



## New South Wales Supreme Court

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**CITATION :** **Brown & Anor v Coal Mines Australia; Alcorn & Anor v Coal Mines Australia Pty Ltd [2010] NSWSC 143**

**HEARING DATE(S) :** 8 February 2010, 9 February 2010

**JUDGMENT DATE :** 5 March 2010

**JUDGMENT OF :** Schmidt J

**DECISION :** Orders:  
The decision of the Warden's Court as well as the determination which accompanied it and the interim and final determinations of the arbitrator, be quashed and set aside.  
The usual order is that the defendant bears the plaintiffs' costs of the proceedings. If there is any dispute in that regard, the parties have liberty to approach.

**CATCHWORDS :** ADMINISTRATIVE LAW - administrative tribunals - judicial review and statutory appeal from administrative authorities to courts - exploration licence holders access to land under Mining Act 1992 - conditions of access arrangement imposed by Mining Warden in review proceedings under Mining Act 1992 - jurisdiction of Warden's Court - jurisdiction of arbitrator - construction of Mining Act 1992 - failure to give statutory notices to landholders - whether more than one access arrangement may be entered between a license holder and landholders - jurisdictional error established - error on face of record - other issues of construction of Mining Act 1992 - conditions to be imposed on access arrangement - construction of s 141(1) of the Mining Act 1992 - failure to give reasons for decision - compensation - errors of law established - right of appeal from Mining Warden's determination under Mining Act 1992 - no statutory right of appeal - decision and determinations of Warden's Court and arbitrator quashed - - ENERGY AND RESOURCES - minerals - courts or tribunals exercising jurisdiction in mining matters

**LEGISLATION CITED :** Crimes (Local Courts Appeal and Review) Act 2001  
Crimes (Appeal and Review) Act 2001

Interpretation Act 1987  
Mining Act 1992  
Supreme Court Act 1970

**CATEGORY :** Principal judgment

**CASES CITED :** Brodyn Pty Ltd v Davenport [2004] NSWCA 394; (2004) 61 NSWLR 421  
Campbelltown City Council v Vegan [2006] NSWCA 284; (2006) 67 NSWLR 372  
Cody v JH Nelson Pty Ltd [1947] HCA 17; (1947) 74 CLR 629  
Craig Williamson Pty Ltd v Barrowcliff [1915] VLR 450  
Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163  
Kirk v Industrial Relations Commissioner [2010] HCA 1; (2010) 262 ALR 569  
Italiano v Carbone [2005] NSWCA 177  
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355  
Re Refugee Review Tribunal; ex parte Aala [2000] HCA 57; (2000) 204 CLR 82  
Rosane Pty Ltd v T&P Clark [2009] NSWLEC 1282  
Rossmar Park Pastoral Co Pty Ltd v Coal Mines Australia Pty Ltd [2008] NSWSC 1385  
Salter v Director of Public Prosecutions [2009] NSWCA 357  
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247  
Sydney South West Area Health Service v MD [2009] NSWCA 343  
Workers Compensation (Dust Diseases) Board Of NSW V Smith, Munro and Seymour [2010] NSWCA 19

**PARTIES :** Plaintiffs in 2009/298057 - Geoffrey William Brown and Sharon Lee Brown  
Plaintiffs in 2009/298059 - Leslie James Alcorn and Margaret Alice Alcorn  
Defendant - Coal Mines Australia Pty Ltd

**FILE NUMBER(S) :** SC 2009/00298057, 2009/00298059

**COUNSEL :** Plaintiffs - Mr A Bannan SC with Mr R Scruby, counsel  
Defendant - Mr J Griffiths SC with Mr R Beasley, counsel

**SOLICITORS :** Plaintiffs - Kemp Strang  
Defendant - Minter Ellison

**LOWER COURT JURISDICTION :** Warden's Court

**LOWER COURT FILE** 2008/57; 2008/59; 2008/58; 2008/60

NUMBER(S) :

LOWER COURT JUDICIAL OFFICER : JA Bailey Mining Warden

LOWER COURT DATE OF DECISION : 21 May 2009

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**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION**

**SCHMIDT J**

**FRIDAY, 5 MARCH 2010**

**2009/00298057 BROWN & ANOR v COAL MINES AUSTRALIA PTY LTD**

**2009/00298059 ALCORN & ANOR v COAL MINES AUSTRALIA PTY LTD**

**JUDGMENT**

**1 HER HONOUR:** By summons filed in June 2009 the plaintiffs seek orders under s 69 of the *Supreme Court Act* 1970 quashing a decision of the Wardens Court given in May 2009 pursuant to the *Mining Act* 1992. The plaintiffs also seek leave to appeal and appeal from that decision under the *Crimes (Local Courts Appeal and Review) Act* 2001. The proceedings in the Wardens Court concerned the conditions upon which the defendant was to be given access to the plaintiffs' properties for the purpose of carrying out prospecting operations under an exploration licence which it had been granted in 2006 by the Minister for Mineral Resources.

2 The plaintiffs challenged the Mining Warden's jurisdiction in the matter, as well as complaining that the Mining Warden had wrongly construed various provisions of the *Mining Act* relevant to the plaintiffs' challenge to the access arrangements which had earlier been granted to the defendant by an arbitrator appointed under the Act. The plaintiffs also sought to challenge various conditions which the Mining Warden had imposed in the access arrangements which he determined, as well as challenging the Mining Warden's refusal of other conditions.

3 Many of the issues lying between the parties turned on the proper construction of various provisions of the *Mining Act*. The jurisdictional issues raised in the Warden's Court proceedings resulted from an alleged failure on the defendant's part to give notices required to be given under the *Mining Act* to landholders other than the plaintiffs.

4 The crucial point on which the jurisdictional questions turned, was whether the *Mining Act* envisaged that a licence holder such as the defendant could access property on which its licence permitted it to prospect under only a single access arrangement to which all landholders were parties, or whether the Act envisaged that there could be a number of access arrangements reached with different landholders, when there was more than one landholder of the property to which access was being sought. While argued, this construction question was not resolved by the Mining Warden.

5 By notice of contention filed without objection during the hearing, the defendant contended that more than one access arrangement may be entered between a licence holder and landholders of one parcel of land.

6 The proceedings were concerned with access to two farming properties in the Liverpool Plains region of New South Wales, near Gunnedah. One is owned by the plaintiffs, Mr and Mrs Brown. The other is owned by the plaintiffs, Mr and Mrs Alcorn. Both properties were mortgaged. They each fell within the area of the Caroon Project in respect of which the defendant had been granted its exploration license, which permitted it to prospect for coal.

7 The Browns' property was some 1087 hectares in size. The defendant initially sought access to a site it had selected on the property. During the course of the arbitral proceedings another site was selected, identified as C22. The C22 site is located on a flood plain, between two fields, separated by a dirt road, in the vicinity of a machinery shed. The land is susceptible to flooding at any time of the year. Crops are grown on these fields. Planting is seasonal, with no set crop rotation pattern, crops grown depending on the state of the soil from time to time. The fields are irrigated between September to April using bore water. The Browns are seeking organic certification for their property. There are freshwater and saline aquifers beneath the land, as well as coal seams.

8 The Browns' concern about the access sought and the conditions on which it should be given, centred on the consequences of the following: puncturing and depressurisation of the aquifers; the puncturing of the coal seams; the sealing of the exploration hole; the contamination of the aquifers by water seepage from other aquifers, by coal seam water and gases and by drilling process chemicals; the contamination of soil by fluid escaping from the exploration hole; and the potential loss of the opportunity to obtain organic certification of the property.

9 The Alcorn property was some 590 hectares in size. The defendant initially sought access to three sites it had selected. During the arbitral proceedings, one site, C39, which was located on a flood plain was relocated to a ridge area near a lagoon used to supply fresh water to cattle. C52 is also in the ridge country and C53 on the edge of the ridge country. These sites were described by the Arbitrator in her interim determination as sites agreed by the parties as 'the least worst option'.

10 The Alcorns operate a Limousin cattle breeding stud. Their land is also partly used for cattle grazing and partly for growing crops. 127 hectares of the land is situated in ridge country and some 462 hectares on the flood plain. Their fields are also irrigated using bore water. There are also aquifers and coal seams lying under the Alcorns' property. The Alcorns have similar concerns to those of the Browns. They are particularly concerned about contamination of the lagoon near the C39 site and the risk of cattle being poisoned or their meat contaminated.

11 Before turning to the issues lying between the parties, it is necessary to say something about the *Mining Act*; the access to the plaintiffs' property which the defendant was thereby given under the licence which it had been granted by the Minister; and how the

proceedings came before the Warden's Court.

### **The Mining Act and the arbitral proceedings**

12 The references made in this decision to provisions of the *Mining Act* are references to the provisions of the Act which applied to the defendant's application for access to the plaintiffs' land. As noted in the Mining Warden's decision, the Act has since been amended.

13 The *Mining Act* established a system of exploration licenses, which permitted applications and tenders for license. Once granted, a licence gave the licence holder exploration rights on private property, as well as an equitable or legal interest in such land (see *Rossmar Park Pastoral Co Pty Ltd v Coal Mines Australia Pty Ltd* [2008] NSWSC 1385 at [26]). In this case the defendant had paid some \$90 million for its 5 year license.

14 Section 22(1)(a) gave the Minister a power to grant an exploration licence 'over all or part of the land over which a licence was sought'. The licence granted to the defendant contained a description of the land over which it was granted and the conditions to which it was subject, as s 28(1)(c) required. The land included the plaintiffs' properties. The licence thus permitted the defendant to prospect on the plaintiffs' land, in accordance with the conditions specified (s 29).

15 Section 31(1)(c), however, limited the defendant's exercise of its rights over the surface of land on which any 'significant improvement' was situated. That is a term defined in the Dictionary of the Act. An issue arose in the proceedings before the Mining Warden as to whether the C22 site to which the defendant sought access on the Browns' property was such a site.

16 The *Mining Act* deals with the circumstances in which a licence may be cancelled in Division 3 of Part 3 Exploration Licenses. They include in s 125(1)(b), if the licence holder 'contravenes any condition of the authority or any provision of this Act or the regulations.' The Minister is also granted a power of suspension, if the licence holder contravenes 'any condition of the authority that is identified in the authority as a condition related to environmental management' (s 125(3)(b)). A licence holder is given a right to appeal a cancellation or suspension of licence (s 128). Landholders have no right to appeal any decision of the Minister not to cancel or suspend a licence for breach of licence conditions, even if the breach affects their land.

17 These provisions were relevant to an issue between the parties as to whether certain conditions should be provided in the access arrangements which the defendant sought with the plaintiffs. Various conditions were sought by the plaintiffs because any contravention of conditions imposed in an access arrangement, permit the landholder to deny access to the land until the contravention ceases, or is remedied to the reasonable satisfaction of the landholder (s 141(b)).

18 The *Mining Act* deals with the carrying on of prospecting operations in Division 2 of Part 8 of the Act, where such licenses are referred to as 'prospecting titles' (s 138(1)). Section 140 precluded the defendant from carrying out prospecting operations on the plaintiffs' properties otherwise than in accordance with an access arrangement. Section 140 provided:

**"140 Prospecting to be carried out in accordance with access**

### **arrangement**

The holder of a prospecting title may not carry out prospecting operations on any land otherwise than in accordance with an access arrangement:

(a) agreed (whether orally or in writing and whether before or after the prospecting title was granted) between the holder of the title and each landholder, or

(b) determined by an arbitrator in accordance with this Division."

19 Section 141 specified the matters for which an access arrangement may provide, by agreement, or arbitration. The defendant sought an access arrangement in respect of each property. The Act specified how such an arrangement could be obtained. Section 142 required that:

### **"142 Holder of prospecting title to seek access arrangement**

(1) The holder of a prospecting title may, by written notice served on each landholder of the land concerned, give notice of the holder's intention to obtain an access arrangement in respect of the land.

