

In the Warden's Court
At Gunnedah in the
State of New South Wales
J.A. Bailey Mining Warden
21 May 2009



Application under the provisions of Section 155 Mining Act 1992 to
Review a Determination of an Arbitrator

Case No:	Applicant	Respondent
2008/57	Margaret Alice Alcorn and Leslie James Alcorn	Coal Mines Australia Pty Ltd
2008/58	Thomas Bailey	Coal Mines Australia Pty Ltd
2008/59	Geoffrey Brown and Sharon Brown	Coal Mines Australia Pty Ltd
2008/60	Anthony Mark Clift	Coal Mines Australia Pty Ltd

Appearances:

Mr. Bannon S.C. with Mr Scruby and Mr Lang of Counsel appeared for applicant in case 2008/57 and 2008/59, instructed by Kemp Strang Solicitors

Mr P Long Solicitor and Ms. A. Weinthal Solicitor, from Long Howland, appeared for applicant in case 2008/58 and 2008/60

Mr Beasley of Counsel instructed by MinterEllison appeared for the Respondent

Hearing Dates: Evidence: 30th March, 1 – 4 April 2009 at Gunnedah
Submissions: 28 April 2009 at Gunnedah

Decision Handed Down at Gunnedah on 21st May 2009

Background

On 12 April 2006, the Minister for Mineral Resources of the State of New South Wales granted Exploration Licence No. 6505 (EL6505) to Coal Mines Australia Limited (CMAL)(the licence holder). The activities of the mining company pursuant to EL6505 has been referred to as the "Caroona Project". The exploration area embraces about 344 square kilometres and incorporates the land owned by Leslie and Margaret Alcorn, Geoffrey and Sharon Brown, Thomas Bailey and Anthony Cliff (the landholders). Prior to entering the land, the licence holder is required, pursuant to S.142 of the Mining Act 1992 (the Act), to seek an access arrangement with each of the landholders. CMAL were not successful in obtaining a consent arrangement. Subsequently, following the appointment of an arbitrator under S144 of the Act, a final determination, pursuant to S155 of the Act was made on 15 November 2008.

Before proceeding into my decision, a word of caution. The Mining Act 1992 was amended on 7th April 2009. That is, after hearing evidence and prior to hearing submissions in this case. However, due to saving clauses in the amending Act, this decision is determined on the legislation as it was prior to 7 April 2009. Any reference to any section in the Act is a reference to the section as it was prior to 7 April 2009. From that amending date, some of the sections referred to in the decision have been altered and some of the section numbers also have been altered.

Decision

1. Following an arbitrator's final determination, an application for a review of that determination was lodged pursuant to the provisions of section 155 of the Mining act 1992. That section provides as follows;

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.
- 2 The hearing of evidence of the review took place over a period of five days at Gunnedah Courthouse commencing the 30th March 2009. A view of the Alcorn and Brown property was taken on the afternoon on the 31st March 2009. At the request of the Solicitor for Mr Cliff and Mr Bailey, no view was undertaken of their properties.
- 3 That view assisted the court to understand the layout of the properties, as well as to understand evidence produced later. It also resulted in the mining company agreeing to alter some matters in respect of each property visited.

- 4 Although there are four separate distinct matters that are being reviewed, they were all heard together due to a great deal of common matters relating to all properties.

Can this Court Refuse Access?

- 5 It is clear from the evidence of all the landholders that they do not want the mining company entering their property and drilling exploratory holes. It was submitted that there is power in the Act for this court to refuse access. Before looking at further matters that were raised, it is necessary at this point of time to outline the history of exploration licenses commencing with the *Mining Act 1906*. Section 83(G) and section 83(H) of the *Mining Act 1906* set out certain restrictions placed upon holders of exploration licenses. Those sections provide as follow

83G. (1) No exploration license shall, ~~except with the consent of the owner,~~ (emphasis added) extend to the surface of any land –

- (a) *within fifty yards of any land bona fide in use as a garden or orchard;*
or
- (b) *within two hundred yards of the principal residence of the owner or occupier of any land whether or not it is the land in respect of which the exploration license is applied for;*
or
- (c) *whereon is any substantial building, bridge, dam, reservoir, well or other valuable improvement, other than an improvement effected for mining purposes and not bona fide used for any other purpose.*

The Minister shall determine whether any improvement referred to in paragraph (c) of this subsection is substantial or valuable etc..

