IN THE MINING WARDEN'S COURT
AT MUSWELLBROOK

J A BAILEY, CHIEF MINING WARDEN

TUESDAY 24 AUGUST 1999

CASE NO.	PARTIES
1998/26	COAL & ALLIED OPERATIONS PTY LTD and C F & G P BATES T J BLAKE G B & D M BUDDEN G G & P E BUDDEN L G J & M E DANIELS M J FARRELL R M & S D FARRELL C M FELL H J & J A GAMPER L G & J C HAMSON R & M LAWRENCE J A LONERGAN J S & N M LONERGAN Patrick LONERGAN K J O'KEEFE & P S FELLOWS D J PARTRIDGE G G PEARCE J & A RILEY ROSEBROOK PTY LTD G SCRIVEN K J & M A THOMPSON W & P WATTS
1998/27	COAL & ALLIED OPERATIONS PTY LTD and J O, V C & M N CASEY J REYNOLDS

DECISION ON PRELIMINARY POINT

INQUIRY UNDER THE PROVISIONS OF SECTION 334 OF THE MINING ACT 1992 IN RESPECT OF MLA 100

DECISION CONCERNING PRELIMINARY POINT

This is an Inquiry into objections by a mining company to claims made by 22 landowners in respect of MLA 100. The Inquiry has been set for hearing on the 16th and 17th September 1999. The mining company has raised a preliminary point in requesting the court to exclude some of the landowners on the basis that they failed to comply with the provisions of Clause 23A of Schedule 1 of the Mining Act 1992.

The mining company submitted that there were four broad categories in which these time contested claims fell. Firstly some claims as to valuable works or structures were not made within the required 28 days; the claims were made outside that time. It was indicated that the claim by W F & P J Watts and the claim of P J Lonergan fell within this category. The company also argued that the claim by O'Keefe and Fellows also falls into this category.

The second category was in respect to those claims that were made of a "generic" nature. Although such claims were made within the required time, it was only after the expiration of the 28 days that specific items were notified to the Director-General of the Department of Mineral Resources. The mining company claimed that T J Blake and possibly the land owned by O'Keefe and Fellows also falls into this category.

The third category nominated by the mining company is a claim as to some specific improvements made within the 28 day period, to which other specific items were added after the 28 day period. The mining company indicated that into this category falls J O, V C & M N Casey, together with D J Partridge, J A Lonergan and possibly the land owned by O'Keefe and Fellows.

The fourth and final category was the area where a "generic" claim was lodged, together with a claim to some specified improvements was made, on or before the 28 day period and further specific items were added after the 28 day period. Although

the mining company nominated this specific category, it indicated that none of the landowners fell into this area.

Clause 23A Schedule 1 of the Mining Act 1992 states:

(1) **An owner or occupier of land to which an invitation for tenders will relate, or over which a mining lease is sought, may make a claim to the Minister that something on the land is a valuable work or structure.**

(2) **A claim must be in writing and must be lodged with the Director-General on or before the date specified in the relevant notice under clause 21.**

(3) **On receipt of a claim made under this clause, the Director-General:**

  (a) **in the case of a claim relating to an invitation for tenders, must decide whether to accept the claim or to object to the claim, or**

  (b) **in the case of a claim relating to an application for a mining lease, must cause notice of the claim to be given to the applicant for the lease.**

(4) **An applicant for a mining lease to whom such a notice is given may object to the claim.**

(5) **An objection must be made in writing and lodged with the Director-General within 14 days after notice of the claim was given to the applicant.**

(6) **Anything identified in a claim as being a valuable work or structure is taken to be a valuable work or structure for the purposes of Section 62 unless it is declared not to be a valuable work or structure under clause 23B.**

Clause 21 of Schedule 1 of the Mining Act 1992 states inter alia:

(3) **An applicant for a mining lease to which this Division applies must (within 21 days after lodging the application or, in a case to which Section 383A (2) (b) applies, within 21 days after the expiration of the period referred to in that paragraph) cause notice of the application to be served on any owner or occupier of the land concerned.**

(4) **Such a notice:**

(a) must state that an application for the lease has been lodged, and

(b) must contain a description, prepared in the manner prescribed by the regulations, of the land over which the lease is sought, and

(c) must state that objections to the granting of the lease on the grounds that the land is agricultural land, and claims with respect to valuable works and structures on the land, may be made to the Minister within 28 days after the date on which the notice is served.

(5) A copy of every notice served in accordance with subclause (3) must be lodged with the Director-General within 21 days after the date on which the notice was served, together with a statutory declaration to the effect that each such notice was served and setting out the name and address of each owner or occupier on whom it was served.

JURISDICTION TO CONSIDER PRELIMINARY POINT

An issue was raised at to whether I have jurisdiction to consider whether claims should be struck out prior to the hearing of the Inquiry.

