

**IN THE WARDENS COURT  
HELD AT KEMPSEY ON  
21ST AUGUST 1996  
BEFORE MR J A BAILEY,  
CHIEF MINING WARDEN**

**CASE NO. 1996/20**

**DECISION DELIVERED  
AT ST LEONARDS ON  
13TH SEPTEMBER 1996**

**APPLICATION BY RZM PTY LIMITED FOR RIGHT OF WAY UNDER  
SECTION 164 OF THE MINING ACT 1992 FOR ACCESS TO MINING  
LEASE 1392**

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This is an application for a right of way under the provisions of Section 164 of the Mining Act 1992. The Application is made by RZM Pty Limited and seeks a right of way into Mining Lease 1392 and such Right of Way is required to go through a portion of land which is known as the Clybucca Historic Site.

At the hearing at Kempsey Court on Wednesday 21st August 1996, there was an objection to the right of way through the historic site, by the Director General of the NSW National Parks and Wildlife Service.

Mr. Galasso, who appears on behalf of the Director General submits that the National Parks and Wildlife Act 1974 prohibits such a right of way through the Clybucca Historic Site. Mr Galasso tended to the Court various extracts of Government Gazettes which indicate, that the subject area is in fact an historic site under the provisions of the National Parks and Wildlife Act 1974. Mr Galasso submits that Section 41 of the National Parks and Wildlife Act 1974 puts a prohibition on any right of way to this historic site.

Section 41 is as follows:-

- (1) It is unlawful to prospect or mine for minerals in a national park or historic site, except as expressly authorised by an Act of Parliament.
- (2) The Mining Act 1992, the Petroleum Act 1955 and the Petroleum (Submerged Lands) Act 1982 do not apply to or in respect of lands within a national park or historic site.
- (3) This section does not apply to or in respect of existing interests, or the renewal or extension of the term of any such interest, as referred to in section 39.
- (4) The Minister may, subject to such terms and conditions as the Minister may determine from time to time, approve of prospecting for minerals being carried out on behalf of the Government in a national park or historic site by a person nominated by the Minister for Minerals and Energy.
- (5) Such an approval has no force unless, before the approval is granted, notice of intention to grant the approval is laid before both Houses of Parliament and:
  - (a) no notice of motion that the approval not be granted is given in either House of Parliament within 15 sitting days of that House after the notice of intention was laid before it, or
  - (b) if notice of such a motion is given, the motion is withdrawn, is defeated or lapses.
- (6) A certificate by the Minister to the effect that the requirements of this section have been complied with in respect of an approval specified in

the certificate is conclusive evidence of compliance with those requirements.

- (7) Except as provided by this section, nothing in this section affects the right, title or interest of any person in respect of minerals in any lands within a national park or historic site.

Mr Kelly who appeared as agent for RZM Pty Limited submitted to the Court that the company is entitled to a right of way to Mining Lease No. 1392 via "the nearest practicable point of a public road." He indicated that the company intended to use an old mining road which runs through the historic site and that it would be necessary to widen that to a small degree and the utilisation of this old road would mean in the long run the least amount of vegetation clearance.

Mr Kelly submitted that this historic site has been set aside but there has been no cultural or other relics that have been found within the area.

It is of no significance to this court as to why the site has been proclaimed a historic site, the fact is that it has been proclaimed such a site and consequently the reasons why, in my opinion, are of no significance whatsoever to my determination in this matter.

Mr Kelly submitted to the court that Section 41 refers to mining only and he says that there will be no mining in this historic site and it is merely an application for a right of way so that machinery can move through the site to the lease area.

The court must determine as to what is the real meaning of Section 41 of the National Parks and Wildlife Act 1974. In relation to statutory interpretation, there are many matters at which a court must look to determine the real meaning of any portion of an Act which is passed by Parliament.

The court may adopt a literal interpretation of the words in the Section; the court might look at the purpose of the Act which has been passed through Parliament and use that to determine the interpretation of the words in the Section; there are perhaps decisions from higher courts which will assist in the interpretation of a Section; the use of dictionaries are available to assist in the interpretation of certain words; there is also the assistance through the Interpretation Act which the court may utilise; and there are other factors which can be considered and which it is not necessary to outline at this point of time.

