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IN THE MINING WARDEN'S COURT ON
TUESDAY, 5TH DECEMBER, 1978 - SYDNEY

SECTION 97(3) INQUIRY FOR PURPOSE
OF ASSESSMENT OF COMPENSATION

BENCH: As I indicated to you I have a prepared judgment here which I propose to read on to the record. The only thing is that the judgment itself is in rather draft form and it will be necessary for you to obtain a copy, if you require a copy from the Transcription Service through ~~the Mine~~ channels rather than directly from me this morning.

JOICE: Yes, Your Worship.

BENCH: This has been the hearing of an application by the Electricity Commission of N.S.W. under Section 97 (3) of the Coal Mining Act, 1975, for assessment of compensation. The lands the subject of the application are covered by Authorisation No.15 which has been granted by the Crown to the Commission in the Jerry's Plains district in the Hunter Valley and on a property known as "Plashett", which is owned by either Mr. William Reynolds, senior, or interests which are kindred to Mr. Reynolds.

Apart from a small area of land describing on it as area 'G' in Exhibit 4 the landowners are represented by Mr. Talbot, Solicitor, at the hearing while Mr. Joice appears as a Solicitor for the Electricity Commission of New South Wales.

The Commission in conjunction with the Joint Coal Board has proposed a programme of exploratory drilling for coal. It is proposed to sink at least fourteen bore holes and possibly up to twenty between depths of 100 to 300 metres at various points on "Plashett" as set out in the diagrams Exhibits 2 and 3. These holes would each have a diameter of about 11 centimetres. Dr. Richard Britton the district geologist with the Joint Coal Board described the intentions of his Board stating that it was proposed after the initial programme to put down a more detailed series of drill holes, but this depended on the result of the initial fourteen. One of the necessary features of drilling of the nature contemplated was the need to cart water to the site and it was proposed that some four water trucks operated by contractors would be used. Five or six drilling rigs would be operated and it was expected that there would normally be at work in each rig a total of two men in addition to the water carters. It was envisaged that the work would take around six months to finish.

BENCH:

Dr. Britton in the plans, Exhibits 2 and 3, set out the routes of access tracks some of which have been defined by established track to the extent of about 24 kilometres while a further 11 kilometres has yet to be established. Therefore, it was proposed that a total of about 35 kilometres or 22 miles of track would be needed within the property. In addition, around each drilling rig site it was proposed that an area of about 20 metres by 20 metres be used some of which area would be taken up in water service pits and pits for the containment of slurry.

Under cross-examination Dr. Britten said that there had been very little complaint received by him or the Joint Coal Board about the conduct of the contractors or drillers but made it plain that his opinion was that any complaint could be remedied and any damage done to the property could be either the subject of monetary recompense or immediate repair. He was able, he said, to give an undertaking as to restoration of the area, the obtaining of permission of persons entering or leaving, and if necessary, their identification to the land owner, the need for them to adhere to established tracks, the need to refrain from entering a property in extremely wet conditions, the need to ensure no weekend work, the need to ensure that no fire arms or dogs be taken onto the area, that the lighting of fires be prohibited and the depositing of refuse not take place.

For the respondents, Mr. Michael Thomas Coffey gave evidence as a man who had been experienced since around 1922 in dealing with companies who were mining or drilling on grazing or farming properties. Generally speaking Mr. Coffey expressed his opinion that a land owner was never fully recompensed in either money terms or in actual repairs for damage done to his property in relation to drillers or miners. He gave instances where trucks had broken down contour banks causing a recommencement of erosion, where vehicles had come in late at night disturbing a family including young children, where fences had been cut necessitating the loss of stock, where diesel fumes and slurry pits had exuded a repulsive odour. He said that in his view it would take around twelve months for any track to become usable again as grazing property once vehicles had been over it and even mentioned his experience of a single entry by a heavy vehicle over grass lands which had killed off the grass under the wheel tracks. He said there had been an unpleasant experience where he had been, he said that there had been an unpleasant experience which he had where four men had been working on a site where there had been no sanitation. He had had ewes and cows disturbed during

BENCH: (cont: 1.)