(2) The notice of the holder's intention to obtain an access arrangement must, in addition to stating the holder's intention, contain:

(a) a plan and description of the area of land over which the access is sought sufficient to enable the ready identification of that area, and

(b) a description of the prospecting methods intended to be used in that area.

(3) The holder of a prospecting title and each landholder of the land concerned may agree (either orally or in writing and either before or after the prospecting title is granted) on an access arrangement."

20 At the hearing before the Warden's Court the plaintiffs raised as an issue that the defendant had failed to give a s 142 notice of its intention to access the properties to 'each landholder.' While notices had been given to the plaintiffs, they had not been given to their mortgagees. It was in this context that the following issue arose; can a licence holder agree to a series of access arrangements with a number of landholders of the one property, or do all landholders have to be parties to any access arrangement made under the Act, whether by agreement or arbitration? There are no access arrangements agreed in this case with any landholder. It was the plaintiffs' case before the Mining Warden that the defendant's failure to give the necessary notices deprived the arbitrator of jurisdiction to determine access arrangements in relation to their property.

21 When no agreement was reached with the plaintiffs, the defendant pursued access to the properties by arbitration. There was no issue between the parties that under s 140, a licence holder may not access a property until an access agreement is in place in respect of every landholder. The defendant had served written notices on the plaintiffs, as s 142 required. They were all landholders. That is a term defined in the Dictionary to mean:

**"landholder** means, in relation to reserved land, the controlling body of that land, or, in relation to any other land:

- (a) the owner of an estate in fee simple in the land, or
- (b) a native title holder of the land, or
- (c) the holder of a lease or licence granted under the *Crown Lands Act 1989* over the land, or
- (d) the holder of a tenure referred to in Part 1 or 2 of Schedule 1 to the *Crown Lands (Continued Tenures) Act 1989* in the land, or
- (e) the holder of a permissive occupancy granted over the land, or
- (f) the holder of a lease granted under the *Western Lands Act 1901* over the land, or
- (g) a person identified in any register or record kept by the Registrar-General as a person having an interest in the land, or
- (h) a person of a class prescribed by or determined in accordance with the regulations to be landholders for the purposes of this definition,

but does not include a person of a class prescribed as outside the scope of this definition."

22 The regulations also deal with landholders as the definition contemplated in (h). Regulation 8 provides:

### **"8 Meaning of "landholder"**

- (1) Persons who are recognised by the Director-General as being landholders of a particular parcel of land are landholders for the purposes of the definition of landholder in the Dictionary at the end of the Act.
- (2) Any person may apply to the Director-General for recognition as a **landholder** of specified land.
- (3) The application must indicate the grounds on which the applicant claims to be a landholder of the land.
- (4) The Director-General may require the application to be verified by statutory declaration.
- (5) The Director-General must decide whether or not to recognise

the applicant as a landholder of the land and must cause written notice of the decision to be given to the applicant as soon as practicable after it is made.

(6) The Director-General may at any time, by notice in writing served on the person, withdraw a person's recognition as a landholder of specified land.

(7) The Director-General must cause a register to be maintained in which the following particulars are to be recorded:

(a) particulars identifying each parcel of land in respect of which the Director-General recognises any person as being a landholder,

(b) the name and address of each such person.

(8) The register is to be kept available at the head office of the Department for inspection, free of charge, by members of the public."

23 It is apparent from the definition that there may be a number of landholders in respect of each property, in addition to owners such as the plaintiffs. There was an issue before the Warden's Court as to whether a mortgagee was a landholder as defined. There was also an issue as to whether or not the failure to serve notices on all landholders deprived the Warden's Court of jurisdiction to deal with the matters brought before it by the defendant.

24 The Mining Warden concluded that the mortgagees were landholders and that the failure to serve notices under s 142 upon them, involved a breach of that section. Those conclusions are not challenged by the defendant. The plaintiffs also argued that this failure went to the Warden's Court's jurisdiction in the matter, because the Act contemplated that there could only be one access arrangement between a licence holder and all landholders. The Mining Warden did not determine this issue. Nevertheless, the Mining Warden concluded that the failure to serve notices on the mortgagees did not deprive the Court of jurisdiction to determine the conditions on which access to the land would be granted. The plaintiffs challenge that conclusion.

25 The plaintiffs and the defendant were unable to agree on the terms of any access arrangements. The plaintiffs opposed the defendant having any access to their properties. When the defendant sought the appointment of an arbitrator, s 143 provided:

**"143 Appointment of arbitrator by agreement**

(1) If, by the end of 28 days after the holder of a prospecting title serves notice in writing on each landholder of the holder's intention to obtain an access arrangement, the holder and each landholder have been unable to agree on such an arrangement, the holder may, by further notice in writing served on each landholder, request them to agree to the appointment of an arbitrator.

(2) The holder of a prospecting title and each landholder of the land concerned may agree to the appointment of any person as an arbitrator."

26 It must be inferred from the cases which the parties advanced that the s 143 notices were also not served on the mortgagees. An arbitrator was appointed, whether by agreement or otherwise (as ss 143 and 144 provide) need not be considered at this point. Section 145 applied to the arbitration, providing:

**"145 Arbitration**

(1) As soon as practicable after having been appointed, an arbitrator:

(a) must fix a time and place for conducting a hearing into the question of access to the land concerned, and

(b) must cause notice of his or her appointment, and of the time and place fixed for conducting the hearing, to be given to the holder of the prospecting title and to each landholder.

(2) The arbitrator may, by a further notice served on the holder of the prospecting title and on each landholder, vary the time or place fixed for conducting the hearing.

(3) The arbitrator must, at the time and place fixed under this section, conduct a hearing into the question of access to the land concerned."

27 Again it must be inferred that no s 145 notice of the arbitration was served on the mortgagees. Section 146 dealt with appearance at the arbitration. It provided:

**"146 Right of appearance**

(1) At any hearing into the question of access to any land by the holder of a prospecting title, the holder and each landholder are entitled to appear and be heard.

(2) A party to a hearing may be represented:

(a) by an agent who is not an Australian legal practitioner, or

(b) with the agreement of the parties and the leave of the arbitrator, by an Australian legal practitioner."

28 Before making any determination, s 147 obliged the arbitrator to attempt to bring the parties to a settlement, providing:

**"147 Conciliation**

(1) An arbitrator is not to make a determination until the arbitrator has used his or her best endeavours to bring the parties to a settlement acceptable to all of them.

(2) If the parties come to such a settlement, the arbitrator must make a determination that gives effect to the terms of the settlement."

29 The mortgagees were not involved in this process, or in the arbitration. There was no evidence that they had ever been given any notices of the arbitration. Whether they had any interest in participating in these processes is not known. The parties' contest over the proper construction of the Act raised the question of whether every landholder is entitled to notice of and to participate in any arbitration over access to the land in question, as flows from the plaintiffs' approach; or whether it is only the landholders with whom the licence holder is seeking a particular access arrangement, who is entitled to so participate, the defendant's approach.

30 In the absence of an agreement, the arbitrator was obliged to embark upon a hearing and to make an interim determination. Section 149 provided:

**"149 Interim determination by arbitrator**

(1) As soon as practicable after concluding a hearing, an arbitrator:

(a) must make an interim determination as to whether or not the holder of the prospecting title should have a right of access to the land concerned, and

(b) if the arbitrator determines that the holder of the prospecting title should have such a right of access, must prepare a draft access arrangement in respect of that land.

(2) As soon as practicable after making an interim determination, the arbitrator:

(a) must reduce the determination to writing, and

(b) must cause a copy of the determination, together with a copy of any draft access arrangement, to be served on each of the parties to the hearing."

31 On 25 August 2008, the arbitrator determined that the defendant was to be given access to site C22 on the Browns' property and to sites C39, C52 and C53 on the Alcorns' property, in accordance with a draft access arrangement then provided to the parties. The plaintiffs objected to the defendant having any access to their properties and if that access was to be granted, sought that further conditions be imposed. The plaintiffs thus sought reconsideration of the question of the access to their land. Section 150 then required that:

**"150 Further arbitration**

(1) A party to a hearing may, within 14 days after being served with a copy of the arbitrator's interim determination, apply to the arbitrator:

(a) for reconsideration of the question of access to the land concerned, or

(b) for variation of any draft access arrangement prepared by the arbitrator in respect of that land.

(2) As soon as practicable after receiving such an application, the arbitrator:

(a) must fix a time and place for continuing the hearing into the question of access to the land concerned, and

(b) must cause notice of the time and place fixed for continuing the hearing to be given to the holder of the prospecting title and to each landholder.

(3) The arbitrator may, by a further notice served on the holder of the prospecting title and on each landholder of the land concerned, vary the time or place fixed for continuing the hearing.

(4) The arbitrator must, at the time and place fixed under this section, continue the hearing into the question of access to the land concerned."

32 At this point, the notice required to be given was not to 'the parties to the hearing', but to 'each landholder of the land concerned'. Again, it must be inferred that s 150 notices were not given to the mortgagees. On 16 November 2008, the arbitrator made a final determination. In this respect s 151 relevantly provided:

"(2) If an application is made to the arbitrator within the period of 14 days referred to in section 150 (1), the arbitrator, as soon as practicable after concluding the continued hearing:

(a) must make a final determination as to whether or not the holder of the prospecting title should have a right of access to the land concerned, and

(b) if the arbitrator determines that the holder of the prospecting title should have such a right of access, must determine a final access arrangement in respect of that land.

(3) As soon as practicable after making a final determination, the arbitrator:

(a) must reduce the determination to writing, and

(b) must cause a copy of the determination, together with a copy of any final access arrangement forming part of the determination, to be served on each of the parties to the hearing."

33 The plaintiffs exercised the right to seek a review of this determination. Section 155 provided:

#### **"155 Review of determination**

(1) A party to a hearing who is aggrieved by an arbitrator's final determination (other than a determination referred to in section 147 (2)) may apply to a Warden's Court for a review of the determination.

(2) An application:

(a) must be accompanied by a copy of the determination to which it relates, together with a copy of any access arrangement forming part of the determination, and

(b) must be filed in a Warden's Court:

(i) in the case of an interim determination that has become a final determination—within 28 days after a copy of the interim determination was served on the applicant, or

(ii) in the case of a final determination—within 14 days after a copy of the final determination was served on the applicant.

(3) An application for review may not be made:

(a) during the period of 14 days within which an application may be made to an arbitrator, or

(b) if such an application is made, until the arbitrator has made a final determination with respect to the application.

(4) The applicant must cause a copy of the application to be served on each of the other parties to the determination to which the application relates.

(5) Subject to any order of a Warden's Court to the contrary, an application for review of a determination operates to stay the effect of any related access arrangement in relation to a party to the arrangement from the time when a copy of the arrangement has been served on the party until the decision of a Warden's Court on the review.

(6) In reviewing a determination under this section, a Warden's Court has the functions of an arbitrator under this Division in addition to its other functions.

(7) The decision of a Warden's Court on a review of a determination is final and is to be given effect to as if it were the determination of an arbitrator."

34 While the s 151 notice of the final determination had to be served by the arbitrator 'on each of the parties to the hearing', the s 155 notice of the application for review had to be served 'on each of the other parties to the determination to which the application relates'. Again, it must be inferred from the way in which this question arose in the proceedings below, that neither notice was served on the mortgagees.

35 Before the Warden's Court the position of the mortgagees arose during the hearing of the plaintiffs' evidence. It gave rise to the question of whether the *Mining Act* envisaged that there could be more than one access arrangement in respect of the same property and whether the failure to give notice under s 142 deprived the arbitrator and the Warden's Court of jurisdiction in the proceedings. The Mining Warden decided that the Court had

jurisdiction, despite the failure to give notices required to be given under s 142 to the mortgagees, but did not deal with the question of whether or not the *Mining Act* permitted more than one access arrangement in respect of the same property.

