into account when considering whether to grant a stay in disciplinary cases.

Those factors are:

- the seriousness of the misconduct found;
- the likely prejudice to public confidence both in the integrity of the disciplinary processes themselves and in the reputation of the profession if the practitioner is granted a stay;
- the means available to mitigate the prejudice alleged; and
- the expedition with which the appeal can be heard.

This approach was cited with approval by Spigelman CJ in the NSW Court of Appeal decision in *Stevens*<sup>11</sup>, where the Chief Justice went on to quote Kirby J in *Bryant* -

*'In the exercise of the jurisdiction to provide a stay, it has often been emphasised that in cases involving a stay of the operation of the criminal law or of laws designed to protect the public (e.g. deregistration of a professional lawyer or medical practitioner) are in a class different from cases involving no more than the suspension of the operation of orders affecting two private litigants only.'*<sup>12</sup>

His Honour the Chief Justice then said-

*'It is clear from this consideration of the authorities that each case must turn on its specific facts. The range of relevant considerations is broad. Nevertheless the fact that the issues involved in professional rights to practice concern the protection of the public, means that the public interest is always entitled to significant weight.'*<sup>13</sup>

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<sup>9</sup> Because of that entirely proper concession made by the Respondent in respect to the question of whether an arguable case is demonstrated, it is unnecessary for me to provide further reasons for that decision.

<sup>10</sup> *Robb & Rees v Law Society of the Australian Capital Territory, Federal Court of Australia, (Robb)* unreported judgement: Finn J (ACT G34 of 1996 - 21 June 1996); Butterworths Citation 9602592 (BC)

<sup>11</sup> *New South Wales Bar Association v Stevens* [2003] NSWCA 95 (*Stevens*) at[101]

<sup>12</sup> *Stevens* op.cit. at [103]; *Bryant v Commonwealth Bank of Australia* (1996) 70 ALJR 306 at 309

<sup>13</sup> *Stevens* op.cit at [104]

This approach has been followed by the Queensland Court of Appeal in *Baker*<sup>14</sup> where Chesterman J, having discussed each of the decisions in *Robb*, *Stevens*, and *Bryant*<sup>15</sup> then says-

*'The cases contain strong statements but I respectfully think they are right. This Court should follow them.'*<sup>16</sup>

The four factors, set out above (from the decision in *Robb*) were expressly endorsed by Chesterman J in the following passage-

*'It is instructive to consider the four factors which Finn J mentioned as being relevant to a decision whether to grant a stay. His Honour was careful to point out that they are not the only factors which may be taken into account, but I think it right to say that those factors should always be considered.'*<sup>17</sup>

With such a clear and unequivocal statement from the Court of Appeal, it is within that framework the Court must consider the balance of convenience question in each of the applications for a stay.

#### **Mr Romanski's evidence and submissions**

Mr Romanski is a 67 year old mining engineer who has worked in coal mines for more than 40 years. His has worked at mines in Europe, Tasmania, New South Wales and Queensland.<sup>18</sup>

In the second half of 2018 he was employed as the mine manager at North Goonyella coal mine. He held professional qualifications - Mine Manager's (UMM) Certificate of Competency and a Site Senior Executive (SSE) Certificate of Competency.

It is these two certificates that were cancelled by the Respondent on 11 October 2021 and are now subject to an appeal.<sup>19</sup>

Counsel for Mr Romanski submits<sup>20</sup> that the balance of convenience favours the granting of a stay for the following reasons-

- a. Mr Romanski is a mature man who led a distinguished career in the coal mining industry for over 40 years;
- b. He has not previously been subject to disciplinary action or complaints;
- c. He continued to work at North Goonyella coal mine after the incident until he resigned in June 2019 to care for his ill wife;
- d. He was not the subject of any action by his employer following the incident in September 2018;
- e. From January 2020 to January 2021 he was employed as Underground Mine Manager at the Cook Colliery where he intended to return working following the death of his wife, however this coincided with the cancellation of his competency certificates.
- f. No workers were injured or killed as a result of the incident in September 2018;

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<sup>14</sup> *Legal Services Commissioner v Baker (No.1)* [2005] QCA 482 (*Baker*) where McMudo P at [1] and Helman J at [2] agree with the decision and reasons of Chesterman J

<sup>15</sup> *Baker* op.cit. at [18] to [27]

