

**IN THE WARDEN'S COURT
AT SYDNEY IN THE STATE OF
NEW SOUTH WALES
25 SEPTEMBER, 2007
J A BAILEY, CHIEF MINING WARDEN**



2007/48

THE MINING ACT 1992

SECTION 164

**INQUIRY AS TO RIGHT OF WAY – EL 396 – CONCERNING
PRESQUARTZ (The Landholder) AND ENDEAVOUR COAL (The Mining
Company)**

APPEARANCES AT CAMDEN ON 22 AND 23 AUGUST, 2007.

Mr P. Holland, Solicitor of Minter Ellison, appears for the Mining Company.
Mr A. Abbott appears as agent for the Landholder.

DECISION HANDED DOWN IN THE ABSENCE OF PARTIES.

DECISION:

Following a review of an Arbitrator's determination in respect of EL 396 and the property wherein the landholder is Presquartz Pty. Ltd, it became necessary to conduct an inquiry under the provisions of 164 of the Mining Act 1992 as to a Right of Way into the exploration area.

This inquiry is proceeding by way of written submissions from the parties. The submission from the landholder takes a preliminary point whereas it challenges the jurisdiction of this particular matter. The issue may be summarised by the commencement of paragraph 1.4 of the submissions filed on behalf of the landholder. It commences "the Warden has no power to determine a 'purported application for a Right of Way'." With the greatest respect to the landholder, it misconceives what is being dealt with at the moment. It appears to be under the impression that because a mining company has headed its submission "Application for a Right of Way ...", that the court has no jurisdiction.

Section 164 of The Mining Act provides:

Mining Act 1992 No 29

164 Rights of way

- (1) The holder of an authority is entitled to a right of way (to be indicated or described in the manner prescribed by the regulations) between the land subject to the authority and a public road.**
- (2) The route of a right of way should, wherever practicable, follow the route of existing roads or tracks (particularly, in the case of land in the Western Division, those the subject of special easements under section 35S of the Western Lands Act 1901).**
- (3) The holder of the authority:**
 - (a) must ensure that substantial gates or grids (or, if the landholder of the land so requires, gates and grids) are placed wherever fences are intersected by the right of way, or**
 - (b) if those fences are rabbit-proof, marsupial-proof or dog-proof fences, must ensure that rabbit-proof, marsupial-proof or dog-proof gates are placed at all such intersections.**
- (4) Any such gate or grid must be of a design and construction that is adequate to prevent stock from straying.**

- (5) The costs of installing and maintaining any gates or grids required by this section are to be borne by the holder of the authority.**
 - (6) A right of way is subject to such conditions as to its exercise, and to such exceptions as to the land over which it may be exercised, as may be prescribed by the regulations or as may be imposed by a warden pursuant to an inquiry under subsection (7).**
 - (7) A warden may hold an inquiry into any matter arising under, or in connection with, a right of way conferred by this section.**
 - (8) Such an inquiry may be held on the warden's own motion or on the application of any landholder affected by, or the holder of any authority entitled to, the right of way.**
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Before I move to sub-sections 7 & 8, which is the basis upon which the preliminary issue is taken by the landholder, it is necessary to look at the genesis of this inquiry. When the court was conducting a review of an Arbitrator's Access Determination, an issue arose as to the need for the mining company to have a Right of Way into the exploration area. Following discussions in court, I announced that on my own motion, I propose to conduct an inquiry under the provisions of 164 (8). I then gave directions that the matter would proceed further by way of written statements. The issue here which is in dispute is as to what point upon the landholder's land, may the mining company enter into the exploration area. That is what I am inquiring into at the moment. The fact that the mining company has headed its submission: "Application for Right of Way ..." takes the matter nowhere insofar as the preliminary issue which has been raised by the landholder.

Accordingly, this court does have power to determine the issue which is in dispute at the moment.

The landholder objects to access via Leaf's Gully Road on the basis of its interpretation of both Section 164 and Section 31 of The Mining Act 1992. In relation to the suggested access route via the north from Appin Road, the landholder objects to that access route relying upon Clause 24(4) of the Mining Regulation 2003. It further relies upon its opinion that any access road from the north would require a Development Consent and the company landholder would not be prepared to consent to a development application. Consequently, this Warden's Court should not allow access via Appin Road. The landholder, in its final submissions makes reference to

compensation. It would appear in reading those submissions that the landholder is making reference to compensation insofar as the review of the Arbitrator's Access Determination was concerned, it doesn't appear to be addressing any compensation in respect of a Right of Way.