Submissions of the mining company were directed to the nature of the Inquiry that was being conducted and as to the power which I have to rule on this preliminary point. The mining company submitted that the Inquiry is judicial in nature. In support of that submission the mining company put to the court that this Inquiry would need to determine the meaning of clause 23A, to make findings as to the proper construction of Section 62 (1) (c).

Reference was also made to Section 336 which states:

> **Any Inquiry held by a warden is to be conducted in public and, in holding the inquiry, the warden has and may exercise the functions of a Warden's Court.**

At paragraph 13 of the written submissions of the mining company it is stated: "If an Inquiry was solely a fact finding exercise, there would be little point in giving the Inquiry all the functions of the Warden's Court."

Reliance was placed upon the matter of *Fencott v. Muller (1983) 152CLR 570* at 608, where the majority of the High Court remarked: "A judicial power which is not exercised to determine the whole of a controversy is, generally speaking, not appropriately and conveniently exercised."

Section 334 (2) of the Mining Act 1992 states:

> **If, by or under this Act, a warden is authorised or required to inquire into any matter, the warden may for that purpose hold an Inquiry into that matter and into *all reasonably incidental matters*** (emphasis added).

It was submitted that Section 334 (2) gives the warden an extended jurisdiction: "That extension is to anything reasonably incidental to the primary matter for Inquiry". The submission went on to say: "As already noted the primary matter for inquiry is the objection to a claim, and, depending on the ground for the objection, the factual characteristics of the claimed item, or, as here, whether the claim was validly made."

After making various submissions as to the meaning of the phrase "reasonably incidental matters" the submission on behalf of the mining company was ".... It is reasonably incidental to an Inquiry into an objection to a claim under clause 23A whether the claim was made in accordance with the requirements of that clause. This is even more clear where the grounds for objection include that the claim did not comply with the requirements."

The submissions on behalf of the landowners were simply that the Supreme Court in *Kayuga Coal Pty Limited v. Ducey & Ors,* which was a decision delivered on the 4th August 1999, stated at paragraph 5 of that Judgment: "It is common ground that the mining warden was exercising an administrative function of inquiring into and reporting on the nature of the improvements."

It is clear so far as I am concerned that an Inquiry of this particular nature is an administrative Inquiry. However in conducting such an administrative Inquiry it is my opinion that it is incumbent upon me to ensure that I act judicially. Clearly many of the matters that have to be determined in an Inquiry of this particular nature require an interpretation of a section or sections of the Mining Act 1992. It is impossible for a fact finding exercise to satisfactorily report to the Minister, as obliged to under the Act, without referring the facts that were found to the Act and interpreting various sections or clauses of the Act to the facts that were found.

It is not a new concept to say that I am performing an administrative function judicially. There are numerous decisions where judicial officers in conducting matters that were of an administrative nature are required to act judicially. There are a number of decisions in relation to committal proceedings which are conducted by magistrates under the Justices Act 1902. One of the more recent decisions was the matter of *Grassby v. R (1989) 168CLR 1* where it was held that whilst not required to make a judicial decision, a magistrate hearing committal proceedings is bound to act judicially in arriving at the result. In committal proceedings after making a determination as to the facts that have been placed before the Court, the Magistrate is obliged to make a determination as to whether or not those facts come within a certain category set out in Section 41 of the Justices Act 1902.

A similar situation exists when a Coroner conducts an Inquest or Inquiry. They are both administrative by nature, however, the Coroner whilst not being bound by the rules of evidence must act judicially not only in interpreting and applying provisions of the Coroners Act but also in applying common law principles such as natural justice.

It is not the role of a Mining Warden, when conducting an Inquiry under Section 334, to disregard any alleged non compliance with the Mining Act 1992.

Consequently, I do have the jurisdiction to determine the preliminary points being raised by the applicant for MLA 100.

CATEGORY ONE - CLAIM MADE OUTSIDE PRESCRIBED TIME

Clause 23A(2) states that a claim *must* be in writing and *must* be lodged on or before the specified date, in this instance 28 days after the landowner was notified by the applicant mining company.

The issue to be determined is whether the word *must* when used in that context is mandatory or directory. At first glance, the word *must* creates a mandatory provision rather than directory. However, in interpreting legislation, not only should the word itself be taken into account, but also the context in which it is used. In considering the meaning of *shall* and *must* as distinct from *may* courts over the years have often moved from the traditional meaning and in some instances have held that words such as *shall* and *must* are not mandatory but directory and the word *may* has been held to be mandatory and not directory.