83H. No exploration license shall, ~~except with the consent of the surface owner,~~ (emphasis added) extend to the surface of any land under cultivation when the application for the exploration license was made; and without such consent no surveys or operations under such exploration license shall be carried out or conducted, ~~except with the authority of the Minister,~~ and at such depth as the Minister may, ~~in his discretion,~~ deem to be sufficient to prevent damage to the surface;

Provided that –

(a) cultivation for the growth and spread of pasture grasses shall not be deemed to be cultivation with the meaning of this section unless, in the opinion of the Minister, the circumstances so warrant; and

(b) in the case of dispute as to whether land is or is not under cultivation within the meaning of this section, the Minister's decision thereon shall be final.

6 The *Mining Act* of 1973 did not see the same restrictions placed upon an exploration license that existed in the 1906 act. However, pursuant to the provisions of section 46 of the *Mining Act 1973*, an owner or occupier was able to object to the granting of a prospecting license on the grounds that the land over which the lease is sought is agricultural land.

Section 46 of the *Mining Act 1973* states, inter alia:

An owner or occupier...may, not later than thirty days after the date on which that notice is so sent...object to the granting of the prospecting licence...on the ground that...the land...is agricultural land.

7 Part 3, division 3 and 4 of *Mining Act 1992* outlines the power in relation to the granting of exploration licenses. Section 24(1) states "an exploration license may be granted over land of any title or tenure." Nothing in that Act prevents the granting of an exploration licence over agricultural land. However, section 31 provides, inter alia:

The holder of an exploration licence may not exercise any of the rights conferred by the licence...on which...is situated a dwelling house that is the principle place of residence...on whichis situated any garden, or on which is situated any improvement....except with the written consent of the owner.

8 In summary, the 1906 Act places a prohibition upon the granting of an exploration licence over gardens, principle residences and valuable improvements unless there is written consent of the owner and occupier; and a prohibition over the granting of an exploration licence

over land that is under cultivation, without written consent of the owner and occupier, except with the written permission of the Minister. The 1973 Act reduced the rights of the owner/occupier to the right to object only upon the basis that the land was agricultural land. Whereas the 1992 Act gives no right of objections by landholders to exploration licence applications. The only relief a landholder receives under the 1992 Act is that there is a restriction on a licence holder in respect of exercising rights over a principal place of residence, a garden or over an improvement, unless there is consent of the landholder.

- 9 It is clear that as the *Mining Act* progressed from 1906 to 1992, the intention of parliament was that holders of exploration licenses have a right to enter land to explore, without being hindered by any objection raised by the landholder. That is not to say that the landholder has no rights upon the granting of an exploration licence.
- 10 A landholder has the right to negotiate access arrangements and compensation. If no agreement is reached, an arbitrator determines the aspect of access and compensation, with a further right of review to a warden's court. The licence holder is also curtailed from unrestrained exploring due to the numerous conditions that are inserted in the exploration licence.
- 11 The Mining Act 1992 has obviously deliberately taken away from landholders the right to object to an exploration licence. Not only is that obvious from comparing prior legislation, but also by observing Schedule 1 of the Mining Act 1992. That clearly gives landholders the right to lodge objections to applications for assessment leases and mining leases, but that schedule makes no mention of similar rights in respect of exploration licence applications. And furthermore, CMAL submitted S29 Mining Act 1992 in giving permission to prospect under an exploration licence, gives unqualified permission under the section. That is correct, but the section must be read in conjunction with the rest of the Act.