The mining company's submission is that the landholder's literal interpretation of Section 164 should not be adopted. It goes on to say that if the literal construction of that section is adopted, it would lead to irrational and unjust consequences. It referred to decisions of the High Court which have held that if words of a statute are ambiguous or uncertain, it is proper to adopt a meaning which will avoid irrational and unjust consequences and will promote the purposes of the statute.

The mining company also challenges the submissions of the landholder as to a requirement to obtain development consent if a Right of Way is granted through the northern end of the land. It also challenges the submissions of the landholder as to its interpretation of clause 24 of Mining Regulation 2003.

It is necessary at this point of time to set out other important sections and clauses which are applicable to this matter. They are Sections 31 and 381 of The Mining Act 1992 and Clause 24 of the Mining Regulation 2003;

Mining Act 1992 No 29

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 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).

- (2) The prescribed distance is:
 - (a) 200 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1) (a), and
 - (b) 50 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1) (b).
- (3) A written consent given under this section is irrevocable.
- (4) Any dispute as to whether or not subsection (1) applies in any particular case is to be referred to a warden for inquiry and report and is to be decided by the Minister on the basis of the warden's report

381 Prospecting unaffected by epis

- (1) If a person is authorised under this Act to prospect on any land:
 - a) nothing in, or done under, an environmental planning instrument operates so as to prevent the person from carrying on prospecting operations on that land, and
 - b) to the extent to which anything in, or done under, any such instrument would so operate, it is of no effect in relation to the person.
- (2) A reference in this section to an environmental planning instrument does not include a reference to a State environmental planning policy made on or after the commencement of this subsection.

Mining Regulation 2003

24 Rights of way

- (1) For the purposes of section 164 (1) of the Act, a right of way to which the holder of an authority is entitled under that section is to be marked out with:
 - a) steel star pickets, or
 - b) other posts having a diameter of at least 75 millimetres,
 - c) along the route of the right of way.
- (2) The pickets or posts are to be fixed into the ground:

- a) at intervals of not more than 150 metres, and
 - b) at each point where the route of the right of way changes direction,
 - c) and must project at least one metre above the ground.
- (2A) Alternatively, a right of way may be marked out with steel star pickets fixed into the ground, and projecting at least one metre above the ground:
- a. in the case of a right of way which follows the route of an existing road or track:
 - i. at the start and finish of the right of way, and
 - ii. at the midpoint of the right of way, or
 - b. in the case of a right of way which does not follow the route of an existing road or track:
 - i. at the start and finish of the right of way, and
 - ii. at intervals of not more than 500 metres and at each point where the route of the right of way changes direction.
- (2B) A star picket referred to in subclause (2A) must bear a tag showing:
- a) the co-ordinates of the picket's position, and
 - b) the serial number of the authority, and
 - c) the name of the holder of the authority.
- (2C) For the purposes of subclause (2B) (a), it is sufficient for the co-ordinates of a picket to be established by means of a Global Positioning System device.
- (2D) If a right of way is marked out in accordance with subclause (2A), the holder of the authority must prepare a map of the right of way and cause copies of the map to be given to the mining registrar and to each landholder affected by the right of way.
- (2E) A map referred to in subclause (2D) must describe the route of the right of way (which must be no more than 10 metres wide) and must indicate the co-ordinates of the position of each picket that bears a tag referred to in subclause (2B).
- (3) The holder of the authority who is entitled to the right of way must ensure that any such picket or post is properly maintained.

Maximum penalty: 20 penalty units.

- (4) For the purposes of section 164 (6) of the Act, the exercise of a right of way conferred by that section is subject to the following conditions:
- a) the holder of the authority who is entitled to the right of way is to pay to the landholder such amount, by way of compensation, as is agreed in writing by the holder of the authority and the landholder (or, in default of agreement, as is assessed by a warden at the request of the holder of the authority or the landholder),
 - b) if the right of way passes over:
 - i. any garden, orchard or land under cultivation, or
 - ii. (ii) any land 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, being land that was, when the right of way was marked out, land of that nature,

the holder of the authority who is entitled to the right of way is not to exercise the right of way otherwise than in accordance with the consent of the landholder.