The decisions are so varied, that the authors of the text *Statutory Interpretation in Australia by D C Pearce and R S Geddes* state at page 264 of the fourth edition:

> "The result of this has been to produce a multiplicity of irreconcilable decisions, making it impossible to assert with any certainty that a provision will be held either mandatory or directory in a particular context."

That text outlines a host of decisions where courts have held that the meaning of a word is contrary to what the word traditionally means. The majority of the decisions cited in that text, however, rule that the word *may* is mandatory, with the minority of cases ruling *shall* or *must* as being directory.

If great inconvenience follows strict construction, courts are inclined to interpret a provision as discretionary, even though it is couched in mandatory terms. *Simpson v. Attorney General [1955] NZLR 271.* In that case, if it was held to be in mandatory terms, it would have meant a great number of Acts of the parliament would have been nullified. The court held that although "shall" was used, it was directory, not mandatory. For to hold it as being mandatory would have caused extraordinary inconvenience and would have served no purpose.

A similar approach was taken in *Samuel Montagu & Co. Ltd v. Swiss Air Transport Co. Ltd [1966] 2QB 306* There, the inconvenience and injustice that would flow from an interpretation which adopted the provision as being mandatory was such that the court indicated the provision was directory only.

The only true guide to statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute: *Hatton v. Beaumont [1977] 2NSWLR 21.*

Submissions on behalf of the mining company were that the word *must* ought to be interpreted as mandatory in clause 23A(2). For if it were not, and landowners or occupiers were able to make claims outside the 28 day period, great delays would be occasioned by all. For instance, it was submitted that if the clause was not interpreted as mandatory, then a landowner/occupier could make a claim even after the completion of an inquiry into objections over claims made by other landowners earlier in time. This would then necessitate in another Inquiry being held. Naturally this would be an intolerable situation.

Decided cases have drawn a distinction between private rights and public rights. In considering the intent Parliament had in enacting a provision, not only should one consider the scope and object of the whole statute, but if a private right or privilege is involved, the provision should be constructed as mandatory and not directory: *Hunter Resources Limited v. Melville & Anor (1988) 77ALR 8.*

Submissions by the mining company were that in this instance, Clause 23A is concerned with the rights of a mining company and the rights of private landowners/occupiers. Consequently, the words in the clause should be constructed as mandatory not directory.

Another matter of some significance is Clause 21(5) of Schedule 1. The wording of this sub-clause can only mean that Parliament intended that the Director-General be made aware, within the specified time of 21 days, that the applicant for a mining lease

strictly complied with the obligations placed upon the applicant in the earlier subsections.

All of these matters are to be considered when determining whether the word *must* as it appears in Clause 23A of Schedule 1 of the Mining Act 1992 is mandatory or directory.

If the clause is interpreted as directory, mischief can be created. An unreasonable landowner could, by deliberately delaying the notification of a claim, create undue delays to an applicant. If the clause is mandatory, no injustice flows to the landowner; for the period of 28 days allows ample time for the landowner to make the claim.

It could never have been the intention of the Parliament to introduce a clause which assists a person or persons being mischievous.

The mining company submits that the insertion of the clauses into the Act in 1996 was "to bring some certainty to both applicants for leases and owner/occupiers, as to their respective rights and entitlements in the resource title process."

Submissions on behalf of the landowners/occupiers are that it matters not if claims are made out of date. The claim has been accepted by the Minister and the Minister has directed that an Inquiry be conducted and a declaration given as to whether or not the claims made are considered to be valuable works or structures.

As attractive as that submission may appear, the acceptance of a claim outside the time frame does not validate the claim, which in my opinion must be lodged within the mandatory period set out in Clause 23A.

It is my finding that a claim is not a claim under Clause 23A(6) unless it is lodged within the time specified in Clause 23A(2).

The claims by the applicant mining company were that the landowners Fellows and O'Keefe together with P J Lonergan and W & P Watts had filed their claims outside the 28 day period.

A letter to the Minister for Mineral Resources in respect of Kenneth John O'Keefe and Pamela May Fellows, who are both owners of the one property, was dated 3rd December 1997 and, according to the file, was faxed to the Department of Mineral Resources on that same day. That letter is certainly filed within the 28 day period. The letter refers to a number of matters; occupied home on the property, a proportion of the property being agricultural land, and "a number of improvements which are contended by the landowners to be both valuable and substantial in the context of the provisions of Section 62 of the Mining Act". I consider this letter to be a generic claim in respect of the Mining Act and I cannot accept that it was filed outside the 28 day period.

In respect of the properties concerning P J Lonergan and W & P Watts it is clear that there was a claim made, within the 28 day period, that their land was agricultural land. It was not until the 23rd March 1998 that Mr Lonergan and W & P Watts notified the Department of Mineral Resources that they were withdrawing their claim that their land was agricultural and it was at that point of time that they indicated that there were various improvements on the property. The file is noted that that letter was received on the 25th March 1998. This is a period which is well outside the 28 day period allowed, indeed it was about 16 weeks outside the 28 day period.