...lambing and calving by the

entry of trucks and had noted how cattle who had been previously hand fed during drought periods then subsequently followed any vehicle which came in, irrespective of whether it was carrying fodder or not, causing loss in weight of those cattle. When various questions were put to him as to the actual total of money that a land owner would lose when, for instance, an area of around 100 yards radius from a drilling rig was disturbed he was unable to put any money value on it. As to the damage done by tyres of heavy vehicles and the loss of land during the regrowing period of twelve months, which he had mentioned, here again he was unable to give any details of the cost although he did say that in a smaller paddock the cost would be expected to be greater than that in a larger area.

Mr. Coffey described how trucks when they go through gateways have their wheels concentrating on particular points causing depressions where water subsequently lies necessitating the land owner to carry gravel to restore the surface. He was unable, when asked by me, to give any accurate money cost to the land owner for this sort of activity.

When asked by Mr. Talbot about the cost factors involved in agistment he felt that this could be up to \$1-00 per head per week and that current rental values of land were around \$5-00 to \$6-00 per acre per annum.

Mr. Stanley Bowman, a grazier of Jerry's Plains gave evidence in similar vein to that of Mr. Coffey. His experience with persons conducting drilling operations commenced in 1954 and since then he has formed a strong opinion as to the reimbursement which a land owner receives from such operations. This opinion is, put quite bluntly by Mr. Bowman, that no compensation is entirely satisfactory. He listed a number of matters, namely erosion, flattening of clover, other grasses and crops, boxing of stock and disturbance to them, damage to tracks and fencing, the loss of usage of large areas of land, depositing of rubbish, the possibility of fire, the presence of dogs brought onto properties by workmen, and perhaps the matter of which Mr. Bowman made the most, that being the considerable inconvenience and nuisance that drillers and those associated with the operations were on a property, getting in the way and taking up valuable time in effecting repairs and supervision. On one occasion recently, his telephone line had been broken by drillers and he had to effect repairs to it, the driller paying him some \$20 for this work. Mr. Bowman pointed out that he had had to effect the

BENCH: (cont'd.)

... repairs himself to get his telephone back in operation, for to wait for repairs by Telecom would mean a delay of several days. Mr. Bowman felt that the sum of \$500 per borehole was a fair amount of compensation but agreed that this was an estimate only for which he could produce no mathematical support, but depending on the depth and how long in time the operation took. He added afterwards that there might well be some further factor which could not be taken into account and which could be not covered by the \$500 per drill hole.

The major landowner, Mr. Reynolds deposed that over 66 years he had been associated with the area. He agreed with all that Mr. Bowman had said, but added that the dust problem created by trucks had the potential of disturbing the feeding patterns of his stock which would not eat dust affected pasture. He also felt the need for supervision of the operators, stating that it must be done by the landowner or someone equally responsible, necessitating the consumption of considerable time and money. He complained also about boxing of stock, gates which were not fastened correctly, gateways which were spread, damage to gully crossings, and a point upon which he placed considerable emphasis, the likely damage to his extensive system of water piping. He said that if a break occurred of which the owner did not become aware for some hours, stock could be left without water creating an adverse effect upon their condition and sale value.

Although a major break in water pipes had not yet occurred, he lived in dread that it might happen with heavy trucks passing over the pipe which had been, by necessity, laid only to a shallow depth below the surface. He could not contemplate, he said, all the likely occurrences that might happen, instancing how he had found a battery which had come from a truck on his land which was potentially dangerous to stock but which had not been picked up by the drilling crew until he had requested.

Mr. Reynolds said that he would not be at court at all but would have signed an agreement with the Electricity Commission as he had done in 1974 and 1976, had he not wanted to get some fairness into the means by which compensations were assessed. He felt that the landowner should be recompensed on the basis of time that the drillers were on the land, not merely as to depth of the number of kilometres travelled within the property.