36 In overlooking that question the Mining Warden plainly erred. As will become apparent, it is a matter of construction crucial to a determination of the jurisdictional questions which had arisen. I turn then to the question of the construction of the *Mining Act*.

**Does the *Mining Act* envisage that there can be more than one access arrangement in respect of a property?**

37 The proper construction of the provisions of the *Mining Act* which touch on this question is not without difficulty, as the parties each submitted. It turns on the meaning of the terms 'an access arrangement' and 'each landholder', used in various of these provisions, commencing with s 140. That section precludes a licence holder from carrying out prospecting operations otherwise than in accordance with an access arrangement agreed with each landholder, or determined by arbitration.

38 The defendant argued that the term 'an access arrangement' could encompass a number of such arrangements, relying on the provisions of s 8 of the *Interpretation Act 1987* as to the singular including the plural, to support the construction for which it contended. It was submitted that the *Mining Act* evidenced no contrary intention (see s 5(2)).

39 For the following reasons, I am unable to accept the construction for which the defendant contended.

40 The difficulty with the defendant's proposition is that s 140 precludes a licence holder from carrying out prospecting operations on any land otherwise than in accordance with an access arrangement. In order for access to be obtained, s 140 envisages that an access arrangement be agreed between the licence holder and each landholder. It is only if there is no such agreement reached, that an arbitration is required. That it is a single arrangement to which all landholders are party, either as a result of agreement or arbitration which is contemplated by this section, becomes apparent when the rest of the statutory scheme is considered.

41 The process of obtaining 'an arrangement' is commenced by a licence holder giving 'written notice served on each landholder ... of the intention to obtain an access arrangement', in accordance with the requirements of s 142. The competing constructions were on the plaintiffs' part, that the Act required the licence holder to give that notice to every landholder and on the defendant's part, that it needed only to give such notice when seeking an access arrangement with a particular landholder. It was entitled to obtain access under a series of arrangements with different landholders.

42 An 'access arrangement' is merely defined in the Dictionary to the Act as 'an access arrangement under Division 2 of Part 8.' 'Landholder' is widely defined in the Dictionary, but the term 'each landholder' is not separately defined and, accordingly, unless there be some contrary intention shown, should be given its plain and ordinary meaning (see *Cody v JH Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629 at 647). The ordinary dictionary meaning of the word 'each', is of course 'every':

**"each**

*adjective* 1. every, of two or more considered individually or one

by one: *each stone in the building*.

**Bibliography:** The Macquarie Dictionary Online © Macquarie Dictionary Publishers Pty Ltd."

43 The wide definition of the word 'landholder' when used in conjunction with the word 'each', is itself a powerful indication that s 140 contemplates that there will be one arrangement agreed with every landholder. The plaintiffs' approach was that the *Mining Act* envisaged that one access arrangement, that is "an arrangement", had to be either agreed with every landholder, or determined by arbitration and if necessary, by review before the Warden's Court, in proceedings in which every landholder was given an opportunity to participate. The end result of that process was that there was one arrangement for access to the property put in place, binding on the licence holder and every landholder, until any landholder ceased to be a landholder, or died (s 158). In that event, a new access arrangement would have to be agreed.

44 The defendant's approach was that a number of access arrangements could be put in place in relation to the same property, either by agreement with a landholder or landholders in each case, or by arbitration and if necessary by review, in proceedings in which only the particular landholders with whom the licence holder was seeking an access arrangement, would be involved. Only the landholder or landholders with whom each individual access arrangement was sought, had to be given an opportunity to participate in that process. It was possible that there could be a series of such arbitrations and reviews, but until it had an access arrangement in place with every landholder, it could not access the land. If a landholder died or ceases to be a landholder, only the access arrangement to which that landholder was a party came to an end.

45 The *Mining Act* expressly governs the duration of access arrangements in s 158. The Warden's Court is given no power to terminate an access arrangement. They only terminate upon a landholder ceasing to be a landholder of the land, or on the landholder's death. The inconvenient consequences which flow from termination of an access arrangement in such an event, flow whether the legislation permits one or more access arrangements. As the defendant accepted, it may not have access until there is an access arrangement in place with all landholders, whether the Act permits one or more access arrangements. The problems which flow from termination of an access arrangement, do not help resolve the question of whether a licence holder may enter more than one access arrangement in respect of the same land.

46 The defendant accepted that on its approach, under s 140 it was only entitled to prospect on land, if it obtained and adhered to all access arrangements applying to the land and that the necessary result of its approach was the possibility of inconsistent conditions in relation to access to the same property being imposed by different access arrangements, either as the result of an agreement, or arbitration, or review. The result would be that it would be precluded from any access to the land, until that conflict was resolved, given that the provisions of s 140 only permit access in accordance with all access arrangements. In my view, this was a difficulty which told strongly against the construction advocated by the defendant.

47 On the defendant's approach such a situation could be resolved by proceedings brought before the Warden's Court under s 296(u) of the *Mining Act*, which gave the Court jurisdiction 'to hear and determine proceedings relating to any of the following matters':

"(u) any question or dispute as to the provisions of an access

arrangement or as to any matter arising as a consequence of such an arrangement,"

48 Section 297 provided that:

**"297 Decisions etc of Wardens' Courts bind parties**

A decision or order of a Warden's Court is, subject to this Act, binding on the parties."

49 Contrary to the defendant's case, however, it is apparent that this legislative scheme did not envisage a situation of inconsistent access arrangement conditions arising. The *Mining Act* expressly contemplates in s 141(3) the possibility of inconsistency arising between an access arrangement, whether agreed, or the result of an arbitral or review process, and the conditions of the licence or the Act or Regulations. In the case of such inconsistency, the access arrangement gives way. The only inconsistency of conditions of an access arrangement not expressly dealt with in the Act, is inconsistency between a number of access arrangements.

50 The express treatment of the topic of inconsistency between an access arrangement and a license, the Act and Regulations is a powerful indicator that there was no need for such provision to be made in relation to inconsistent access arrangement conditions, because the Act envisaged that there would only be one access arrangement between a licence holder and all landholders, in respect of any property.

51 The absence of any obvious mechanism by which such an inconsistency could be resolved, unless the parties to the inconsistent access arrangements all agree to a resolution, is another indication that more than one access arrangement was not contemplated by the legislation.

52 While s 303 of the *Mining Act* provides that the Warden's Court is to 'hear and determine' any complaint brought before it, it is given no power to resolve the difficulty created by inconsistent conditions provided in separate access arrangements. That would require a power of amendment of an access arrangement, given that the licence holder is precluded from access other than 'in accordance with an access arrangement' (s 140).

53 The defendant argued that "it is clear that there cannot be inconsistencies between access arrangements pertaining to the one portion of land". The difficulty is, however, that the Warden's Court has no power under the *Mining Act* to amend inconsistent arrangements, if more than one access arrangement may be entered in respect of the same land.

54 Variation of an access arrangement which is the product of an agreement, would appear to require the agreement of the parties. No express provision is made in the *Mining Act* for variation of an agreed arrangement. Section 141(1)(h) provides that an access arrangement may make provision for 'the manner of varying the arrangement', but does not require that such provision must be made and does not otherwise contemplate a mechanism for dealing with inconsistent conditions of a number of access arrangements.

55 In the case of an access arrangement determined by an arbitrator, the arrangement may be varied pursuant to s 157, but that requires 'the consent of all of the parties to the arrangement'. There is no mechanism provided for variation in the absence of such an agreement. An access arrangement which is the product of a review by the Warden's Court is final and is to be given effect as if it were the determination of an arbitrator (s 155(7)).

56 It is the plaintiffs' case that they have a right of appeal against the Warden's Court decision in such a review and the defendant's case that there is no such right of appeal. For reasons which appear below, I have concluded that the defendant's approach to the construction of the *Mining Act* is in this respect correct. There is no such right of appeal. It follows that any inconsistent provision of access arrangements which emerge from a review process could not be resolved in appeal proceedings. Even if there were such a right of appeal, there is no appeal provided at all in respect of an arrangement which has been agreed.

57 There is, it seems to me, only one provision of the Act which possibly points to the construction for which the defendant contended. That is the provision made in s 155(5):

"(5) Subject to any order of a Warden's Court to the contrary, an application for review of a determination operates to stay the effect of any related access arrangement in relation to a party to the arrangement from the time when a copy of the arrangement has been served on the party until the decision of a Warden's Court on the review."

58 There is no definition in the Act of a 'related access arrangement'. That access arrangements made between a licence holder and differing landholders in relation to the same land, might be 'related' access arrangements, if more than one such arrangement were permitted by the Act, is possible. Another possibility is that more than one exploration licence might be issued in respect of the same land, with the result that a landholder might be dealing with more than one licence holder, as to the conditions upon which access to the land should be given to each of them. That such arrangements and the conditions which they provide for access to the same land, might be regarded as relating to each other, is also possible.

59 It seems to me that it is more likely that it is the latter situation rather than the former, to which s 155(5) was directed. This conclusion follows from s 140 of the Act, under which a licence holder is not entitled to access the land unless it complies with the access arrangement applying to the land. It follows from that provision, that if more than one arrangement was permitted, that there would be no need to stay any other access arrangement in respect of the same land. The licence holder could not prospect on the land until an access arrangement with all landholders was in place.

60 By way of contrast, it may be readily seen that there might be a need to stay an access arrangement with another licence holder with rights to explore the same land, while the Warden's Court is reviewing the access arrangements applying to another licence holder in respect of that land. Unless that occurred, the issue between the landholder and the second explorer may be impacted by access which the first explorer obtains in the meantime to the land under its access arrangement, while the review proceeds. In *Rosane Pty Ltd v T & P Clark* [2009] NSWLEC 1282, it was observed by the Land and Environment Court that 'there can be multiple exploration licences over the same area of land' (at [16]). That recognition tends to confirm the view that s 155(5) was directed to a situation where multiple exploration licenses are granted by the Minister in relation to the same land, rather than multiple access arrangements being permitted under the *Mining Act* between one licence holder and a number of landholders.

61 Of itself, the possibility of multiple exploration licenses being issued in respect of the same land, is another reason for adopting a cautious approach to a construction of the Act which not only permitted such multiple exploration licenses, but which also permitted multiple access arrangements in respect of each licence holder. The potential for multiple

access arrangements containing inconsistent conditions thereby only appears to multiply, without any effective mechanism for dealing with the possibility of inconsistent access conditions being provided in the Act.

62 When the scheme of the Act in relation to notices required to be given at various junctures is considered, the conclusion that the *Mining Act* contemplates only one access arrangement in respect of each property, is reinforced.

63 Given the very broad definition of landholder, there is no question that it is possible that there may be many landholders of one property. Under s 140 a licence holder seeking access to such land may not carry out prospecting operations on any land otherwise than in accordance with 'an access arrangement agreed ... with each landholder, or determined by an arbitrator'.

64 The defendant accepted that it was not entitled to access the land until it had obtained an access arrangement with every landholder. Of itself this aspect of the defendant's approach to the construction of the legislation does not lend support to its argument that the Act contemplates that there may be more than one access arrangement made in respect of the land. It is a general principle of statutory construction that words used in legislation are used consistently. As observed in *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450 at 452:

"I think it is a fundamental rule of construction that any document should be construed as far as possible so as to give the same meaning to the same words wherever those words occur in that document, and that that applies especially to an Act of Parliament, and with especial force to words contained in the same section of an Act. There ought to be very strong reasons present before the Court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section."

65 The scheme of the *Mining Act* is to require written notice of the intention to obtain 'an access arrangement' to be 'served on each landholder' (s 142). Such an arrangement may be agreed between the licence holder 'and each landholder' (s 142(3)). Under s 143, arbitration may be pursued if after 28 days after the service of the written notice 'on each landholder' of the intention to obtain access 'the holder and each landholder have been unable to agree on such an arrangement, the holder may', by further written notice 'served on each landholder, request them to agree to the appointment of an arbitrator'. Again, agreement as to an arbitrator is contemplated, as between a licence holder and 'each landholder'.