<sup>16</sup> *Baker* op.cit. at [28]

<sup>17</sup> *Baker* op.cit. at [31]

<sup>18</sup> Affidavit of Marek Romanski dated 7<sup>th</sup> Dec2021 (*Romanski Affidavit*) at para 11; Romanski Outline at para 1

<sup>19</sup> Romanski Outline at para 5

<sup>20</sup> Romanski Outline para 73 to 77

- g. The alleged conduct was isolated and occurred over a short period of time and does not reflect unfitness or an ongoing risk to safety;
- h. No action was taken against Mr Romanski by the Respondent until over two years after the incident;
- i. The public interest was not harmed by Mr Romanski continuing to work during that period;
- j. Mr Romanski has maintained his commitment to health and safety by attending professional education seminars;
- k. He has already served a period of suspension of several months with the associated professional and reputational harm;
- l. He worked in a highly skilled position and there is a public benefit in having suitably qualified and experienced persons available to work in coal mines;
- m. Mr Romanski is in the twilight of his career and having already lost significant income due to having to care for his late wife, he now needs to return to work to fund his retirement.

The evidence that Mr Romanski relies upon in his application for a stay is set out in his affidavit of 7<sup>th</sup> December 2021.

Affidavits in support of Mr Romanski's application were also filed by John Sleight<sup>21</sup>, Michael Lerch<sup>22</sup>, and Darrell Sherrell<sup>23</sup>. Each of these deponents spoke of their personal knowledge of the Applicant and the Respondent's decisions.

The three deponents each speak in very positive terms about their views and opinions<sup>24</sup> of the Mr Romanski's professional qualifications, abilities, and experience in coal mining.

The Respondent submitted<sup>25</sup> that nothing in Mr Romanski's affidavit addresses any of the specific issues found against him in the Respondent's letter cancelling his certificates of competency.

What Mr Romanski does say in his affidavit is –

- '14. It is my professional and personal opinion that the incident was controllable, manageable and should not have occurred. The plan that was developed by myself and the Ventilation Officer, Dennis Black, I believe would have prevented the fire occurring had it been implemented at the appropriate time.
- 15. It has not been alleged that I caused the fire that occurred at North Goonyella Mine, however it has been implied that my actions and decision making ultimately led to the ignition event and subsequent fire occurring. I refute this suggestion.'<sup>26</sup>

While Counsel for Mr Romanaski submitted that detailed evidence will be placed before the Court during the appeal, I nonetheless must make my decision for a stay on the evidence before me.

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<sup>21</sup> Affidavit of John Sleigh (**Sleight Affidavit**) dated 1 February 2022

<sup>22</sup> Affidavit of Michael Lerch (**Lerch Affidavit**) dated 28 January 2022

<sup>23</sup> Affidavit of Darrell John Sherrell (**Sherrell Affidavit**) dated 28 January 2022

<sup>24</sup> The Respondent did not formally object to the reception of this opinion evidence but noted it was simply that, an opinion. The Respondent submitted that the same weight ought to be placed on it as the affidavit material that he relies upon: Leslie Marlborough (**Marlborough Affidavit**) dated 18 February 2022; Affidavit of Laurence John Crisp (**Crisp Affidavit**) filed 18 February 2022; Affidavit of Peter Anthony Newman (**Newman Affidavit**) filed 18 February 2022

<sup>25</sup> Transcript page 1-66 lines 6 to 11

<sup>26</sup> Romanski Affidavit para 14 and 15



I find that much of Mr Romanski's affidavit is directed at the prejudicial effect that the Respondent's decision has had, and will continue to have, on his financial position.<sup>27</sup>

Having to leave his job to care for his ill wife, Mr Romanski lost his income during that 12 month period and also depleted his savings by some \$95,000. This equates to a total financial loss of approximately a quarter of a million dollars.

In my view, it is self-evident that for someone aged 67 and nearing the end of his working life, this represents a significant amount of money leading into an eventual retirement from working.

However, as the Respondent submitted and was acknowledged by the Applicant, Mr Romanski is not prevented from seeking employment in coal mines at a level other than that which requires the certificates of competency that are the subject of the appeal.

Mr Romanski states he could take another job, but it would attract an income he describes as being 50% to 70% less than what he previously earned.

