

13/6/97

DECISION CONCERNING THE APPLICATION BY CASTLE MOUNTAIN ENTERPRISES PTY LIMITED IN RESPECT OF A RIGHT-OF-WAY FOR ML 1395

This matter came before me at Quirindi Court House on the 29th January 1997. At the Inquiry the applicant company was represented by Mr Ken Heath, a Managing Director of that company. Mr Singh, Solicitor, appeared for the landowner Mr G S Pollock. There was no appearance initially on behalf of the Quirindi Shire Council.

The mining company in this matter has had access to the mining lease across the land owned by Mr Pollock by entering the property via Callaghan's Lane. There is in fact a written agreement drawn up on the 13th December 1995 concerning this right-of-way.

Following Development Approval by the local Shire Council a condition of that approval was that access to the mining lease via Callaghan's Lane would be for a period of 180 days only. That period has now expired by the effluxion of time.

The mining company has proposed a right-of-way across Mr Pollock's land with an access point in Wallabadah Road. From this particular access point it will be necessary for a road to extend a further three quarters of kilometre across the Pollock's property. Evidence was produced to the Court that this particular proposed road was necessary from the indicated access point because it was the only point along the road, that is Wallabadah Road, that the RTA would allow access of trucks going to and coming from the mining lease. Furthermore a straighter road was impractical because of the particular terrain on this property.

Mr Pollock objected strenuously to this new proposed right-of-way indicating that it would interfere to a greater extent with the grazing cattle and would hinder the general use of his land.

Both Mr Pollock and the mining company would prefer to have access via the original right-of-way, that is through Callaghan's Lane.

Mr Singh submitted on behalf of Mr Pollock that Section 65 (3) of the Mining Act 1992 applies in this instance. That subsection states:

"If a mining lease is granted over land for which an appropriate development consent has been given:

- (a) Any condition (being a special purpose condition within the meaning of Division 2 of Part 2 of Schedule 1) imposed on the development consent by a consent authority, or by a body hearing an appeal from a consent authority, is void; and

- (b) the development consent (to the extent only to which it relates to the use of the land concerned for the purpose of obtaining minerals) is taken to have been given free of the condition.”

Division 2 of Part 2 of Schedule 1 to the Act at Clause 15 provides as follows:

“in this Division: “Special Purpose Condition” means a condition concerning:

- (a) The preparation of land for mining; or
 (b) (c) (d) (e)”

Mr Singh submitted that a right-of-way comes within the meaning of “the preparation of land for mining”. He submitted that an integral part of mining is the processing of the mineral which is extracted and that clearly mineral cannot be processed without the transportation of that mineral from the mining lease to elsewhere. He submitted that as a right-of-way must be an integral part of the preparation of land for mining that Section 65 applies and consequently the condition which is imposed by the Quirindi Shire Council in the development consent in relation to the prohibition of utilising Callaghan’s Lane as a means of access into the mining lease is void.

Having regard to the submissions of Mr. Singh, arrangements were made for Mr. Sheridan, General Manager of Quirindi Shire Council to attend the hearing. The matter was adjourned to allow Mr. Sheridan to convey to the Council the submissions put forward at the hearing and for the Council to make any written submissions to me, before a decision was made.

In a written communication received on behalf of the Quirindi Shire Council, it was submitted that S.65 does not apply in this instance as the section “relates to what might be referred to “speciality” mining practices which would ordinarily be outside a Council’s competence to specify.”

The question to be determined is whether the condition which prohibits the use of Callaghan Lane at this point of time is a “special purpose condition”. The applicants are relying upon Schedule 1, Div 2 Cl 15 (a) as a special purpose condition, that is, “*the preparation of land for mining*”.

An immediate reaction as to what might constitute a condition concerning the preparation of land for mining would be a condition or conditions concerning pegging out, surveying, seismic testing, creation of exploratory bore holes, etc. These matters do not apply in this instance.

The word “mining” does not appear in the dictionary of the Mining Act, 1992. The Oxford dictionary defines “mining” as: *the action of mine*. “Mine” is defined in the Mining Act, both as a noun and a verb.

The Mining Act, 1992, defines "mine", to mean, when used as a verb:

"to extract material from land for the purpose of recovering minerals from the material so extracted or to rehabilitate land from which material has been so extracted;"

when used as a noun

"- any place, pit, shaft, drive, level or other excavation, drift, gutter, lead, vein, lode, reef or salt-pan (whether occurring naturally or artificially created) in, on or by means of which, any mining operation is carried on;"

In this instance though, "mining" is a gerund, a verbal noun. The grammatical function of the word "mining" in the phrase "preparation of land for mining" is that of a noun. Although, when looking at the phrase and the dictionary definitions in the Act, one wonders whether the draftsman intended "mining" to be used as a verb in that phrase?

There is no definition under the Act, of "preparation". The Oxford dictionary defines that word as: "the act of preparing" and "prepare" is defined as: "to get or make ready".

From those dictionary definitions, if "mining" is taken to be a verb, the phrase *the preparation of land for mining*, could be taken to mean, *making ready land to extract material therefrom for the purpose of recovering minerals from the material so extracted*. If "mining" is taken to be a noun, the phrase could be taken to mean, *making ready land as a place or excavation on which any mining operation is carried on*.

In the current mining operations, some mineral has already been extracted and removed from the property. It is true, as submitted by Mr. Singh, that the mineral is no good, so far as the mining company is concerned, unless it is removed from the land, and that the removal must be an integral part of the extraction of material from the land. However, at the point of time when this application was before the court, material/mineral had already been extracted from the land and one assumes that there is already a place, shaft, excavation etc on which a mining operation is carried on, on the mining lease.

Consequently, the "preparation of land" has already taken place, it is now past tense.

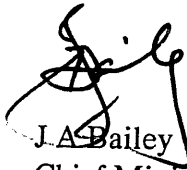
If the construction of a right of way is part of "the preparation of land for mining", it is only for that period of time when the land is being prepared. The right of way via Callaghan Lane was permitted in the early stages. It is now past that stage and the development condition, if it ever could be considered a special purpose condition, is certainly no longer a special purpose condition.

Section 65 of the Mining Act, 1992 does not apply to this application for a right of way into ML 1395. Consequently, the right of way must enter the property of the

Pollock's via Wallabadah Road, as that, having regard to the restriction placed upon the use of Callaghan's Lane in the development consent, is the nearest practicable point of a public road to the land subject to mining lease 1395.

As the parties were not in a position to canvass the question of compensation, that will be left open at this stage for agreement between the parties, with a right to bring the question of compensation back before the wardens court.

The instrument evidencing right of way will be forwarded to the parties concerned and a copy is attached to the file.



J.A. Bailey
Chief Mining Warden
21st February 1997