Mr. Lancelot Lee, a valuer and licensed Auctioneer Stock and Station Agent and Real Estate Agent, swore that he had inspected the property Blachett. Through this witness was tendered as Exhibit 7 a compensation agreement of which it was initially said it was over a similar property and in which the New South Wales

BENCH: (cont'd.) ... Department of Mines had agreed to the cost of \$30 per kilometre travelled, for particular bores, and the sum of \$25 per bore site in respect of a proposed survey or prospecting operation on another property called Yammanie, owned by Mr. and Mrs. Webber. Working on that basis, Mr. Lee arrived at figures which when applied to Plashett provided that there was - providing that there was one drilling rig on each bore site meant that a figure of 7.08 kilometres track distance in respect of each site could be arrived at resulting in a total of \$256 per bore per month, using the formula from the Yammanie property as a basis.

To this figure of \$256 Mr. Lee would add the sum of \$250 per week for wages for a man for supervision, implying that it was entirely the work of one man every day of the week to supervise the drilling crews' activities. In cross-examination it became plain that while Yammanie and Plashett were put forward as comparable properties, they were in fact far from that. Yammanie is a much smaller property than Plashett, no depth of boreholes was known to Mr. Lee, the properties were in quite different locations and the work on Yammanie was to be done over merely one month as against a longer period contemplated for Plashett.

Mr. Lee further agreed in cross-examination that he had never before done a study for the purposes of assessing compensation for drilling operations of the sort envisaged. Mr. Lee offered an alternative basis, this being to equate the possible compensation to a rental value of the property. Putting that at \$6 per acre reduced it to a lesser figure by some \$2.50 per acre, by reason of the operations, and applying the 11,500 acres of Plashett to the \$2.50 loss, Mr. Lee arrived at a figure of \$28,700 per annum, which when reduced to a weekly basis came to \$552.83 per week. On top of that Mr. Lee would have also added the \$250 for a man's wages for the supervision, to which I have previously referred.

In reply Mr. Joyce called Mr. William Griffin, who is the supervising valuer within the Commission. He has had considerable experience in negotiating agreements as to compensation with landowners, and was mindful to reject the time basis formula put forward by Mr. Reynolds and some, but not all of the basis for assessment upon which Mr. Lee had arrived at his figures. He produced some figures which refuted Mr. Lee's rental loss value at \$2.50 per acre, and although cross-examination suggested that his own figures may have been incorrect, he adhered to his opinion to disagree with Mr. Lee. He spoke of the difficulty in assessing compensation prospectively and while agreeing that the time basis was possible, as suggested by Mr. Reynolds, considered that it should not apply to cost per bore or value per kilometre. Although

BENCH: (cont'd.)

... agreeing with Mr. Lee's evidence in part, he felt that when bore sites are close to each other the Yammanie formula could not be satisfactorily applied. He highlighted the fact that while supervision was necessary, one man's work was not needed every day of the week and pointed to the differences in size and topography, some properties being easier than others to supervise.

On the other hand he said much depended upon whether the landowner could make use of access tracks once they were put down, and often the larger property owner was more affected than that of the smaller property owner because of the increased management costs and other factors.

On the subject of supervision, I feel bound to say that I am unable to accept the evidence of Mr. Lee that the sum of \$250 per week would be a necessary cost to the landowner for this activity to be done adequately. The landowner is entitled to supervise operations and therefore needs recompense for that, but in my view \$250 per week is excessive, as I could not entertain for one moment that a man would be actually employed in supervision on a full time basis of the operation of the kind contemplated by the Commission on Plashett at this time.

On the other hand as to time being a factor, I must agree that it is a necessary part of any fair calculation of figures on compensation. Surely the landowner whose use and occupation is being disturbed and inconvenienced or this is likely to happen over a period of weeks or months is entitled to compensation for as long as that disturbance and inconvenience lasts, irrespective of the number of kilometres travelled and the number of bore sites.