66 If the Act envisaged that an agreement as to access might be reached by the licence holder with some, but not all landholders, there would still have to be an arbitration as to access in respect of those landholders who did not reach an agreement. At that point s 143 requires that 'each landholder' is granted a right of appearance 'at any hearing into the question of access' to the land.

67 That the legislature granted such rights of participation to every landholder, at every hearing concerning the conditions on which access is to be granted to the land, is entirely understandable, given landholders' interest in the land and the conditions upon which an explorer might access it. That s 143 reflects a legislative concern to ensure participation of

all landholders in the one proceedings by which access to the land is to be granted, seems entirely logical, particularly when the potential difficulty with multiple access arrangements with inconsistent conditions is considered.

68 An arbitration in which all landholders were entitled to participate would then concern itself with the matters specified in s 141(1)(f), which included matters in which all landholders might be interested in, when a licence holder is accessing the land, as well as the question of compensation to be paid to 'any landholder'. Section 141 provides:

**"141 Matters for which access arrangement to provide**

(1) An access arrangement may make provision for or with respect to the following matters:

- (a) the periods during which the holder of the prospecting title is to be permitted access to the land,
- (b) the parts of the land in or on which the holder of the prospecting title may prospect and the means by which the holder may gain access to those parts of the land,
- (c) the kinds of prospecting operations that may be carried out in or on the land,
- (d) the conditions to be observed by the holder of the prospecting title when prospecting in or on the land,
- (e) the things which the holder of the prospecting title needs to do in order to protect the environment while having access to the land and carrying out prospecting operations in or on the land,
- (f) the compensation to be paid to any landholder of the land as a consequence of the holder of the prospecting title carrying out prospecting operations in or on the land,
- (g) the manner of resolving any dispute arising in connection with the arrangement,
- (h) the manner of varying the arrangement,
- (i) such other matters as the parties to the arrangement may agree to include in the arrangement.

(2) An access arrangement that is determined by an arbitrator must specify the compensation, as assessed by the arbitrator, to which each landholder of the land concerned is entitled under Division 1 of Part 13.

(3) In the event of an inconsistency between:

- (a) a provision of an access arrangement, and

(b) a provision of this Act, of the regulations or of a condition of a prospecting title,

the provision referred to in paragraph (b) prevails.

(4) If the holder of a prospecting title contravenes an access arrangement, a landholder of the land concerned may deny the holder access to the land until:

(a) the holder ceases the contravention, or

(b) the contravention is remedied to the reasonable satisfaction of the landholder.

(5) Subsection (4) does not affect any proceedings that may be brought against the holder of the prospecting title in respect of the contravention of the access arrangement."

69 Given the differing kinds of interests which various landholders might have in the land and what compensation is provided for, it is apparent that not every landholder might be entitled to compensation in respect of a licence holder's access to the land. Thus the use in s 141 of the term 'any landholder' in relation to questions of compensation, rather than 'each landholder', used elsewhere in the section.

70 The repeated use in other sections of the terms 'an arrangement' in conjunction with the term 'each landholder' and the use of the term 'each landholder' in the various notice provisions of the Act, may not be overlooked. From the outset of the statutory access process, the *Mining Act* does not provide that notice of an intention to seek access to land may be given only to 'a landholder' with whom the licence holder seeks an access arrangement. Had that term been used, or conversely, the word 'landholders', this statutory scheme would have been more readily capable of being construed as either term including the other and thus contemplating that a series of access agreements might be arrived at between a licence holder and different landholders.

71 The word 'each', however, qualifies the word 'landholder' and must be given work to do. The plaintiff's construction of the word 'each' as meaning 'every' in this context has force, requiring the licence holder initially to notify every landholder of its intention to seek access to the land in accordance with s 142. If agreement is not reached with all of them, then to give every landholder notice of the statutory arbitral process under s 143, so that the question of the access to be given to the land may be resolved in the one process, in which all those interested in the question of access might be heard. If there is no agreement reached between 'the parties', an arbitration then proceeds.

72 That construction is supported by the balance of the statutory scheme, which provides for appointment of an arbitrator by the Director General, if agreement on an access arrangement is not reached between the licence holder and 'each landholder' (s 144). Once appointed, the arbitrator must also give various notices to the licence holder and 'each landholder' (s 145). 'Each landholder' is then given a right of appearance 'at any hearing into the question of access' being sought (s 146). On its face that right of appearance is not restricted to proceedings involving only the licence holder and a particular landholder.

73 Once the proceedings before the arbitrator commence, the language used in the governing provisions change, in a way which may also not be overlooked in resolving the questions here lying between the parties. Initially, there is to be conciliation in which the arbitrator has to attempt to bring 'the parties' to a settlement (s 147). If 'the parties' come

to a settlement, the arbitrator is obliged to give effect to the terms of settlement by making a determination (s 147(2)).

74 The determination which results is subject to s 156(2) which provides that it has effect as if it were a deed 'duly executed by each of the parties', thereby resolving the basis upon which the licence holder is to have access to the land. If there is no agreement reached between 'the parties', an arbitration must proceed.

75 The Act specifies who 'the parties' are. In the Dictionary 'party' is relevantly defined as:

**"party** means:

(b) in relation to an access arrangement—the holder of a prospecting title to whom, or a landholder of land to which, the arrangement relates."

76 It follows that at the conciliation stage of the process, 'the parties' are the licence holder and the landholders of the land to which the arrangement relates. That is, each landholder of the land who had to be given notice of the licence holder's intention to obtain access to that land. This definition makes it clear that a landholder could not evade the consequences of the process put in train by a licence holder seeking an access arrangement, by not appearing in the arbitral proceedings which the licence holder pursued in order to obtain access to the land. That is an important element of the scheme, given that until there is an access arrangement in place with every landholder, a licence holder is not entitled to prospect on the land.

77 If the parties do not reach an agreement an arbitration proceeds in which the arbitrator must act according to 'equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms' (s 148(2)). At that point, the *Mining Act* expressly envisages that not all landholders might participate in the arbitration, but nevertheless permits the hearing to proceed (s 148(3)). Section 149 requires that the hearing be conducted 'even though one or more of the parties to the hearing fails to attend the hearing' (s 148(3)). Plainly the Act contemplates that in such an event, an absent landholder will be bound by the outcome of the arbitration, as is confirmed by later provisions.

78 Once the arbitrator determines that the licence holder should be given access to the land, an interim determination must be served on 'each of the parties to the hearing' (s 149(2)). Such a party is then given a right to seek a further arbitration, if not content with the interim determination. If the interim determination is not challenged, it becomes the final determination, binding on each of 'the parties' (s 151(1)). That the legislation distinguishes at this point between 'parties to the hearing', those who participate in the arbitration and 'the parties' who will be bound by the outcome of the arbitration, even if they do not participate, may not be overlooked.

79 The Act did not deal with the effect of an agreed access arrangement, but the effect of an arrangement determined by an arbitrator was dealt with in s 156. It provided:

**"156 Effect of access arrangement etc**

An access arrangement determined by an arbitrator:

(a) takes effect:

(i) in the case of a draft access arrangement that is taken to be a final access arrangement—at the end of the period of 14 days after a copy of the draft access arrangement has been served on each of the parties, or

(ii) in the case of a final access arrangement prepared under section 151—when a copy of the arrangement has been served on each of the parties,

or on such later date as may be specified in the arrangement, and

(b) subject to section 141 (3), has effect as if its terms were embodied in a deed that had been duly executed by each of the parties."

80 Section 141(3) provided that any in the event of conflict between an access arrangement with a licence condition, the Act or the regulation, the access arrangement gives way. If a final arbitration is sought, the Act again reverted to the use of the term 'each landholder', requiring that the arbitrator must then give notice to the licence holder and 'each landholder' of the further hearing (s 150). The reversion to the phrase 'each landholder' at this stage of the arbitral process, rather than continuing the use of the phrase 'parties to the hearing', confirms that the Act contemplated that not all landholders will have participated in the arbitral proceedings to that point, but even if they have not, they must be given notice of the further arbitral proceedings. By s 146, a landholder who had not participated to that point, still might exercise a right of appearance at the further hearing.

81 Given the impact of any final determination made by the arbitrator, namely as a deed 'executed by all the parties' under which the licence holder may be granted access to the land, the Act plainly contemplated that every landholder will have notice of the further proceedings by which may emerge a deed binding the landholder as if the landholder had executed it.

82 Once a final determination was made under s 151, it had to be served 'on all of the parties to the hearing', again contemplating that not all landholders will have chosen to participate in the final stage of the arbitral process. That they were, however, bound by the outcome of the arbitration, whether or not they participated in the hearing, is apparent from the provision made in s 156.

83 This is an important aspect of the statutory scheme. Were such provision not made, a landholder served with a s 142 notice by a licence holder, could have avoided access to the land being obtained by the licence holder, through the expedient of not appearing at the hearing of which it was given notice. That could not have been envisaged, given that s 140 only permits a licence holder to have access in accordance with an access arrangement, agreed with a landholder and determined by an arbitrator.

84 Section 156 provided that draft access arrangements and final access arrangements take effect after service 'on each of the parties', whereupon they are deemed to be a deed executed by all 'the parties'. Again at this point, that term is used in its defined sense. At this stage the Act did not confine service to 'the parties to the hearing', because, of course, that may be a narrower group than the landholders who are all bound by the access arrangement determined by the arbitrator, once it was served upon them. Once so bound, every landholder was given the right to deny access to a licence holder who breaches a condition of the access arrangement (s 141(4)). Section 157 then only permitted later

variation of an arrangement determined by an arbitrator, by 'consent of all of the parties to the arrangement'.

85 In construing the Act, it is clearly necessary to consider the consequences of the competing constructions for which the parties respectively contended, given the purpose of the legislation. This was discussed in *Rossmar Park Pastoral Co Pty Ltd* where *Rothman J* observed:

"31 Modern legislatures regularly enact laws that take away or modify common law rights. This particular statute is concerned with the facilitation of mining and/or exploration rights and the balancing of that economic imperative and the rights of persons granted such licences, on the one hand, with the holders of land otherwise entitled to the enjoyment of that land, on the other."

86 The defendants argued that to confine the Act to one access arrangement would be to give rise to difficult arbitrations involving a number of landholders, even when agreement was able to be reached with some of them. The result of that construction would be that each time a landholder ceased being a landholder, a new access arrangement would have to be arrived at with all landholders, precluding access until a new arrangement was reached.

87 This must, of course, be weighed against the possibility of repeated access to arbitration between differing parties in respect of access to the same land, and the resulting possibility of inconsistent access arrangements emerging, potentially the product of a number of agreements, interim and final arbitral determinations and review determinations by the Warden's Court. The problem of a landholder ceasing to be a landholder giving rise to the need for a new arrangement to be reached with a new landholder would still arise, even if more than one access agreement was permitted. As the defendant accepted, until a new arrangement was reached with any new landholder, its access to the land would be precluded under s 140.

88 To my mind, the difficulties to which the defendant pointed do not tell decisively against the construction for which the plaintiffs contend. To the contrary, it seems to me that the construction which results in only one access arrangement in respect of the land in question, binding on the licence holder and all landholders, is not only the more practical of the two schemes for which the parties contended, but also that which the various provisions to which I have made reference appear to contemplate.

89 For all of these reasons, I am satisfied that the Act contemplates only one access arrangement as between a licence holder and all landholders.