- 12 Section 149(1)(b) of the *Mining Act 1992*, states, in part, *...if the arbitrator determines that the holder of the prosecuting title should have such a right to access....* It has been submitted that this provision gives an arbitrator the right to exclude a mining company from land. I have ruled before and still maintain that S.149 (1)(b) allows an arbitrator to refuse access, if, for instance, the land which is sought to be entered is not land which is within the area covered by the exploration licence. I am aware that such a circumstance happened when a matter went to arbitration some years ago. In that instance, when the arbitrator became aware that the landholders land was not within the area covered by the licence, the arbitrator refused access.
- 13 In the matters before the court on this occasion, the landholders have all indicated they do not want the mining company upon their land at all. To that end, Mr Bannon questioned the mining company witness, Mr David, about the Brown's property. It was ascertained that CMAL has no intention to mine under that property. Mr. David was asked why he needed to drill one exploratory hole on that land. I have referred to that evidence elsewhere in this decision. However, if, for instance, Mr David had indicated that there was no reason to drill on the Brown's land and that sufficient exploration could be achieved by drilling one extra hole on someone else's land, then perhaps that could be another reason as to why access should not be granted.
- 14 Other than those unusual circumstances outlined above, I do not interpret S.149 (1)(b) as giving a general right to an arbitrator to override the rights that have been given by the Minister, to a mining company, pursuant to an exploration licence. I say that particularly in regard to the fact that the Mining Act 1992 does not provide for the right of a landholder to object to the granting of such licence. Having regard to Section 155(6), the powers of the court in conducting a review is that of an arbitrator. Consequently, the court, similarly to an arbitrator, does not have the power to refuse access to the holder of an exploration licence.

- 15 There were other submissions that were raised on behalf of the Browns in the final submission, urging the court to deny access. One issue is that no plans have been put forward as to the construction details of the above ground tanks that CMAL intend to use on the property. It was submitted: *"The Browns desire and are entitled to have plans and specifications of the new proposal presented to them so they can consider them with the assistance of experts"*.¹ The submission goes on to say: *"Refusal of access on this application would not prevent CMAL from obtaining access at some later time when it had addressed the above concerns"*.
- 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 submission² put forward a proposed condition in respect of 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.
- 18 Another issue wherein it was submitted that access should be refused is in respect of Section 31(1) of the Mining Act 1992. That section provides:

31 Dwelling-houses, gardens and improvements

- (1) The holder of an exploration licence may not exercise any of the rights conferred by the licence over the surface of land:
- (a) on which, or within the prescribed distance of which, is situated a dwelling-house that is the principal place of residence of the person occupying it, or
 - (b) on which, or within the prescribed distance of which, is situated

¹ Submissions of 17 April 2009 paragraph 36.

² See paragraph 123 of submission dated 24 April 2009

any garden, or

(c) on which is situated any improvement (being a substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure) other than an improvement constructed or used for mining purposes and for no other purposes,

except with the written consent of the owner of the dwelling house, garden or improvement (and, in the case of the dwelling-house, the written consent of its occupant).

- 19 The submission makes reference to the evidence of Mr Brown and suggests that the area where CMAL intends to drill is a "water disposal area" and a "valuable work" or both.
- 20 When questioned by Mr Bannon, the following appears at pp575, 576 of the transcript: *Q: And that area of the drill site, I think you described it the other day as an area which was – is this right, gently graded from west to east? --- That's correct. Q: Why is it graded that way? ---To drain the water to a low point, to keep it away from the shed. Q: In the circumstances where there is bigger rain? --- Bigger rain. Q: So in those bigger rain areas, that operates as a water disposal area? --- It does. Q: And graded for that purpose? --- It is.*
- 21 Questions following outline the concern that Mr Brown would have if above ground tanks are installed due to the possibility of water diversion in that area in times of heavy rain falls, creating trenches and erosion. Nothing was put to the court, through Mr Brown or another witness, which would indicate that the area in question is in fact a water disposal area. Indeed the only reference is in the leading question put above by Mr Bannon and agreed to by Mr Brown.
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 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.

24 There was a challenge from all of the landowners to the validity of these proceedings. That challenge was based upon the provisions of Section 142 of the Mining Act 1992.

25 The Section 142 Notices – Jurisdiction of the Court

Evidence was received from all of the landholders that each property was subject to a mortgage by a bank. It appears that no notice, under the provision of Section 142, was given to the mortgagees.

Section 142 (1) provides:

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.

26 In submissions in respect of the landholders Alcorn and Brown and also in respect of Bailey and Clift, the court was urged to rule that because no notices were sent to the relevant mortgagees, the arbitration was a nullity and consequently invalid. Accordingly, if the arbitrator's access arrangement was invalid, this court has no jurisdiction to review the same.