- (5) The amount agreed or assessed for the purposes of subclause (4)
(a) may be a fixed amount or an amount calculated at a fixed rate.**

In *Grey v Pearson (1857) 10ER1216 at 1234*, Lord Wensleydale placed a limitation on the literal approach to the interpretation of statutes. He said: "... the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity or inconsistency but no further." Those words of Lord Wensleydale's have been quoted with approval in more recent years in Australian courts.

Lord Simon of Glaisdal, in the matter of *Black-Clawson International Limited vs. Papierwerke Waldhof-Aschaffenburg AG (1975) AC 591 at 645*, said: "... it may become apparent that the primary and natural meaning cannot be what Parliament intended; it produces injustice, absurdity, anomaly and contradiction, or it stultifies or runs counter to the statutory objections."

Furthermore, this principle has been given statutory support.

Section 33 of the (NSW) Interpretation Act 1987 provides:

Interpretation Act 1987 No 15

33 Regard to be had to purposes or objects of Acts and statutory rules

In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

The purpose of the Mining Act 1992 is: “to make provision with respect to prospecting for and mining minerals.” The granting of an Authority, a Mining Lease or, in this case, an Exploration Licence, gives the holder the right to enter land which is generally not owned and/or occupied by the holder, to either explore for minerals or, alternatively, to extract minerals from that land. Generally a landowner/occupier of land has the right to the quiet enjoyment of that land and to utilise it for whatever (legal) purpose the owner and/or occupier desires, without any interruption from any other parties. The Mining Act clearly interferes with that right. However, built into the Act are various provisions which make it quite clear that any mining done upon another landholder’s property is to be done in harmony with the rights of the landholder. Notwithstanding that, Authorities are issued not only without the consent of the landholder but very often over objections of the landholder.

The granting of an Exploration Licence is done without any consultation with the landholder. Once that Exploration Licence is issued, it is quite clear from Section 164 of The Mining Act 1992 (this is agreed upon by Presquartz Pty. Ltd) that the holder of that Exploration Licence is entitled to a Right of Way into that piece of land which is subject to the Exploration Licence. That is a statutory entitlement to the holder of the Exploration Licence. The Act and Regulations make provisions as to certain obligations which are placed upon the holder.

If one looks at the submissions of Presquartz Pty. Ltd in relation to this matter, the landholder is clearly saying that on the interpretation of the relevant sections of The Act, so far as it is concerned, the mining company has no right to enter the land from the southern end through Leaf Gully Road. Furthermore, because the Landholder company is not consenting to certain matters, the mining company has no right to enter through the northern end and Appin Road. Consequently, if the submissions of Presquartz Pty. Ltd are accepted, it is quite clear that it is impossible for the mining company to exercise its entitlement to a Right of Way in respect of EL 396 and effectively nullifies its right to conduct exploration activities.

Presquartz Pty. Ltd takes issue with Section 164 (1), in particular the part which says that “a Right of Way between the land subject to the Authority and a public road.” Its submission is that Leaf Gully Road is within the area which is subject to EL 396 and

that there is no land which is “between” Leaf’s Gully Road and Presquartz’ property which is not within EL396 and consequently, they are not entitled to a Right of Way through that area.

The entry via Leaf’s Gully Road is the most convenient to the mining company and it would appear to create a great deal less disturbance to the landholder than if the entry to EL396 was from the northern end, via Appin Road. One would expect that the intention of the Mining Act 1992 in relation to exploration and mining is that it should be done with the least amount of impact upon the landholder subject to the authority, to surrounding landholders and to the land itself. Entry via the southern end achieves this objective more so than entry via the northern end.

The question which I pose is: What is the meaning of the phrase *the land subject to the authority* as it appears in s.164(1)? Although the plan of the area subject to EL 396 was not tendered in the Inquiry into the Right of Way, I am aware, that it is an area in excess of 72 square kms. This would encompass scores of individual lots of land.

The right of way that the court is now determining is the right of way into the Presquartz land, not into the property of other landholders. Consequently, *the land subject to the authority* can only be in this instance, if the Section is to be interpreted to convey the spirit and intention of the Mining Act 1992, that land which belongs to Presquartz, ie Lot 1 DP 58067, within the confines of the area subject to EL396.

That being so, to customise Section 164(1), it could read:

Endeavour Coal Ltd (*the holder of an authority*) is entitled to a right of way (to be indicated or described in the manner prescribed by the regulations) between Lot 1, DP 58067 (*the land subject to the authority*) and Leaf’s Gully Road (*a public road*).