Clearly the notification by W & P Watts and P J Lonergan have been filed outside the 28 day period and accordingly cannot be considered to be a claim in accordance with Clause 23A Schedule 1 of the Mining Act 1992.

CATEGORY TWO - CLAIMS OF A "GENERIC" NATURE

The next area of contention between the mining company and the landowners/occupiers is the form which the claims must follow. Reference was made

to the wording of Clause 23A(1): "....may make a claim to the Minister *that something on the land is a valuable work or structure*" (emphasis added).

There have been some notifications which were referred to as "generic" and simply stated that the landowner had "something on the land which was a valuable work or structure".

Submissions on behalf of the landowners were that the lodgement of a "generic" claim was simply complying with the provisions of Clause 23A (1). Reference was made to Section 336 of the Act which indicates that when conducting an Inquiry a warden may exercise the functions of a warden's court. This was then linked with Section 306 which states that a warden's court may make any amendments to proceedings necessary to determine the real issues. Consequently, a warden may give appropriate directions at the Inquiry to ensure the "generic" claim is specified. It was further stressed on behalf of the landowners that nothing in Clause 23A requires the landowner to specify what "that something on the land" is.

It was submitted on behalf of the mining company that the court should infer that Clause 23A requires specification. Otherwise, it was said, a ludicrous situation exists where upon receipt of a "generic" claim the obligation is then on the Director-General to cause notice of that claim to be given to the applicant for the lease [Clause 23A (3) (b)]. Once that is done the applicant for the lease must then lodge any objection within fourteen (14) days. With generic claims the applicant would be lodging objections without knowing what it was objecting to. A ludicrous situation then exists as the matter is referred to a mining warden to inquire whether unspecified "something on the land" is a valuable work or structure.

What occurred in this instance, was that the Director-General wrote to the landowners/occupiers and requested them to specify their claims, allowing them a certain period in which to do so (this period being outside the original 28 day period for lodging claims). No doubt the Director-General adopted this approach to assist the mining company in determining whether objections should be lodged to the claims.

However, there is no express legislative support for those actions of the Director-General.

By way of example of the delay caused by this approach, the claim by C F & G P Bates was made on 17th November 1997 with a reply as to specification being made on 20 March 1998. Fellows & O'Keefe made a generic claim on 2 December 1997, with a reply as to specific claims on 18 March 1998.

The Director-General was adopting a common sense approach to ensure the legislation worked. However, the moot point is what would the Director-General do if the parties did not reply to the request for specification? It appears he would have no other power than that expressed in Clause 23A (3) (b), that is, refer the generic claim to the applicant; in other words, nothing would have been achieved except delay.

Submissions on behalf of the applicant mining company were that the court should infer from the wording of Clause 23A that the legislative intent is that items should be specified in any claim. Whereas a nicety such as that would be desirable, I cannot interpret from the general wording of the phrase "make a claim to the Minister that something on the land is a valuable work or structure" that a general claim made within the specified time would be invalid.

Consequently, the claims made by C F & G P Bates and P S Fellows & G J O'Keefe are valid claims under Clause 23A.

As the present wording of the Clause creates unnecessary delays I shall be making a recommendation to the Minister in due course to make an appropriate amendment to Clause 23A, Schedule 1, Mining Act 1992 so that it is clear all claims made are to be specified at the time of making the claim

With my ruling that a generic claim lodged within the appropriate time is a valid claim, there is no need to consider the other matter raised by Mr Ball, that is, any specification after the 28 day period of a generic claim ought to be rejected. The reason being that it would be impossible to conduct an Inquiry without specification.

CATEGORY THREE - LODGEMENT OF SPECIFIC CLAIMS WITHIN 28 DAYS - WITH FURTHER SPECIFIC CLAIMS LODGED AFTER 28 DAYS

In considering the third category which the mining company referred to, that is a claim being made as to specific improvements within 28 days to which other specific items were added after the 28 day period, I accept submissions on behalf of the landowners, that is to reject those specific items which were added after the 28 day period, would be a denial of natural justice. It would be an absurd interpretation of that clause to allow a generic claim to be made within 28 days and then to allow specification outside the 28 day period but to then disallow specification to be added to a claim outside the 28 day period if that landholder had made a specific claim within the 28 day period. This is another reason as to why attention should be given to amending the clause to ensure that such absurd situations do not exist.

CONCLUSION

All claims presently before the Inquiry are claims lodged pursuant to the provisions of Clause 23A, Schedule 1, Mining Act 1992 with the exception of the claim made by W F & P J Watts and the claim by P J Lonergan.