### **Did the Mining Court have jurisdiction in the matter before it?**

90 In written submissions the defendant complained as to the time at which the jurisdictional questions were raised in the proceedings before the Warden's Court. That criticism is not one which may be accepted. The review proceedings before the Warden's Court involved a de novo hearing in which new evidence may be received. That review arose out of the arbitral proceedings which had preceded the review application. In that context, that a party might legitimately raise the question of whether the arbitrator was acting within jurisdiction and whether, in the circumstances, the Warden's Court had jurisdiction to determine the review of the terms of the access arrangement which the arbitrator had resolved upon, were plainly questions properly open to be raised in the

proceedings.

91 The position of the mortgagees did not in fact come to light until the review proceedings before the Warden's Court. That was, no doubt, unfortunate, but is not relevant to a determination of the jurisdictional question, as the High Court's recent judgment in *Kirk v Industrial Relations Commissioner* [2010] HCA 1; (2010) 262 ALR 569 makes clear. There reference was made to the description of jurisdictional error in the case of an inferior Court in *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163:

"72. First, the Court stated [(1995) 184 CLR 163 at 177.], as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist" (emphasis added). Secondly, the Court pointed out [(1995) 184 CLR 163 at 177.] that jurisdictional error "is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers" (emphasis added). (The reference to "theoretical limits" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) Thirdly, the Court amplified [(1995) 184 CLR 163 at 177 - 178.] what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:

(a) the absence of a jurisdictional fact;

(b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and

(c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

The Court said [(1995) 184 CLR 163 at 178.] of this last example that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern" and gave as examples of such difficulties *R v Dunphy; Ex parte Maynes* [(1978) 139 CLR 482; [1978] HCA 19.], *R v Gray; Ex parte Marsh* [(1985) 157 CLR 351 at 371.] and *Public Service Association (SA) v Federated Clerks' Union* [(1991) 173 CLR 132]."

92 In this case the Mining Warden concluded that there was jurisdiction because, while the defendant had been obliged to serve notice of its intention to obtain access to the properties on the mortgagees who were landholders under s 142 of the *Mining Act*, in his view the mortgagees would have had 'no interest in the proceedings' and that the Parliament did not

intend that an arbitrator's determination would be invalidated by the failure to notify.

93 In coming to that conclusion his Honour made no reference to the statutory scheme, or the question of whether it contemplated that a licence holder could obtain only one, or more access arrangements to a particular property. As the High Court discussed in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [93], what the Mining Warden had to determine was whether the acts which had resulted in the final arbitral determination which had come before it for review under s 155 of the *Mining Act* were valid, so as to grant the Court jurisdiction to review that determination. In resolving that question the Court had to determine whether it was the purpose of the *Mining Act*, that acts done in breach of the provisions which required that every landholder be notified of a licence holder's intention to seek access to the land and that they all be given the opportunity either to agree to the arrangement, or to participate in the arbitral process which would produce the access arrangement by which they would all be bound, would be invalid.

94 While the parties argued the question of the construction of the *Mining Act* which I have dealt with above, his Honour did not consider or resolve that question, or take into account the statutory scheme in determining the jurisdictional question which he decided. These were necessary considerations. Even the defendant submitted that the question of whether there could only be one access arrangement was a principal consideration.

95 The conclusion that the mortgagees would have no interest in the proceedings was not a basis upon which the question of the legislative intention could be determined. His Honour's conclusion rested on the Mining Warden's experience over 13 years in proceedings under other provisions of the *Mining Act*, that mortgagees had no interest in attending. His Honour said that he could make no assumptions from that experience, but in the absence of evidence, took the view that it was necessary to consider what interest the mortgagees 'may have in the proceedings'. He posed the question as to what a bank might achieve in the proceedings and observed that he could not contemplate how compensation might be achieved, but postulated that assistance might be provided by the Bank to a mortgagor without legal assistance. Against this his Honour noted at [45] that:

The landholders are extremely well legally represented

Unlike the time in which a mining company would occupy land under a mining lease, the occupation of these properties will be for an extremely short period of time, a matter of a few weeks at the most

There is no threat to the land secured under the mortgage

Relatively speaking, the compensable loss of the landholder, as the result of the drilling would be of no interest to the mortgagee bank

96 His Honour did contemplate that the mortgagees might have an interest in the conditions on which access to the land was granted. The *Mining Act* itself recognises that such an interest might exist, given that the definition of landholder includes mortgagees. His Honour did not consider that the concerns lying at the heart of the dispute between the parties, namely conditions minimising the risk of contamination and damage to the land which provides the security for the funds advanced by the mortgagees to the plaintiffs, might also be of concern to the mortgagees.

97 The conclusion that the *Mining Act* contemplates only one access arrangement and that the arrangement which has been put in place has been determined in the absence of any notice to, or involvement in the arbitral proceedings by the mortgagees gives rise to a number of difficulties, which his Honour also did not consider.

98 The defendant accepted that without an access arrangement being reached with the mortgagees, it could gain no access to the land, given the requirements of s 140. Unless the plaintiffs succeed in the order sought, there is no statutory basis for any second access arrangement to be made. The effect of s 156 of the Act is to bind each mortgagee to the access arrangement determined by the Mining Warden, as if it were a deed to which the mortgagee was a party, even though they have been given no notice or opportunity to participate in the process by which that result was arrived at.

99 That result is one which could not, as a matter of elementary fairness, be accepted as binding the mortgagees. Were they to take any steps to have the access arrangements set aside, it is difficult to see how they could fail. The defendant argued, however, that this was a complaint going to procedural fairness, which the plaintiffs had no standing to raise. For their part the plaintiffs contended that they, too, have a proper basis for having the access arrangement set aside in those circumstances. In my view that submission must be accepted.

100 The legislature envisaged that an access arrangement would emerge from a process which involved the licence holder and all landholders in which all matters relevant to a determination as to a basis of access to the land, which balances all of the competing interests could be considered. That has not occurred. The Act does not provide for a second separate access arrangement to be made with the mortgagees and even if one could be arrived at, there is no statutory mechanism for resolving any inconsistency between the two arrangements, if one later came to light. In that event, the defendant might thereby be deprived of access to the land.

101 In resolving the jurisdictional question his Honour said at [36] –[37]:

"36 All parties have made reference in their submission to the celebrated case of **Project Blue Sky v ABA** [1998] HCA 28, where the High Court indicated that matters done in breach of conditions regulating the exercise of statutory power do not necessarily invalidate proceedings.

At [91] the High Court said:

*An act done in breach of the conditions regulating the exercise of the 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 to the parties of holding void every act done in breach of the condition ... 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."*

At [93] the High Court made reference to the classification of statutory provisions as being "mandatory" or "directory". It went on to say:

*A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provisions should be invalid.*

**In Attorney General of New South Wales v World Best Holdings** [2005] 63 NSWLR 557, Spigelman CJ, when considering the High Courts decision in **Project Blue Sky**, referred to the phrase "*to invalidate any act that fails to comply*" (*emphasis added*) which appears in paragraph [91] and the phrase "*an act done in breach*" (*emphasis added*) that appears in paragraph [93]. His Honour goes on to say:

*I do not understand the word "any" to be used in the sense of "every". The word "an" indicates that the court must look at what Parliament intended to be the consequences of the particular breach under consideration.*

37 It is necessary to consider the particular circumstances of these cases to determine whether it was Parliament's intention to invalidate the arbitration determination on the basis that section 142 notices were not forwarded to the mortgagees."

102 His Honour resolved that question, as I have indicated, by postulating what interest the mortgagees might have had in the question of access to the land which provided their security for funds loaned to the plaintiffs. The question is, however, one of statutory construction, not an assessment of what the mortgagees' possible interest might be in the access arrangement which the defendant sought. What must be determined is whether the legislature intended that failure to comply with the various requirements stipulated by the *Mining Act*, as to the involvement of all landholders in the process by which an access arrangement is produced, by which they are then all bound, would invalidate the arbitrator's determinations and deprive the Warden's Court of the jurisdiction to review that determination. Given the scheme of the *Mining Act*, there can be to my mind no question as to the legislature's intention, namely that such failures must invalidate the acts in question.

103 The defendant also made reference to various decisions which looked at circumstances where the breach of the statutory requirement was regarded to be a matter of form, rather than of substance, with the result that invalidity was not found. In this case the failures are akin to those considered in *Italiano v Carbone* [2005] NSWCA 177 and *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394; (2004) 61 NSWLR 421 at [57]. There can be no confidence that failure to notify the mortgagees would not have effected the outcome of either the arbitration or the review proceedings (see *Re Refugee Review Tribunal; ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 at [104]).

104 I am satisfied in this case that it is apparent that the access arrangement arrived at without giving the notices necessary to be given to all landholders, cannot be regarded as

acts which the Parliament envisaged would not invalidate the statutory power. This is not a question of form, rather than substance, nor a question of procedural fairness which the plaintiffs have no standing to raise. What has occurred has removed from the arbitral process parties who have legitimate interests in the access to the land which the licence holder was seeking, which the *Mining Act* recognises they might wish to protect and whose participation might have had an influence on the approach which the other parties, the arbitrator and the Mining Court might have taken to the resolution of matters which were in issue as to access.

105 The failure to recognise the invalidity of the arbitral proceedings, led his Honour to fail to recognise that the Warden's Court had no jurisdiction to entertain the review proceedings. The parties agreed that in the event that I came to this view, the proper order would be to quash both the decision of the Warden's Court and the arbitrator's determinations. I accept that this is the appropriate outcome in the circumstances and propose to order accordingly.

### **Other errors on the face of the record**

106 The plaintiffs submitted that his Honour had erred in his construction of other provisions of the *Mining Act*, which provided a further basis for the orders sought. I am satisfied that the plaintiffs have also made out this aspect of their case, at least in substantial part.

### **Access to the properties**

107 The plaintiffs opposed the defendant being given any access to their properties, taking the view that ss 149(1) and 151(2) permitted an arbitrator, and subsequently the Warden's Court in review proceedings, to preclude the defendant being given access to their land. They also opposed access being granted to the particular sites in respect of which access was being sought.

108 While the defendant denied that it could be entirely refused access to land in respect of which it had a right to prospect under its license, it accepted that it could be denied access to the particular sites to which it sought access. That concession properly reflects what is provided in ss 149(1) and 151(2), which respectively provide:

#### **"149 Interim determination by arbitrator**

(1) As soon as practicable after concluding a hearing, an arbitrator:

(a) must make an interim determination as to whether or not the holder of the prospecting title should have a right of access to the land concerned, and ...

#### **151 Final determination by arbitrator**

...

(2) If an application is made to the arbitrator within the period of 14 days referred to in section 150 (1), the arbitrator, as soon as practicable after concluding the continued hearing:

(a) must make a final determination as to whether or not the holder of the prospecting title should have a right of access to the land concerned, and ..."

109 The Mining Warden concluded that s 149(1)(b) gave no general right to override the rights given by the exploration licence and that 'an arbitrator does not have the power to refuse access to the holder of an exploration license' (at [14]). Nevertheless, he also took the view that access could be refused, if the land to which access was sought was not covered by the license; or where it was established that there was no reason to drill on the land and sufficient access could be gained by drilling on other land. In the case of the Browns' property, the Mining Warden concluded that while the defendant did not propose to mine under their land, it was necessary for the defendant 'to drill to understand the geology, hydrogeology and the variations in the coal seam over the area' (at [78]). He did not deal separately with the question of access to the Alcorns' land,

110 Undoubtedly, as the defendants argued, conclusions as to access must be reached on a consideration of the merits. Such a decision is not susceptible to challenge in judicial review proceedings. The Act does not specify any criteria upon which the power to refuse access granted in s 149 and s 151 might be exercised by an arbitrator or the Warden's Court. The proceedings are governed by the requirements of s 148, 'equity, good conscience and the substantial merits of the case'. The decision must be made in the context of the undoubted purpose of the *Mining Act*, to provide an efficient, clear and fair basis for exploration and mining of the State's mineral resources. That requires a balancing of the competing interests of the licence holder, who is granted a title to the land under the exploration licence for which very substantial sums are paid, with the interests of landholders, who include, of course, owners of the property such as the plaintiffs in these proceedings and their mortgagees. They, too, may have very substantial financial investments or interests in the land.