He says he was earning \$44,000 per month at North Goonyella. On my calculation, and based on his own evidence, he could now still earn somewhere between \$22,000 and \$30,800 a month.

There is nothing by way of evidence before the Court to say Mr Romanski has attempted to gain any such alternate employment.

While the financial prejudice suffered by Mr Romanski is an important factor it is not, in my respectful view, the deciding factor.

As Chesterman JA said in **Baker** (with respect to a legal practitioner losing their right to practice pending the outcome of an appeal) -

*'...Something more must be shown than 'prejudice' of this kind.*

...

*It poses a problem for the respondent because the ground he advances for the stay is what might be called "the common one": his inability to practise pending the appeal. No other ground was identified and that one is, on the authorities, insufficient.<sup>28</sup>*

Turning to the other evidence in support of Mr Romanski's application, that is the three affidavits filed<sup>29</sup>, the material contained within them does not provide the Court any real assistance in the determination of a stay application.

While ultimately it will be a decision for Mr Romanski, they may form the basis of further evidence during the appeal.

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<sup>27</sup> Romanski Affidavit para 28 to 40

<sup>28</sup> *Baker op.cit.* page 118 at line 5 to 6, and line 9 to 12

<sup>29</sup> Sleight Affidavit; Lerch Affidavit; and Sherrell Affidavit



## Dr Black's evidence and submissions

Dr Black is a 51 year old mining engineer who holds a Bachelor of Engineering (Honours) – Mining and a Doctorate in Philosophy focusing on gas drainage from coal. He has 30 years' experience in the mining industry.<sup>30</sup>

In the second half of 2018 he was employed as the ventilation officer at North Goonyella coal mine. He held professional qualifications – a first class Mine Manager's Certificate of Competency and a second class Mine Manager's Certificate of Competency.

It is these two certificates that were cancelled by the Respondent on 11 October 2021 and are now subject to an appeal.<sup>31</sup>

Dr Black's evidence is set out in the affidavit he filed together with affidavits from Gary Parker<sup>32</sup>, and David Holt<sup>33</sup>.

The affidavits of Mr Parker and Mr Holt express their personal knowledge of the Applicant and his professional qualifications, experience, and work history. Mr Holt exhibited a reference in support of Dr Black to his affidavit (**DH-2**).

Exhibited to Dr Black's affidavit are his written responses<sup>34</sup> to the Respondent's notices of 8 October 2020 and 28 June 2021 respectively, in which he directly addresses the matters raised by the Respondent.

In respect to the letter marked **DB-6**, while I have had regard to the entirety of the material contained in it, I particularly note the responses set out in detail at paragraphs 3 (a) to (h), 3 (n) to (z), 5 to 12, 13 to 17 and 35 to 43.

These are each important matters, but they go to issues that may form the basis of further evidence and consideration at the appeal.

I note that at the relevant time Dr Black-

'...had only been acting in the role of ventilation officer as a temporary arrangement until a permanent replacement for the vacant ventilation officer could be recruited. At the time (Dr Black) was acting in that role...he was also performing duties as gas drainage coordinator.'<sup>35</sup>

While this again may be a matter further ventilated at the appeal, I do not find that it advances Dr Black's application for a stay. Whether he was 'acting' or 'permanently' occupying the role of ventilation officer, the obligations attached to that role remained a duty of the office holder.<sup>36</sup>

Counsel for Dr Black submits<sup>37</sup> that the balance of convenience favours the granting of a stay for the following reasons-

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<sup>30</sup> Affidavit of Dennis Black dated 13<sup>th</sup> January 2022 (**Black Affidavit**) para 5 to 10

<sup>31</sup> Letter from Mark Stone to Dr Black dated 11 October 2021 (**Stone-Black Letter**) page 1

<sup>32</sup> Affidavit of Gary Parker (**Parker Affidavit**) dated 11 February 2022

<sup>33</sup> Affidavit of David Holt (**Holt Affidavit**) filed 23 February 2022

<sup>34</sup> Black Affidavit at Exhibits **DB-4** and **DB-6**

<sup>35</sup> Black Affidavit, Exhibit DB-6 at para 41

<sup>36</sup> See s39(1) and s61A of the *Act op.cit.*

<sup>37</sup> Black Outline *op.cit.* para 26 to 49

- (a) There is an arguable case (as previously stated, this point was conceded by the Respondent);
- (b) The Respondent arguably had no power to make the decision;
- (c) There are obvious deficiencies in the decision;
- (d) There is a reasonable prospect the Court will make a different decision;
- (e) The protective elements of the Act can be adequately accommodated whilst a stay is granted