Referring to the other bases submitted by Mr. Lee, I do not think, with respect to him, that his contentions are as the Act would require me to access compensation. Each property is different, and while it is traditional that the principle of comparability is a necessary and important ingredient in any valuation or assessment study, each particular case has individual features which differ it from the rest. For this reason, for the purposes of this exercise, rental value is not taken account of, and I delete from consideration the figures used in the formula in relation to Yammanie.

Section 98 of the Act sets out the various criteria under which a Warden must work to come to some assessment of compensation. He must do his assessment irrespective of the amount of evidence that he has before him in respect of the "loss caused or likely to be caused" and notwithstanding the fact that an

BENCH: (cont'd.)

... accurate figure is well nigh impossible as the future cannot be foretold. Perhaps this is why it is called an "assessment" of compensation. It follows that I must work on the basis of Section 98 and not the market value, although the market value for purposes other than mining is relevant in view of Section 98(1)(d), compensation cannot exceed this figure. I might add that Mr. Griffin expressed an extempore value of Plashett at something in excess of \$3 million.

I have had evidence about many matters all of which can be said to come under Section 98(1)(b), many being able to be classified specifically under one particular head, for example, destruction or loss of, or injury to, or disturbance of, or interference with, stock on land, while others for example, inconvenience and loss of time performing supervisory work, could not be classified specifically and would have to come under "all consequential damage."

As I have already observed the witnesses expressed a reluctance to state a particular value for compensation purposes on matters either particular or in general, and even Mr. Bowman could not mathematically justify his figures of \$500 per drill hole.

I could not help being impressed with the evidence of Mr. Griffin, nor could I disagree with his contention that a valuation exercise (and I include compensation exercise) which was performed on a purely mathematical basis is generally unacceptable. However the Act implies otherwise and I am bound to attempt assessment of compensation for the future as well as for the past. I think therefore that a formula is the best possible answer.

Generally I accept the evidence of the witnesses, especially Mr. Reynolds as to damage and loss, or likely damage and loss. I think for instance that his claim for dust on pasture grasses is one based on experience and common sense, it being an accepted fact that in grazing, stock will look for sweeter grasses which are unaffected by dust. On the other hand his concern for the water pipes being possibly breached might well not be as real as he fears, bearing in mind that a pin-point search would not deprive the stock of water completely. Nevertheless it would have to be found and repaired, and that would take time, and cost money.

In all the circumstances I am of the view that there should be an assessment of compensation on four bases: (1) cost per kilometre travelled by vehicles; (2) cost per bore site; (3) cost of supervision; and (4) the time factor, that is the

BENCH: (cont'd.) ... time in weeks from the commencement to the end of drilling operations.

As to (1) kilometres travelled, rather than work on track distance, that is track per hole, I think the only accurate way is to say that there will be a charge of compensation of so much per kilometre actually travelled per vehicle. Bearing in mind that apart from water trucks, there will be the likely entry upon the property of service, personnel carrying and other types of vehicles, it will be necessary for a log to be kept of kilometres travelled, and that should represent an accurate reflection of how much entry actually takes place. Taking into account the damage to the surface, to tracks, crops and grasses, the likelihood of erosion, the loss of fencing and damage to gates and gateways, the loss of usage by the owner, the loss of weight in stock and the other factors about which Mr. Reynolds, Mr. Bowman and Mr. Coffey complained, I am of the view that the sum of 9 cents per kilometre travelled by each vehicle, whether water truck or otherwise within the property, is equitable. In view of the possible difficulty of calculation once time has been permitted to pass, it is my view that a log having been kept on a daily basis in respect of each vehicle, that periodic payments should be made weekly.