111 His Honour thus had to consider the Browns' case that access should be denied to the flood prone site C22, because, for example, the defendant, which had proposed to use in ground sumps at the site, had accepted during the course of the review proceedings that such sumps could not be used, given that the area was flood prone and so had proposed, instead, to use above ground sumps. Such sumps were to be the containers in which the fluids used in the drilling process was to be stored. In ground sumps are holes in the ground lined with plastic and the Browns' concerns that the drilling fluid would contaminate the land if it was spilled when the land flooded, was accepted by the defendant during the review proceedings. The defendant then proposed the use of above ground sumps. There were, however, no plans or specifications for the design or operation of the proposed above ground sumps. It was argued for the plaintiffs that in the circumstances, access should be denied, until plans and specifications were proposed and could be assessed with the assistance of experts.

112 The Mining Warden refused to deny access on that basis, concluding that:

"16 Parties to proceedings are entitled to have some finality. To refuse access on these grounds would no doubt mean once again going through the process of 1) attempting to obtain an access agreement 2) arbitrate on access and then 3) review the arbitrators determination before this court. This would be, in my mind, an intolerable situation for both CMAL and the landholder.

17 CMAL in its submission put forward a proposed condition in respect to the above ground tanks. That suggested condition would, hopefully, satisfy the concerns of the Browns and obviate the necessity for further negotiation/litigation on access. I propose to adopt that condition."

113 The conditions ordered provided that:

#### **"7 ABOVE GROUND SUMPS**

(a) Before prospecting operations commence at site C22, CMAL will install 3 above ground sumps at site C22 for the storage of water and drill fluids.

(b) The design and operation of the sumps referred to in subclause (a) above shall be approved:

(i) by an expert appointed by agreement reached between the Landholders and CMAL, or, in the absence of such agreement,

(ii) by an expert recommended by the Australian Drilling Industry Association."

114 The result was, the plaintiffs complained, that the question of whether or not access to the C22 site should be granted had not been determined by the Mining Warden. Rather, the question of access to the site and on what conditions had been delegated to an expert, yet to be appointed, who could deny access entirely, if the design and operation of the sumps were not approved. This delegation was submitted not to be available under the *Mining Act*.

115 For the defendant it was argued that there was nothing unusual about the detail of a condition imposed being subject to later expert assessment and that there was no error of law involved in the approach adopted. His Honour's conclusions showed that irrespective of what view he took of the legislative scheme, he would have granted access. That was open to him, as a matter of complete discretion. It was inconceivable that a design for the sumps could not be achieved, but if it could not, then the licence holder could not gain access to the site.

116 I am not convinced that the discretion given the Warden's Court was as unconfined as the defendant submitted, having in mind the requirements of s 148 of the *Mining Act*. It is unnecessary to say more about this, however.

117 In so far as the access arrangement which the Mining Warden determined encompasses the possibility that the defendant might be denied access to the site entirely, as the result of a decision later made by an expert, the plaintiffs' submission must be accepted. Refusal of access is a decision which may only be made by an arbitrator or the Warden's Court in accordance with ss 149 or 151 of the Act. The Act does not envisage the delegation of that function to an expert.

118 The plaintiffs argued that the way in which the proposal to use above ground sumps had emerged in the proceedings, once the defendant accepted that in ground sumps could not be used; the uncertainty that above ground sumps could be used at all and if they could

be, how adequate protection to the property was to be ensured, provided a proper basis for refusal of access to the C22 site, so that these issues could be investigated. If the defendant wished to proceed after investigation of these matters, a new access arrangement could be proposed and considered. To grant access because it would be 'intolerable' for the parties to refuse access, because they were 'entitled to have some finality', as his Honour reasoned, was to misunderstand the nature of the review exercise provided by the legislation.

119 There is it seems to me some force in the submission. Finality in the proceedings would have been achieved by the refusal of access to the site. It was common ground between the parties that the defendant would then have had the right to seek an access arrangement on a new basis, by issuing a fresh s 142 notice. Given the defendant's ongoing exploration rights under its license, this construction of the Act must be correct. The plaintiffs' properties are large. The defendant is undoubtedly entitled to seek access to any part of the property, during the course of the license. Even if access to a particular site on the property is refused, because of a particular difficulty with the basis on which access to the site was sought, that would not preclude a licence holder from renewing its endeavours to gain access to that site on other conditions which a landholder might agree, or an arbitrator might impose.

120 A decision that the defendant was to use above ground sumps was open to the Mining Warden as a matter of merit. The difficulty with the approach adopted by the Mining Warden, in the face of the way that the proposal to use an above ground sump emerged, was that it did not resolve the question of whether or not access would be granted and on what conditions. Instead that was left in the hands of an independent expert. While the defendant could not conceive that an above ground sump could not be designed to achieve approval, while the possibility exists, the finality which his Honour thought necessary was not achieved. The Act does not provide for such a devolution of the discretion to grant access to a particular site.

121 In the case of the Alcorns' property, there was an issue as to the drilling procedures to be adopted, particularly at the site near the lagoon used to water cattle. Their contention was that access should be refused, until the defendant resolved the basis on which it would conduct the drilling operation, so that any risks which it posed to their land could be identified and dealt with by way of relevant conditions. His Honour did not deal with this contention in his decision, implicitly rejecting it without giving any reason for its rejection.

122 The defendant's case was that the expert evidence showed that there was no risk of contamination of aquifers, once the aquifer is cased and grouted, or if a cement plug was used, if needed. The plaintiffs' case was that the Mining Warden's refusal to impose conditions in relation to the way drilling was to be conducted at the particular sites to which the defendant sought access on their land, meant that the plaintiff was not bound to take the measures which had been identified in the experts' evidence, as addressing any contamination risk. This was despite the evidence showing that the plaintiff remained uncertain as to how it would actually conduct drilling at the three sites on the Alcorn property.

123 The condition imposed merely adopted the licence conditions imposed by the Minister. For reasons which follow, it seems to me that the Mining Warden fell into error in the approach adopted.

Section 141(1) of the *Mining Act*

124 Section 141(1) relevantly provided:

**"141 Matters for which access arrangement to provide**

(1) An access arrangement may make provision for or with respect to the following matters:

...

(c) the kinds of prospecting operations that may be carried out in or on the land,

(d) the conditions to be observed by the holder of the prospecting title when prospecting in or on the land,

(e) the things which the holder of the prospecting title needs to do in order to protect the environment while having access to the land and carrying out prospecting operations in or on the land,"

125 At [119] his Honour observed:

"119 What must be determined is what conditions can be inserted into an access arrangement in accordance with Section 141, more particularly S141(1)(e)? The issue is twofold: firstly, to what extent may an access arrangement include matters of an environmental nature, which are already in the exploration licence?

and secondly, what exactly does S141(1)(e) refer to?"

126 At [129] - [130], his Honour answered these questions:

"129 With that in mind, together with the provisions of S141(4), I can see no point in repeating, in the access arrangement, clauses which exist in the exploration licence and other supporting documents.

130 To the second issue, what then, does S.141(1)(e) refer to? To my mind it must incorporate matters, "in order to protect the environment" which are not included in an exploration licence or supporting documents. These are generally, but not restricted to, matters of concern that are raised by individual landholders and/or matters of a generic nature - such as washing of vehicles entering upon properties, if necessary; ensuring that noxious weeds are not conveyed into the particular property."

127 Despite this, his Honour then imposed as access conditions the licence conditions which had been imposed by the Minister, but refused numerous of the conditions sought by the plaintiffs, without explanation, stating in relation to clauses 15 to 26 which were concerned with drilling, for example, merely that he could see no reason why they should be included. In relation to other conditions, his Honour stated that he did not propose to insert them, without giving any reasons for their rejection. Thereby his Honour refused to impose conditions which specified, for example, the particular drilling method to be used,

how holes would be cased and grouted in particular conditions, the type of cement to be used and how the holes would be filled, upon completion of drilling.

128 The importance of reasons sufficient to provide an explanation for conclusions reached in an arbitration in respect of an access arrangement under the *Mining Act* was recently discussed in *Rosane Pty Limited* at [8] - [10]. The same observations apply to reasons given in review proceedings before the Mining Court. In *Campbelltown City Council v Vegan* [2006] NSWCA 284; (2006) 67 NSWLR 372, the Court of Appeal explained the importance of reasons, in the context of a judicial decision maker by reference to *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257 (Kirby P), 268-269 (Mahoney JA) and 278-279 (McHugh JA). The matter was recently discussed again by Basten JA in *Workers Compensation (Dust Diseases) Board Of NSW v Smith, Munro and Seymour* [2010] NSWCA 19 at [136] - [138]. In this case the Mining Warden was determining legal rights as between a licence holder and a landholder and it follows that adequate reasons were required to be given for the conclusions reached on the matters over which the parties joined issue.

129 It is difficult to see, despite his Honour's resolution of the questions which he posed as to the meaning of s 141, that he then took the steps necessary to resolve various of the issues which the parties had contested in the proceedings, as to the conditions which could, or should be imposed pursuant to s 141(1)(e) in the access arrangement by which the parties were to be bound, 'in order to protect the environment'.

130 As the parties each accepted, the conditions imposed by the Minister on a licence holder pursuant to s 26 of the *Mining Act*, could cover the same field as conditions imposed in an access arrangement, as s 141 envisages. It is convenient to explain the difficulty which arose from his Honour's approach, by using the conditions sought by the plaintiffs in relation to drilling as an example of the result of the approach adopted and how that departed from the statutory scheme.

131 The licence conditions imposed in relation to drilling provided:

### **"23 Drilling**

(a) At least 28 days prior to commencement of drilling operations other than Category 1 drilling the licence holder must notify the relevant Department of Natural Resources Regional Hydrologist of the intention to drill exploratory drill holes together with information on the nature and location of the proposed holes.

(b) If the licence holder drills exploratory drill holes he must satisfy the Department that during and after the activity:

i) all holes cored or otherwise are constructed and/or sealed to prevent the collapse of the surrounding surface;

ii) if any drill hole meets natural or noxious gases it is plugged or sealed to prevent their escape;

iii) if any drill hole meets an artesian or sub-artesian flow it is effectively sealed to prevent contamination or cross-contamination of aquifers, and its permanently sealed with cement plugs to prevent

surface discharge of groundwater;

iv) potentially hazardous tools or logging equipment dropped in holes and unable to be recovered must be reported to the Regional Inspector of Mines and if directed to do so the licence holder must recover the equipment;

v) waters flowing from any drill holes must be managed and contained. Disposal of any such water must be in accordance with the ANZECC/ARMCANZ 2000 Water Quality Guidelines so as to meet the environmental values of the receiving watercourse or stock dam, or must be disposed of in accordance with a licence issued by the Department of Environment and Conservation;

vi) once any drill hole ceases to be used the land and its immediate vicinity is to be rehabilitated to its former condition;

vii) activities undertaken in regard to this Condition must be included in reports prepared in accordance with Condition 28(a).

## **24 Drilling (Additional for Group 8 and 9 Minerals)**

(a) Before commencing drilling within the licence area, the licence holder must carry out an assessment of the risk of gas blowouts to the satisfaction of the Department. If this assessment indicates that there is potential for a gas blowout to occur in any particular drill hole, that drill hole is to be drilled using a drilling rig fitted with gas blow out prevention equipment according to the Schedule of Onshore Petroleum Exploration and Production Safety Requirements.

(b) The licence holder must report orally and forthwith to the Department all over-pressure gas occurrences that occur during drilling. Written notification of the occurrence is to be given to the Inspector within 24 hours of the occurrence.