Each of these points were the subject of detailed oral submissions. Counsel for Dr Black, in response to an observation I made about the balance of convenience question identified in *Robb*, said the following-

'...as we apprehended, the core issue as well. In terms of what we said earlier, that was in reference to the cases such as *Baker*, which - as I'll seek to develop - all involved starkly different circumstances, much more serious findings of course. Baker was the solicitor who's gained some notoriety in our legal profession where there was findings of dishonesty on his part and specific findings of unfitness. Other - other cases that my learned friend relies upon at about paragraphs 28 and 29 of his written submissions, which is really where the core issue lies, involve other similarly very serious findings, for example of a barrister who would not return - file tax returns for many years. That's what I'll seek to develop quite different from this case...' <sup>38</sup>

A central theme in Dr Black's submissions, was that the alleged conduct leading to the cancellation of his certificates, was not as serious, when objectively viewed, as the conduct complained of in the cases each of the Parties referred to.

Those cases involved dishonesty and/or breaches of trust by lawyers, questions of character of medical practitioners and other regulated professionals.

To that end, the terms 'objective gravity' and 'objective seriousness' were used in Dr Black's submissions to illustrate that point. <sup>39</sup>

Dr Black's evidence was that he had suffered a financial loss in the order of 50% since he lost the position as Ventilation Officer at Goonyella North mine. While he initially maintained an income of \$500,000 per year when he left Goonyella North and worked at Grasstree mine, he was let go from the position of Technical Services Manager in May 2020.

He remained unemployed until November that year when he took up the position of Manager Technical Services, at South 32 Illawarra Metallurgical Coal (**South 32 IMC**).

Dr Black earns to \$240,00 per year in that role at South 32 IMC.

Because he relied on mutual recognition in New South Wales (NSW) of his mining certificates, he was advised by the New South Wales Government Resources Regulator that, under s 33 of the *Mutual Recognition (New South Wales) Act 1992*, his NSW equivalent certificates were automatically cancelled following the Respondent's decision to cancel his Queensland certificates of competency.

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<sup>38</sup> Transcript page 1-13 lines 36 to 45

<sup>39</sup> Transcript page 1-15 lines 29 to 34; page 1-17 lines 28 to 31; page 1-18 line 21

As I observed with respect to Mr Romanski's evidence, the financial prejudice suffered is an important factor to consider but it is not the determining factor. It is, as Chesterman JA noted in *Baker*, the 'common' ground relied on for a stay, however in the absence of more cogent grounds it will not succeed.

It is incumbent on the Applicant in these proceedings to place evidence before the Court to show what attempts have been made to mitigate any prejudice they have suffered or are likely to suffer.

There is some evidence in Dr Black's affidavit about the number of positions he had applied for, but they all relate to a period before the certificates were cancelled.<sup>40</sup>

Nothing was placed before me to demonstrate what attempts have been made by Dr Black to obtain other employment outside of those areas for which he is required to have the certificates of competency.

### Decision

Given the statement of Chesterman J in *Baker* where he endorsed the four factors identified in *Robb*, I have examined each of those factors against the evidence and submissions of the parties and I make the following findings.

- **Seriousness of the misconduct found**

I am not persuaded, that an act of dishonesty, or a breach of trust, or issues of inappropriate character can be properly viewed as conduct that is more objectively serious, than a set of findings by a Regulator, after an extensive investigation, that a person in a position of control and authority in a coal mine, has failed to follow statutory and regulatory provisions that are designed to provide a safe workplace for coal mine workers.

While a lawyers' dishonesty may result in significant financial loss to a client or the tax office, and a breach of trust or a failure of a character test by a medical practitioner can completely destroy the relationship between a doctor and patient with ongoing associated suffering, the conduct identified by the Respondent in the cases before me, had the potential to result in injury or death to others who worked at, or visited the coal mine.