If Parliament intended S.164 to have the meaning which the landholder proffered, then, as submitted on behalf of the mining company, ...*it would lead to the irrational and unjust situation where the holder of an authority would have to apply to have parts of their authorities relinquished in order to be able to rely on a right of way*

conferred by section 164 of the Mining Act. I cannot accept that Parliament intended that such a situation may have to occur before the holder of an Authority may exercise its rights.

Consequently, having regard to the matters placed before the Court, I find that the mining company has a right to enter the property of Presquartz Pty. Ltd via Leaf's Gully Road. Annexure "A" of the submissions of the mining company show the Right of Way which they have indicated, that is a way which appears to impose the least amount of disturbance to the landholders property and consequently I find that that particular Right of Way should be used.

That being so, there is no need to consider the submissions in respect of the Right of Way from the northern end of the subject property, other than to comment that the dispute as to whether development consent would be required for a Right of Way from that point or whether the holder is "protected" by s.381 of The Mining Act. This would be of no concern to a Warden's Court when determining the issue of the Right of Way.

I now refer to the submission concerning Section 31 of The Mining Act 1992. There can be no dispute that it has been held that a fence in general is a valuable improvement. It is clear that Section 31 says that the holder of an Exploration Licence may not exercise any rights over the surface of the land upon which is a valuable work or structure without the written consent of the landholder or occupant. However, if one looks at the provisions of Section 164 of The Mining Act 1992, it expressly gives permission to intersect fences in relation to Rights of Way and place gates or grids in their places. Obviously, there is a conflict in relation to Section 31 and Section 164 of The Act. If one looks at the matter of *Goodwin v Phillips (1908) 7 CL 1 at 14*, O'Connor J said: "Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, insofar as it is inconsistent with the special provision, must be deemed not to apply". This approach is usually summarised in the *maxim generalia specialibus non derogant*. Before a Court can adopt the *generalia specialibus* approach, it is necessary that there be a irreconcilable conflict between the two

sections. The Court would have to be satisfied that the two sections 31 and 164 could not possibly stand together. It is quite clear that those two sections do not stand together.

Consequently, I find that Section 164 of The Mining Act 1992, overrides Section 31 of The Act. Therefore, the mining company is able to construct a gateway or grid in place of the fence to gain entry to the southern portion of the subject land.

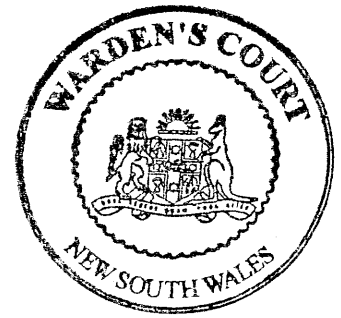
Another issue raised by the landholder is the provision of Clause 24 of the Mining Regulation 2003, in particular sub-section 4 which provides that any Right of Way passing over an improvement requires the consent of the landholder. Clearly, Presquartz is not going to consent, consequently, it is submitted that the mining company would not be able to exercise its right in proceeding through the fence line. The mining company in response to that submission, highlights the provision of Section 164(6). I agree with the reasoning of the mining company that the provisions of the Regulations apply only to those matters where there is an agreement as to the passage of the Right of Way and that sub-section (6) clearly places upon a Warden, the right to impose conditions if there is an Inquiry held under sub-section 7.

There is a further authority for rejecting this submission of the landowner in respect to Regulation 24, that is the rule that if there is a conflict between an act of Parliament and a Regulation and that conflict is irreconcilable, then the Regulations must give way to the Act. Authorities for that is *Foster v Aloni (1951) VLR 481*, *Institute of Patent Agents v Lockwood (1894) AC 347*.

Finally, I turn to the aspect of compensation which is provided for in Clause 24(4)(a) of Mining Regulation 2003. The landholder makes reference in its submission to “the development potential of the land has been given in evidence by a Director of Presquartz at \$150 million and has not been contested by the mining company”. Although the submission makes reference to the amount offered by the mining company to the Arbitrator and the eventual award by the Arbitrator, that is in relation to the compensable loss concerning the access arrangement in respect of EL 396; it is not a reference to the compensable loss which is likely to be occasioned as a result of the Right of Way.