(c) The Department may direct the licence holder to undertake analyses and tests on any or all coal seams intersected in drill holes which in the opinion of the Department are likely to be economically mineable.

(d) Once any drill hole ceases to be used the hole must be sealed, surveyed and marked in accordance with Departmental Guidelines for Borehole Sealing on Land, Coal Exploration. Alternatively, the hole must be sealed as instructed by the Department.

## 26 Maintenance of Open Drillholes

Where the licence holder wishes to temporarily maintain a drill hole in an open condition for monitoring purposes, these drillholes are to be managed in accordance with the Environmental Management Plan."

132 These licence conditions were expanded by the more detailed Environmental Management Plan approved by the Department of Primary Industries, but these documents dealt with matters of broad application, not matters concerning access to particular land or particular sites. In relation to drilling, it provided that:

### "6.10 DRILLING

#### 6.10.1 Statutory Requirements

##### 6.10.1.1 EL Requirements

Conditions 23 and 24 of the EL outline the requirements specific to the drilling process:

##### 23 Drilling

- a) At least 28 days prior to commencement of drilling operations other than Category 1 drilling the licence holder must notify the relevant Department of Natural Resources Regional Hydrologist of the intention to drill exploratory drill holes together with information on the nature and location of the proposed drill holes.*
- b) If the licence holder drills exploratory drill holes he must be(sic) satisfy the Department that during and after the activity;*
  - i. all holes cored or otherwise are constructed and/or sealed to prevent collapse of the surrounding surface;*
  - ii. if any drill hole meets natural or noxious gases it is plugged or sealed to prevent their escape;*
  - iii. if any drill hole meets and artesian or sub-artesian flow it is effectively sealed to prevent contamination or cross-contamination of aquifers, and is permanently sealed with cement plugs to prevent surface discharge of groundwater;*

*iv. potentially hazardous tools or logging equipment dropped in holes and unable to be recovered must be reported to the Regional Inspector of Mines and if directed to do so the licence holder must recover the equipment;*

*v. water flowing from any drill holes must be managed and contained. Disposal of any such waters must be in accordance with the ANZECC/ARMCANZ 2000 Water Quality Guidelines so as to meet the environmental values of the receiving watercourse or stock dam, or must be disposed of in accordance with a licence issued by the Department of Environment and Conservation;*

*vi. once any drill hole ceases to be used the land and its immediate vicinity is to be rehabilitated to its former condition;*

*vii. activities undertaken in regard to this Condition must be included in reports prepared in accordance with Condition 28(a).*

**23 Drilling (Additional for Group 8 and 9 Minerals)**

*a) Before commencing drilling within the licence area, the licence holder must carry out an assessment of the risk of gas blowouts to the satisfaction of the Department. If this assessment indicates that there is potential for a gas blowout to occur in any particular drillhole, that drillhole is to be drilled using a drilling rig fitted with gas blowout prevention equipment according the Schedule of Onshore Petroleum exploration and Production Safety Requirements;.*

*b) The licence holder must report orally and forthwith to the Department all overpressure gas occurrences that occur during drilling. Written notification of the occurrence is to be given to the Inspector within 24 hours of the occurrence ;*

*c) The Department may direct the licence*

*holder to undertake analyses and tests on any or all coal seams intersected in drill holes which in the opinion of the Department are likely to be economically mineable.*

*d) Once any drill hole ceases to be used the hole must be sealed, surveyed and marked in accordance with Departmental Guidelines for Borehole Sealing on Land: Coal exploration. Alternatively, the hole must be sealed as instructed by the Department."*

133 These licence conditions did not deal with the particular situation of landholders such as the plaintiffs or their land. The plaintiffs undoubtedly have a keen, direct interest in many of the matters dealt with in these conditions, including in relation to how drilling is to be undertaken at particular sites on their land and how water flowing from drill holes is to be managed in the particular conditions prevailing at those sites. Pertinently for what his Honour had to resolve, the licence conditions did not deal with the precise manner of drilling which the defendant proposed to utilise at the particular sites to which it sought access on the plaintiffs' properties and what might need to be done in that respect, in order to 'protect the environment' as s 141(1)(e) envisaged.

134 The parties' disagreement in the review proceedings as to what access conditions were to be imposed in order to achieve such protection, had to be resolved in light of the evidence and in accordance with the requirements of s 148(2), namely 'equity, good conscience and the substantial merits of the case'.

135 After referring to the parties' respective positions, his Honour observed:

"127 I find it hard to accept that without the conditions inserted, as requested by the landholders, the landholders are left powerless. Section 141(4) provides:

(4) If the holder of a prospecting title contravenes an access arrangement, a landholder of the land concerned may deny the holder access to the land until:

(a) the holder ceases the contravention, or

(b) the contravention is remedied to the reasonable satisfaction of the landholder.

128 The landholders involved in these matters and indeed other landholders within the Caroon area, are astute people. They form part of a community, which is active in ensuring that their land is not ruined by the exploration work of CMAL. They have lobbied (and demonstrated) consistently since CMAL came into the area. They are doing their utmost to ensure that CMAL is "kept on its toes" in relation to its performance under EL6505. Furthermore, CMAL has indicated that it has no objections, subject to some

concerns over OH&S matters, of conditions being inserted allowing landholders to enter upon the drilling site to observe operations. Coupled with the protective tenacity of the landholders is the fact that, as evidenced in exhibit 59, the Department of Primary Industries conducts environmental compliance audits in respect of the Carooona Exploration Program.

129 With that in mind, together with the provisions of S141(4), I can see no point in repeating, in the access arrangement, clauses which exist in the exploration licence and other supporting documents.

130 To the second issue, what then, does S.141(1)(e) refer to? To my mind it must incorporate matters, "in order to protect the environment" which are not included in an exploration licence or supporting documents. These are generally, but not restricted to, matters of concern that are raised by individual landholders and/or matters of a generic nature - such as washing of vehicles entering upon properties, if necessary; ensuring that noxious weeds are not conveyed into the particular property."

136 Despite his Honour's observation that he 'could see no point in repeating conditions in the access arrangement already contained in the license', the parties were agreed that the effect of the determinations which his Honour made, in [2] of the Alcorn determination, for example, was to incorporate as conditions of the access arrangement, all of the conditions imposed in the licence, including those contained in the 'Exploration Environmental Management Plan for the Carooona Project'.

137 The plaintiffs did not seek to appeal this aspect of the determination, but used it to illustrate that by adopting this approach, his Honour had refused access conditions which were 'matters of concern that are raised by individual landholders', going to the detail of how, for example, drilling was to be conducted on the particular sites on their property to which the defendant sought access. The plaintiffs had sought that various conditions be imposed in relation to such drilling, because the licence conditions were stated in broad terms, rather than specifying how those obligations were to be met, in the circumstances of the particular sites to which the defendant sought access on their land.

138 The parties joined issue on those matters before the Mining Warden. The defendant called evidence as to 'precisely how it intended to drill on the plaintiffs' land'. Expert evidence was called which went to the risk of contamination of both water aquifers and the land, which might be posed by such drilling at the particular sites to which the defendant sought access. There were differing views initially amongst the experts. In the case of an expert commissioned by the Carooona Coal Project Community Consultation Committee (whose report was received over the objections of the plaintiffs), the opinion expressed was that 'there is no evidence that exploration drilling for coal could damage aquifers, provided that procedures outlined in the above documents are adopted'. These were the defendant's documents.

139 The experts called by the parties conferred and a consensus emerged. Firstly, that the risks which drilling posed was relatively small and secondly, how drilling should be conducted in the particular conditions pertaining to the sites on the plaintiffs' properties to which the defendant sought access, in order that those risks be addressed. Despite this, his

Honour declined to impose conditions in relation to drilling to reflect the consensus which had emerged from the experts. The result was that the defendant was not bound to abide by the views to which the experts had come in relation to drilling at the sites on the plaintiffs' land, during that course of the review proceedings as to the issues in contest.

140 The parties joined issue over the method of drilling in a context where there was a concern that the exploration which the defendant intended to pursue gave rise to the risks of aquifer and land contamination resulting from the drilling process. The defendant's expert's evidence was that while the risks were small, if it occurred, contamination was difficult to detect. If there was contamination to the land, which came to the notice of the plaintiffs, there would be an immediate right to refuse access, until the breach was remedied, if the contamination resulted from the defendant's breach of an access condition. If contamination was the result only of a breach of a licence conditions, all that the plaintiffs could do would be to draw the contamination to the attention of the Minister, in the hope that the Minister would agree that a licence condition had been breached and that action would be taken in respect of the breach. If the Minister refused to take action, all that the plaintiffs would be left with, would be a right to seek compensation.

141 The reasons given by the Mining Warden for the refusal of the access conditions sought in relation to drilling, was that he could see no reason why such conditions should be imposed, given his view that they were adequately dealt with in the licence conditions and associated obligations. The point of the expert evidence was, of course, to delve into particular matters pertaining to the sites in question, which were not dealt with specifically in the licence conditions, as s 141 contemplated. To my mind there can be no question that his Honour misunderstood the statutory scheme in this respect, with the result that he erred in the approach adopted to the resolution of the contest over the access conditions to be imposed upon the defendant.

142 I am satisfied that his Honour was undoubtedly correct to refuse some conditions proposed by the plaintiffs, for example a condition that drilling be subject to an opinion from an independent hydro-geologist, who could impose further conditions. The Act does not envisage such a devolution of the Warden's Court functions.

143 In so far as his Honour came to the view, however, that there 'was no point' in an access condition dealing with matters already dealt with in licence conditions such as those dealing with drilling, his Honour plainly erred in his understanding of the statutory scheme. Under the *Mining Act* there would be a very substantial, practical point in a landholder succeeding in having an access condition imposed in relation to how drilling was to be conducted at a particular site on the property and a licence holder resisting the imposition of any condition at all. If the result of a conclusion that a specific condition should be provided was inconsistent with any broad licence condition, the licence condition would prevail. Otherwise, contravention of the specific access condition would give the plaintiffs the right to refuse the defendant access to the land, until the contravention ceased.

144 Undoubtedly, whether or not any particular access condition directed to precluding contamination as the result of the drilling process adopted should be imposed was a matter for the Mining Warden to determine as a matter of discretion, but it was a discretion which had to be actively exercised in accordance with the dictates of the statutory scheme.

145 His Honour's decision that to refuse to impose the access conditions sought, because there was no point, once he had imposed all licence conditions as access conditions, involved error. It expanded the right to refuse access for breach of any licence condition from a right only lying in the Minister, to one given to all landholders. It is impossible to see that this accorded with the scheme of the Act. Nor seemingly, had it been sought by the

plaintiffs. The exercise of the discretion arising under s 141 required that the matters on which the parties had in fact joined issue be considered and determined, whether or not they related to matters the subject of conditions in the license. Under the statutory scheme, the plaintiffs' claims could not be dismissed without explanation, or on the basis of a view that there 'was no point' in providing for access conditions which touched on areas already dealt with in licence conditions.

### Significant improvement

146 Before the Warden's Court the Browns objected to access to the C22 site being given because it was a part of the property where there was a 'significant improvement', to which the defendant was not entitled to access. The issue was not raised in the arbitration. Section 31 of the *Mining Act* precluded the defendant from exercising its rights under the Act on land where there is a significant improvement. That term is defined in the Dictionary as:

*"significant improvement* means any substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure."

147 Mr Brown gave evidence about the C22 site. His evidence was that the land was developed and laser levelled; that it was flood prone; that the land was graded in order to drain water to a low point to keep water away from the nearby shed; that it had been graded by the previous owner so that the water drained into a shallow dam; that at the other side of the drill site there was a road and irrigation ditch and that any above ground sump installed at the site would require expert advice as to the potential for the tanks to be moved by flooding and to divert water so as to cause trenches, erosion and impact on crops in adjacent fields. Mr Brown was not cross examined about this evidence and the defendant led no evidence about these matters.