In respect to **Dr Black**, the Respondent found he contravened the following health and safety obligations-

- (i) Failing to comply with a procedure that was part of a Safety and Health Management System ("SHMS") for the Mine, namely PHMP-004 and the Sealing Management Plan, by not directing Control Room Operators ("CROs") to apply TARP-019 and TARP-025 and to cease applying TARP-036, and by not raising with Mr Romanski and Persons senior to Mr Romanski, that Mr Romanski was failing to adhere to the Safety Management Plan ("SMP"), in contravention of s39(1)(a) of the Act.

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<sup>40</sup> Black Affidavit para 27 to 34



The Respondent went on to make 21 findings, with many of them adverse to Dr Black. As a result, the Respondent cancelled Dr Black's First Class Mine Manager's Certificate of Competency and his Second Class Mine Manager's Certificate of Competency.

In respect to **Mr Romanski**, the Respondent found he had contravened the following health and safety obligations-

- (i) Failing to conduct an appropriate risk assessment for the sealing of 9 North Longwall, in contravention of s39(i)(a) of the Act;
- (ii) Not applying the sealing management plan that Regional Inspector Leslie Marlborough had acknowledged, in contravention of s39(i)(a) of the Act and s327(2) of the Coal Mining Safety and Health Regulation 2017 ("the Regulation");
- (iii) Changing the proposed method of sealing the Mine, described in the 9 North Longwall sealing management that Regional Inspector Leslie Marlborough had acknowledged, in contravention of s39(i)(c) of the Act and s328(2) of the Regulation;
- (iv) Not withdrawing workers to the surface and conducting an Incident Management Team ("IMT"), on 28 August 2018, upon the detection of ethylene, that being a reasonable and necessary course of action, in contravention of s39(1)(c) of the Act.

The Respondent went on to make 64 findings, many of them adverse to Mr Romanski. As a result, the Respondent cancelled Mr Romanski's First Class Mine Manager's Certificate of Competency and his Senior Site Executive's Certificate of Competency.

Based on the evidence before the Court and an analysis of the relevant authorities, I find the misconduct found with respect to each Applicant is serious, relative to the roles each held at the material time. Weighing the decisions of the Respondent against the objects of the Act and how those objects are to be achieved, together with the fact the Parliament has legislated to regulate this profession in the way it has, I am satisfied the Regulator's decisions disclose misconduct of a serious nature.<sup>41</sup>

- **The likely prejudice to public confidence both in the integrity of the disciplinary processes themselves and in the reputation of the profession if the practitioner is granted a stay**

On the issue of prejudice, I find neither Applicant has advanced cogent grounds beyond the significant financial prejudice they have each personally suffered. While I accept that the financial losses are significant and are likely to continue until at least the appeals are determined, it is not itself the determining factor for a stay application.

It is incumbent on each to bring evidence to show that the granting of a stay would not prejudice the public confidence in the process designed to ensure the ongoing safety of coal mines.

While many of the authorities each of the Parties rely on concern lawyers, doctors, teachers, police officers, childcare workers and other professional groups, they all possess a commonality, and that is

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<sup>41</sup> In saying this, I accept that each of the Regulator's decisions are subject to an appeal and the Regulator's findings will be tested in that appeal process.

the need to maintain confidence in the process that is designed to regulate the relevant profession or calling.

As was observed by Finn J in *Robb*, it had been the Supreme Court of the ACT that had suspended Mr Robb's practicing certificate following findings made against him and:

*'... to grant a stay would, in my view, pose a significant threat to the reassurance that the disciplinary processes and sanctions themselves provide to the public.'*<sup>42</sup>

In the present case, it is the Regulator to whom Parliament has provided the relevant authority to make the findings it did. It appears, on the materials before the Court, that the Regulator conducted an extensive investigation over a long period of time and only arrived at his decisions following that process.

That being so, I must have proper regard for the integrity of the legislated process which is designed to protect those who work in coal mines and the public generally. As observed in *Robb*:

*'... a stay in the face of such findings would require the demonstration of a reason of some cogency.'*<sup>43</sup>

The important roles each Applicant held prior to their certificates being cancelled were among the highest levels in coal mining.

They were responsible for the operation of the coal mine in circumstances where the health and safety of every other person who worked at the coal mine was dependent on the Applicants doing their jobs according to the Act and Regulations.