In effect, nothing has been put to me by either party as to a sum of money which would be a relevant amount for the compensable loss in respect to the Right of Way of the mining company in entering the landholder's property through Leaf's Gully Road. It would appear that the only interference to the property would be replacement of a gate where a fence area presently exists. Provision will be made for that fence area to be replaced once again upon completion of the exploration. That being so, it would appear that there would be no compensatory loss in respect of the Right of Way. However, if I am incorrect in respect of that and there is a compensatory loss, the parties have a right to agree to a sum of compensation or, alternatively, to bring a further action before the Court in respect of that compensatory loss.

So, in summary, I find that the mining company is entitled to a Right of Way into the property of Presquartz Pty. Ltd which is subject to EL 396, via Leaf's Gully Road and, in accordance with the "Instrument Evidencing Right of Way" attached.



MINING ACT 1992

SECTION 164

INSTRUMENT EVIDENCING RIGHT OF WAY

2007/48

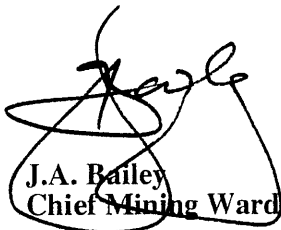
I, John Anthony Bailey, Chief Mining Warden for the State of New South Wales, hereby certify that Endeavour Coal Pty. Ltd (herein called the holder, reference to whom shall include its transferees, agents, employees and nominees) is entitled to a Right of Way over the land set out in the attached Plan relevant to Exploration Licence No. 396 (The Mining Act 1992).

Such Right of Way is subject to the following conditions:-

1. The holder shall have access to the area of the said lease as herein defined and limited.
2. All proper precautions are to be taken by the holder so as not unreasonably to interfere with the environment.
3. The holder or any person claiming a legal or equitable interest in the land subject of the Right of Way has the right to apply to the Chief Mining Warden for additional conditions to, or variations or suspension of, the conditions of the Right of Way, or for cancellation of it.
4. The Chief Mining Warden may at his discretion add conditions, vary the conditions herein or cancel any part or the whole of the Right of Way or the conditions thereof.
5. The holder is not to suffer to be done, or to do, anything which would lead to an introduction of noxious weeds and noxious animals onto the Right of Way and shall take all necessary steps to eradicate such things should any be introduced by reason of the Right of Way.
6. The holder shall not take onto the Right of Way any dog, nor light any fires nor shall any gates or fences be interfered with unless as herein permitted.
7. The holder shall install such gates and cattle grids and provide locks and keys in such positions to ensure as far as possible security and satisfactory movement along the Right of Way.
8. The holder shall install such drainage facilities, culverts and pipes as are necessary to ensure as far as possible adequate movement of water and minimum interference with the surface of the Right of Way.
9. The Right of Way shall be via Leaf's Gully Road, as shown in attached diagram (Annexure "A"), numbered X-333b, Version 4. The entry point on Leaf's Gully Road shall be subject to road safety and meet the approval of the Roads and Traffic Authority.
10. Upon the holder ceasing to use the Right of Way the holder shall rehabilitate it to the condition it was in prior to the creation of the Right of Way.