In *Amalgamated Society of Engineers -v- Adelaide Steamship Company Limited* (1920) 28CLR 129, Higgins J refined and explained what is known as the literal rule:

“the fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. ....when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.”

The interpretation of a statute however is not as simple as applying the literal rule. There may be circumstances when the meaning of certain words are unclear. Generally words and phrases are to be given their ordinary meaning unless a contrary is shown. It is the duty of the court to give words the construction “that produces the greatest harmony and the least inconsistency”: *Australian Alliance Assurance Company Limited -v- Attorney General (Queensland)* (1916) 51CLR 135 per Cooper CJ at 161.

Sub section 1 of Section 41 clearly indicates that there is to be no prospecting or mining for minerals in an historic site unless there is expressed authorisation by an Act of Parliament. Sub Section 2 of Section 41, taken literally, excludes the Mining Act 1992 from any application to any land within an historic site.

Mr Kelly made reference to the heading which appears at Section 41 of the Act, that is the word "mining". His submission was that the intention of Parliament was to exclude the provisions of the Mining Act 1992 only in so far as it applies to mining.

I see that word as a general word, looking at all aspects of mining, not just that aspect which is restricted to the extraction of minerals from the soil. I do not see that word as restricting all the sub sections to the act of the extraction of minerals only.

It is of some benefit to look at the purpose of the creation of an historic site under the National Parks and Wildlife Act, one would think primarily for the preservation of fauna and flora. For such preservation, it could be expected Section 41 should have its widest possible meaning.

However, if what Mr Galasso submits is correct, why then are certain activities under the Mining Act specifically allowed?

I am referring to the following:

\*S.41(4) of the National Parks and Wildlife Act - allowing the government to prospect an historic site (one would expect the purpose being to obtain geological information), but only with Parliamentary sanction.

\*S.252(6) of the Mining Act - the warden may grant a permit to enter land within a historic site for the purposes of conducting an environmental assessment. Such permit may only be granted with the concurrence of the Minister administering the National Parks and Wildlife Act, 1974.

Both of these activities would generally create a minimum of disturbance for a relatively short period of time. Both of these may only occur by Ministerial or Parliamentary sanction.

There is no provision in s.164 of the Mining Act, similar to that which appears in S.252(6) of that Act. If it was the intention of Parliament to allow a right of way through an Historic Site, an act which would normally create a greater disturbance for a greater length of time, than approvals which might be granted under Sections 41(4) of the National Parks and Wildlife Act and S.252 of the Mining Act, at the very least one would expect Ministerial or Parliamentary concurrence being required, and if that were so, it would naturally be expressed in either the Mining Act or the National Parks and Wildlife Act.

Reference was made to the decision in *Packham v. Minister for the Environment and Anor (1993)31NSWLR65*. A question now arises as to whether S.252 of the Mining Act can stand side by side with that decision. I think so - for any power of the Minister concerning an historic site can be exercised only for the purpose which promotes or is ancillary to the use and enjoyment of the land as an historic site and the granting of a permit for an environmental assessment could be critical to ensure that the integrity of the site is not interfered with by mining activities, which is intended to take place, say, adjacent to the site. On the other hand, *Packham's* case is an authority which could prohibit a Minister from approving a right of way through an historic site.

It is the opinion of this court that Section 41 of the National Parks and Wildlife Act 1974 excludes the Mining Act 1992 from having any application to an historic site, other than where expressly enacted.

Consequently, Section 164 of the Mining Act does not apply to this historic site. The court has no power to grant a right of way through the Clybucca Historic Site. Any right of way has to go through another route at this point of time.

As no alternate right of way was put to the court, the court is unable to rule on the route in which a right of way into ML 1392 may travel. It will be necessary for RZM Pty. Limited to consider an alternative right of way and the court may be reconvened at later date to consider such alternative right of way.