As was submitted by Counsel for the Respondent:

*'This kind of decision... is one which is made to protect the public and the reputation of the management of mines generally. That is to say it's a highly regulated profession against the background of a long and tragic history of fatalities in those workplaces, typically the deaths of people who are unable to control the circumstances of their own safety...'*

Neither Applicant took issue with that description of their relevant roles and I accept it as an accurate representation of the importance of their former roles.

Coal mine workers' safety and lives depend on the integrity of the process that is designed to ensure, those charged with the responsibility to ensure coal mines operate in a safe manner, always act in a manner consistent with the Act and Regulations.

Chesterman JA in *Baker* found that, even with conditions attached to the lawyer's practicing certificate that would have mitigated against any future misbehaviour, those conditions themselves did nothing to promote public confidence in the integrity of the disciplinary process.

As stated by Spigelman CJ in *Stevens*-

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<sup>42</sup> *Robb op. cit.* (BC 11), line 12 to 13

<sup>43</sup> *Robb op.cit.* (BC 10), line 2 to 3

*'...The relevant authorities indicate that the protection of the public is a matter entitled to significant weight on an application for a stay once it appears that a professional person has acted improperly to a substantial degree.'*

It is clear on the authorities, that in determining where the balance of convenience lies in a stay application of this sort, the public confidence in the integrity of the disciplinary process is an important factor and one to which significant weight must be attributed.

In respect to this factor, I find the Applicants have not demonstrated cogent reasons to find in their favour.

- **Means available to mitigate the prejudice alleged**

As already mentioned above in respect to both Applicants, there is little by way of evidence to demonstrate what either Applicant has done to seek alternate employment within the coal mining industry, in positions that do not require them to hold the now cancelled certificates of competence.

Both were enjoying highly paid jobs and the evidence is that each of them have lost significant incomes. However, it was submitted that each could seek work at a lower income level and indeed with respect to Mt Romanski, his own evidence was he could potentially earn somewhere between \$22,000 and \$30,800 a month.<sup>44</sup>

Dr Black had gained alternate work but has since lost that as it was dependent on him holding the certificates. But there is nothing in the evidence to show that he has attempted to gain alternate work since the certificates were cancelled, albeit at a lower income level.

As Finn J observed in *Robb*-

*'...Factor (iii) is in turn is not without importance. Mr Robb, by the Court's order, has not been shut out totally from practicing his profession. He has been shut out from practicing as a principal.'*<sup>45</sup>

On the materials before me, it appears both Applicants could seek alternate work, albeit at a lower income level, in the coal mining industry and thereby mitigate the financial prejudice they have incurred.

On this issue, I find neither Applicant has demonstrated in their evidence, that they have attempted to mitigate the prejudice alleged.

- **Expedition with which the appeal can be heard**

Counsel for each Applicant relied on the decision in *Baker* to argue that because of the long delay likely before the appeal is determined, this was a factor that should lead the Court to find the balance of convenience falls in the Applicants' favour.

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<sup>44</sup> Romanski Affidavit para 28, 39 and 40

<sup>45</sup> *Robb op.cit.* (BC 11) line17 to 18



While it is unfortunate that significant time will pass before the final determination of the appeal, it is the case that the Applicants asked for the timeframe eventually settled by the Court when directions were issued on 8th February 2022.

On that occasion, the matter of the appeal was set for next mention on 13th September 2022. That is some 7 months after those directions.

The Respondent submitted during argument before me, that while they were ready to proceed whenever the court calendar would allow, they raised no objection to the directions on the basis that it suited the Applicants.

That is to say, the Respondent rejects that the delay is because of anything they are responsible for.

In reply, the Applicants submitted that the delay was necessary due to the complex nature of the appeals and the expert reports that were required to be obtained for the appeals.

That might be so, but they can hardly claim this factor falls in their favour in circumstances where they are responsible for setting the timeframe for the appeals to be heard.

In respect to this issue, I find on the evidence, any delay in the finalisation of the appeals is largely because of the timeframe set by each of the Applicants.

On that basis they have not satisfied the Court that this factor should be decided in their favour.

#### **Other evidential issues raised during submissions**

Another matter I will briefly mention concerns the affidavit evidence presented to the Court in these applications.

On the hearing of the substantive appeals, the Court is not bound by the rules of evidence and must observe natural justice<sup>46</sup>.