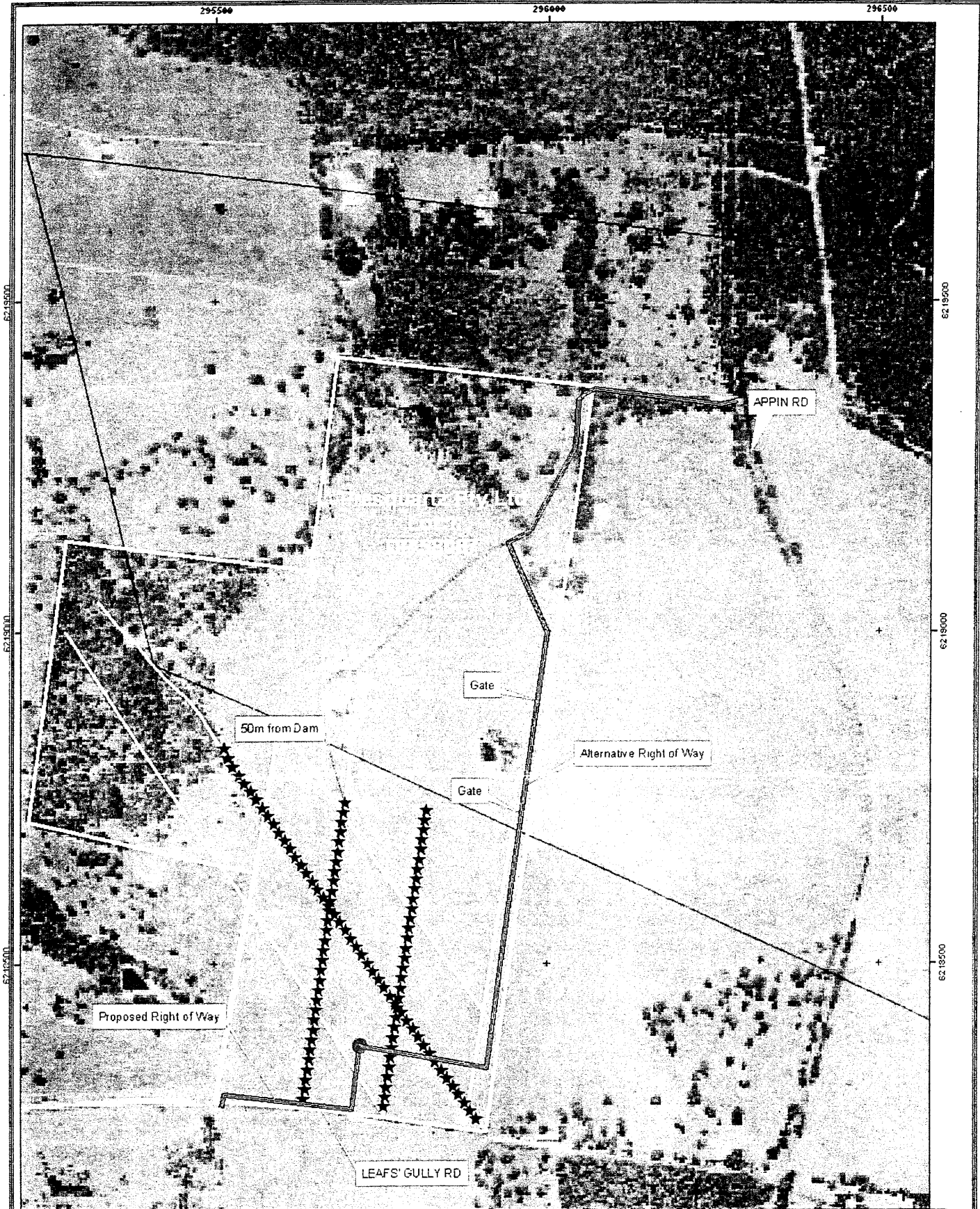
11. There shall be made such site adjustments which are necessary to give effect to the spirit and intention of this Right of Way and to allow the holder and any other legal users of the Right of Way a satisfactory means of access to the areas the subject of the Authority and the lands to be lawfully accessed.
12. Subject to the terms hereof and renewal of the Lease, the period over which the Right of Way may be exercised shall be for the unexpired term of the Authority and any renewals thereof and including any necessary periods for rehabilitation of the area subject to the Authority and/or Right of Way.
13. The Minister for Land and Water Conservation and the Minister for Primary Industries shall be indemnified from and against all actions, suits, claims and demands of whatsoever nature and all charges and expenses in respect of any accident or injury to any person or property which may arise out of the works as authorised under this Right of Way. For the purposes of this condition the term Minister shall include Her Majesty the Queen, Her Heirs and Successors, the State of New South Wales, the Minister and the agents, servants, employees and contractors of Her Majesty, Her Majesty's Heirs and Successors, the State of New South Wales and the Minister.




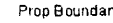




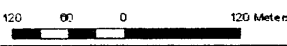
DATED at SYDNEY this 25th day of SEPTEMBER, 2007.



J.A. Bailey
Chief Mining Warden

ANNEXURE "A"



 Carbon Steel Materials Hawatta Coal Holdings Pty Ltd Asset Development Resource & Exploration	Legend		Presquartz Pty Ltd Lot 1 DP 58067	Shots: 108 Receivers: 890		
	Receivers 	Prop Boundary 	Access Track 	Date: 24th August, 2007 Author: LF Signed: CF: PR		Scale 1:5,000 Horizontal Datum MGA - Zone 96
	Borehole 	Shotline (108 Source) 	Authorisations 			
				X-333b Version 4		