148 His Honour took the view that:

"22 There was no reference prior to the hearing of the case to Section 31 of the Act. There was no reference during the hearing of the case nor during the site visit to Section 31. The first mention comes with the written submission. There are two matters need(sic) to be said. Firstly, as to whether or not the area where CMAL intends to drill on the Browns land is a "water disposal area" or "improvement" is a question of fact. As it has not been previously raised as an issue in this case, CMAL has been deprived of questioning Mr Brown about it and calling, if necessary, an expert to give an opinion as to whether it is a "water disposal area" or "improvement". Consequently, on the evidence before the court, it is not possible to make a determination as to whether it is a "water disposal area" etc. Secondly, even if there were evidence, a proceeding under S.155 is not the place to make a determination under Section 31 of the Act.

23 Consequently, I do not propose to refuse CMAL access to the Browns land on the grounds that the area in which they intend to drill is allegedly a "water disposal area" or an "improvement" or both."

149 The Browns complained that they were entitled to rely on the provisions of s 31 of the Act and had raised the matter in the necessary way, by leading the relevant evidence. It was a matter for the defendant whether it met that evidentiary case and it had received the necessary opportunity to do so. The defendant's position was that the matter had arisen without adequate notice and his Honour's refusal of the Browns' application was a proper approach in the circumstances which had arisen.

150 It was a matter for his Honour to determine whether or not access would be given to site C22. His Honour expressly contemplated that access could be refused in circumstances where the defendant's licence did not give it the access which it sought. In this statutory scheme, a refusal to grant access to a site to which s 31 of the *Mining Act* applied was plainly a proper matter for the plaintiffs to raise in the proceedings and for his Honour to determine. Under the Act the defendant had no right to access a 'significant improvement' on the plaintiffs' land. Even if access were granted, in the absence of the matter being determined by the Warden's Court, the Browns were still entitled to return to that Court under s 31(5) to have the issue resolved.

151 The Court of Appeal has recently reiterated the need for parties to co-operate to ensure that litigation is not conducted by ambush (see *Sydney South West Area Health Service v MD* [2009] NSWCA 343 at [53]).

152 Whatever be the answer to the question of how the issue came to be raised in the proceedings, there can be no question that opposition to access to a particular site being granted on the basis that it was a site which the licence holder was not entitled to explore, was properly open to be taken in arbitral or review proceedings. Here access was granted, his Honour taking the view that the issue had been raised too late and that as a result, the defendant had been deprived of a fair opportunity to put its case on that issue.

153 As a matter of discretion that course must have been open to his Honour, especially when it is considered that it is still open to the plaintiffs to take the proceedings envisaged by s 31(5), if there remains any dispute as to whether the C22 site is a 'significant improvement'.

154 That outcome may be regrettable, because it would necessitate further proceedings between the parties, but in the circumstances, that his Honour's conclusion involved an error of law, is not apparent. Given the orders which will be made in this case, however, there is no question that this issue is one which may properly be raised and resolved in further arbitral or review proceedings in which the parties are involved in relation to access to the C22 site. Such proceedings will then undoubtedly be the appropriate time to resolve this question.

### **Compensation**

155 The *Mining Act* envisages that a landholder might be compensated in respect to a licence holder's access to the property. Section 263 provided:

#### **"263 Compensation arising under exploration licence**

(1) On the granting of an exploration licence, a landholder of any land (whether or not subject to the licence) becomes entitled to compensation for any compensable loss suffered, or likely to be

suffered, by the landholder as a result of the exercise of the rights conferred by the licence or by an access arrangement in respect of the licence."

156 Compensation might be agreed with a landholder, in which event it was treated as an obligation under the licence (s 263(4)). Compensation may also be provided as a condition of an access arrangement, as the result of an agreement, or arbitration (s 141(1)(f)). Assessment of compensation was otherwise dealt with in Division 3 of Part 13 of the *Mining Act*. 'Compensable loss' was defined in s 262 as:

*"compensable loss* means loss caused, or likely to be caused, by:

(a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or

(b) deprivation of the possession or of the use of the surface of land or any part of the surface, or

(c) severance of land from other land of the landholder, or

(d) surface rights of way and easements, or

(e) destruction or loss of, or injury to, disturbance of or interference with, stock, or

(f) damage consequential on any matter referred to in paragraph (a)–(e),

but does not include loss that is compensable under the *Mine Subsidence Compensation Act 1961*."

157 The plaintiffs sought compensation of \$35,000 per drilling hole as a condition of access. The evidence showed that amount had been calculated by selecting the figure proposed by the defendant, of \$330 per week for each drill site, and requiring that weekly sum to be paid in respect of the entire two year period during which the defendant sought access, in respect of each drill site. That sum came from the evidence of the valuer Mr Austen, whose view was that it was only compensation under s 262(b) which was available. His view was that the plaintiff's loss would be \$15 per week, having regard to the criteria specified in s 262 and that the sum of \$330 per week proposed by the defendant would be generous and not unreasonable.

158 The Mining Warden appears to have misunderstood the plaintiff's claim and its basis, given his observation at [95] that the plaintiffs' claim was for '35,000 per borehole per week', after referring to evidence given by the defendant's expert, who had agreed in cross examination as to the basis of the calculation of that sum.

159 The Mining Warden concluded that compensation should be imposed as a condition of access and awarded a sum of \$330 per week for each drilling site, for the period during which the defendant 'accesses the land to erect fencing or do other work, until the fencing

is removed. Payment to be made at the completion of each borehole and removal of fencing from that site'. The Alcorns were awarded an additional \$50 per week to compensate them for fencing which had to be erected. The plaintiffs argued that in coming to that conclusion, his Honour erred as to the proper construction of the *Mining Act* and what compensation it provided for.

160 The plaintiffs claimed that the loss should be calculated by reference to what a reasonable person in the position of the defendant would pay for the rights conferred by the access arrangement under an arms length negotiation and not in the context of the statutorily imposed arbitration, between it and a willing landholder. The access arrangement was to terminate on the earlier occurrence of the expiry of two years and the completion of drilling. It was in the context of the special value which the land had to the defendant, that it would be accepted that the result of an arms length negotiation would be payment of compensation for the two year term, during which the plaintiffs were put in a position where there was little that they could do with the affected parts of their land.

161 The defendant submitted that the compensation which the plaintiffs claimed was not compensation under the Act, which did not envisage that it be calculated by reference to what might be negotiated at arms length if the licence holder had no statutory right to access the land.

162 The reasons given by the Mining Warden for various conclusions on matters in dispute between the parties were less than clear and in some cases, absent. In this instance, however, it seems to me that, properly understood, the Mining Warden did not actually reject the approach urged for the plaintiffs, but rather took a different view as to the period to which reference should be made, in undertaking the calculation which the plaintiffs urged. He rejected compensation calculated on the basis of the entire potential two year period of the access arrangement and instead, required the calculation to be made by reference to a period when the plaintiffs erected fencing around the bore hole and later removed it, presumably when access to the land then ceased. That, in my view does not involve any error of law, but a resolution of the competing views in the face of the evidence, as a matter of discretion which was open, given the evidence and the matters to which compensation was directed under s 262 of the Act.

### **Right of Appeal**

163 It is strictly not necessary to resolve all of the other matters about which the parties joined issue, but given the nature of this controversy, how the cases were advanced and its impact upon the construction point which I have already dealt with, something must be said in relation to the appeal rights established by the *Mining Act*. It seems to me that the defendant's argument that the Act does not contemplate any appeal on the merits from a decision of the Warden's Court must be accepted.

164 Once an arbitrator's final determination has resulted in a review before the Warden's Court, the court 'has the functions of an arbitrator', 'in addition to its other functions' (s 155(6)). Thereby, the Warden's Court is obliged to adhere to the provisions of the Act governing the arbitration, namely to act according to equity, good conscience and the substantial merits of the case' (s 148(2)). The Court's review decision is 'final and is to be given effect to as if it were the determination of an arbitrator' (s 155(7)). The effect of an arbitrator's determination is that provided by s 156(b):

"(b) subject to section 141 (3), has effect as if its terms were embodied in a deed that had been duly executed by each of the

parties."

165 Sections 141(3) deals with inconsistency with licence condition, the Act and the Regulations. Section 297 provides that a decision or order of the Court is binding 'subject to this Act'. Section 296(t) establishes the Warden's Court's jurisdiction in review proceedings. Section 321 provides for appeals under the *Crimes (Local Courts Appeal and Review) Act* in respect of orders made by the Warden's Court under Division 2 of Part 8 of the Act. The form and service of orders of the Court is dealt with in s 318.

166 In *Salter v Director of Public Prosecutions* [2009] NSWCA 357, the Court of Appeal had to consider whether a magistrate had made an "order" within the meaning of s 53(3)(b) of the *Crimes (Appeal and Review) Act* 2001. Reference was there made to authorities which discussed the difference between a judgment and an order, it being observed:

"13 The word "order" is narrower in scope than the word "judgment", although they may substantially overlap in a particular statutory framework. It may well be that a decision on a separate question of law will constitute a "judgment" in a particular statutory context. For present purposes it is not strictly necessary to distinguish between the two concepts."

167 The two words are not necessarily co-extensive, as *Spigelman J* observed at [23].

168 In this statutory context, there is no appeal provided in respect of a determination made by the Court under s 155, appearing in Division 2 of Part 8. Such a determination does not result in any order. Subsection 155(7) provides that the Court's decision in relation to the review of an arbitrator's final access arrangement is to be given effect as a determination of an arbitrator, not as an order of the Court. Section 156 provides that such an arbitrator's determination is given the effect of a deed executed by the parties to the arrangement. Service of an arbitrator's determination is provided for in s 151, rather than in the way provided in s 318 for orders of the Court. It follows that under this statutory scheme, a review in proceedings brought under s 155 does not result in any order of the Court.

169 In the *Mining Act* decisions, orders and determinations are provided for. Some decisions made by the Warden's Court may result in an order, decisions under s 155, however, result in a determination, given the same effect as an arbitrator's final determination, that is a determination by which the parties are bound, as if they had executed a deed. While the plaintiffs argued that there was nothing in the Act which would lead to the view that an order did not encompass a determination, it seems to me that the provisions which give effect to a s 155 determination of the Court, as if it were an arbitrator's determination, properly leads to the view that this argument may not be accepted.

170 As the defendant submitted, the legislature has limited merit reviews of the exercise of an arbitrator's discretion in relation to conditions to be imposed in an access arrangement, which originally resulted in an interim access arrangement, to the processes which result in the arbitrator's final access arrangement and then a review by the Warden's court. No appeal from that second merit review is provided. Errors of law are subject to judicial review, but otherwise, no right of appeal is given from a determination made under s 155.

## **Discretion**

171 The defendant argued that there was an overarching discretion to refuse the relief sought which should be exercised, given the lateness of the jurisdictional and other points taken by the plaintiffs. I am unable to accept that submission, in light of the conclusion which I have reached as to the proper construction of the *Mining Act*, and the errors of law into which the Mining Warden fell in relation to the jurisdictional and other matters I have earlier dealt with.

172 Ambush and surprise in litigation is, of course, always to be discouraged. The management practices of all courts are nowadays directed to ensuring that this does not occur. Given however the difficulties of construction of the legislation which it has been necessary to resolve, the High Court's current view of jurisdictional error, and the errors revealed in the Mining Warden's decision, it would be unjust to refuse the relief here sought, notwithstanding inconvenience which may result.

### Orders

173 For the reasons given, I order that the decision of the Warden's Court as well as the determination which accompanied it and the interim and final determinations of the arbitrator, be quashed and set aside. The usual order would be that the defendant bears the plaintiffs' costs of the proceedings. If there is any dispute in that regard, the parties have liberty to approach.

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