The Respondent submitted that-

*'...Given an application for a stay is incidental to the substantive appeal, and ss239 and 240 appear in the same division and part of the Act, it logically follows that the Court is likewise not bound by the rules of evidence in determining the present applications.'*

I comprehended from the submissions made on behalf of each of the Applicants, that they also proceeded on that same basis.

While those rules may not apply, the Court does not completely set them aside.

As Brennan J observed in *Pochi*-

*'...No Tribunal can, without grave danger of injustice, set them on one side, and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although the rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'...*

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<sup>46</sup> See s240(4) the Act

And further, his Honour continued-

*'...It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above...'*<sup>47</sup>

Several objections were made by the Applicants during the hearing regarding affidavits that had been filed by the Respondent.

In particular, reference was made to affidavits by Laurence Crisp<sup>48</sup> and Peter Newman<sup>49</sup>, filed by the Respondent on 18 February 2022.

Mr Crisp is an Inspector of Coal Mines and Mr Newman is the Chief Inspector of Coal Mines for Queensland.

An objection was raised by counsel for Mr Romanski on the basis they each contained opinion and/or alternatively that matters referred to within them, were alleged to have occurred at a time after the Applicant had left Goonyella North coal mine and was working at Cook Colliery mine.

As such, it was submitted that I should either exclude their reception into evidence altogether (or at least those parts to which exception was taken) or alternatively, if they were to be received, I should place little probative weight on their contents.<sup>50</sup>

Counsel for the Respondent submitted each was highly relevant, as they demonstrated behaviour attributed to Mr Romanski that allegedly occurred at the Cook Colliery in 2020, and that behaviour was directly related to the exercise of discretion in granting a stay application.

As the argument developed, Counsel for Mr Romanski submitted that their reception would be unfair to Mr Romanski because he had not been provided an opportunity to put on evidence to rebut the allegations in the affidavits.

On this latter point, Counsel for the Respondent made the following points-

The affidavits were each filed on 18 February 2022, which was some two and a half weeks prior to the hearing, and that ought to have provided ample time for Mr Romanski to file his own affidavit in reply.

Alternatively, it was submitted that Mr Romanski could have, but did not, seek an adjournment of the proceedings to allow him further time to file further material.

As Mr Romanski was present in the Court for the duration of the stay application hearing, he could easily have been called to the witness box to give evidence on the matters raised in the two affidavits, but he was not called.

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<sup>47</sup> *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, at page 41 (*Pochi*)

<sup>48</sup> Affidavit of Laurence John Crisp (**Crisp Affidavit**) filed 18 February 2022

<sup>49</sup> Affidavit of Peter Anthony Newman (**Newman Affidavit**) filed 18 February 2022

<sup>50</sup> Transcript page 1-18 to 1-19; the Applicants provided the Court a document setting out their objections to the Respondent's evidence and it was marked as 'MFI #C'

Relying of these points, the Respondent submitted that the Court should draw a *Jones and Dunkel*<sup>51</sup> inference from the fact that no evidence was led by Mr Romanski to meet those allegations found in the affidavits of Mr Crisp and Mr Newman.

Counsel for Mr Romanski submitted against any such adverse inference being drawn.

Taking the submissions on behalf of Mr Romanski at their highest, I accept the past several months would have been particularly difficult for him, and the pressure of the litigation no doubt has added to that difficult period. This may explain why nothing was filed in answer to the allegations in the affidavits.

However, there is significant merit in the Respondent's submissions regarding the time available to file an affidavit in answer to the allegations, or to call Mr Romanski to give evidence in response to them, or to have sought an adjournment of the stay hearing to provide additional time for him to file further material.

Had I not determined the questions on the other materials that were received into evidence, the Respondent would have been, in my respectful opinion, on strong grounds to have both the Crisp and Newman affidavits admitted.

Given the reasons I have already set out above in respect to the stay applications before me, I do not need to finally determine whether I should draw a *Jones and Dunkel* inference with respect to this issue. Even without those affidavits, I find there is sufficient evidence before the Court to make the findings set out in these reasons.

### **Disposition**

Having regard to the evidence before the Court, together with the relevant authorities and the submission of each of the Parties, I find that neither Marek Romanski or Dennis Black has satisfied the Court that the balance of convenience falls in their favour for the granting of a stay.

On that basis, I refuse each of the applications.

### **Orders**

The application for a stay by Marek Romanski is **dismissed**.

The application for a stay by Dennis Black is **dismissed**.