In relation to bore sites, there is some dispute as to how much land ^{is used} or fouled, but in my opinion it is fair to say that Doctor Britten's estimation of 20 metres by 20 metres which after all is around 65 feet by 65 feet is a reasonable one. In the circumstances I am of the view that the sum of \$12 per week for each operative bore site during that week or part thereof is appropriate. This again can be payable weekly.

Supervision and the need for it has already been discussed. I think that it is a major factor but the need for supervision is that it be constant, but not necessarily full time. Rather than attempt to say that so many days per week would be required to supervise, I would place upon it a straight out monetary figure per week by way of assessment, and this weekly figure I arrive at is \$100, taking into account also that the owner may see the need to make his own independent check as occasion presents itself of kilometres travelled by vehicles.

As I have said time ought to be a factor, coming as it does in my view in an indirect way under "all consequential damage" in Section 93(1)(b)(vi). As it is not precisely known how long the drilling project will take, due to the imponderables of weather, labour and other features, there will be built into the formula, the sum of \$20 per week for as long as the owner's land is likely to be entered by the persons in connection with the

BENCH: (cont'd.)

... authorisation while drilling takes place.

The formula will therefore be, $b(a + 100 + 12x) + .09z$. In that formula a is the time factor in this case \$20; b is the number of weeks; the \$100 represents the supervision factor; x is the number of operative bore sites during the particular week or part thereof; and z is the total kilometres travelled. An example is that if three bore sites are worked during a particular week and a total of 200 kilometres are travelled within the property by all vehicles for that week, then the compensation payable would be as follows:

$$\begin{aligned}
 & 1(20 + 100 + 12 \times 3) + .09 \text{ (cents)} \times 200 \\
 & = 120 + 36 + 18 \\
 & = \$174 \text{ per week.}
 \end{aligned}$$

There are particular matters to be the subject of payment, for example two gates need to be replaced and a fair figure for these would be \$140 each. Additionally there was evidence of particular problems such as gully crossings, and while I made an attempt to come to some common ground upon which the parties could agree as to what was to be done with the crossings, this did not occur. It presents itself as an engineering difficulty, which perhaps may be solved by the deposit by the Commission of some river gravel or blue metal on the steep banks to avoid gouging, rather than concreting. I decline to make an assessment of this matter as to the crossings at the present time, but it might well be something that could come under Section 100 at a later stage, once any damage can be actually seen. However, as to the gates, if the Commission does not replace the two gates, I direct that the payment of \$280 be made to Mr. Reynolds within 14 days of commencement of operations.

Two other problems or possible difficulties about which mention has been made and of which I have made some practical suggestion to attempt to solve or alleviate are possible damage to water pipes and the ever existence of the likelihood of bush fires, both emanating from the entry of trucks. No solution was reached. In the circumstances then, as in the case of the creek crossings, Section 100 may have to be relied upon at a later stage should any particular damage occur.

Mr. Joice a copy of the judgment will be made available if you want as soon as it can be transcribed.

Now are there any questions at all?

JOICE: No Your Worship, I think I've got all the formula down there.

BENCH: Mr. Talbot did approach me informally about costs. I indicated to him, I think in your presence, that I had adopted the practice in the past of directing the parties pay their own costs. Do you want to put anything to me on that particular subject?

JOICE: Your Worship, I don't wish to make any application for costs myself. I don't particularly wish to stop Mr. Talbot applying for costs if he wishes himself, so I make no application and leave it at that.

BENCH: Yes, in the circumstances I am of the view that the normal practice should apply here and there will be an order that parties pay their own costs.

Yes I'll take the adjournment thank you.

TYPED FROM MR. McMAHON'S NOTES - NOT RECORDED.

BENCH: The payment of \$280 is to be made direct to Mr. Reynolds. The amount of the formula based compensation for the first week to be paid direct to Mr. Reynolds at the conclusion of operations for that week and thereafter compensation calculated on the formula may be paid weekly direct to the landowner as the weeks expire, or at such other more convenient intervals as both the authorisation holder and Mr. Reynolds agree.