

WARDEN'S COURT
New South Wales
Picton

Jurisdiction: Mining
Parties: Illawarra Coal Holdings Pty. Ltd.

v.

Robin Craig

File number: 2006/51

Hearing dates: 15 June 2006, 31 July 2006

Date of Decision: 1 August 2006

Mining Warden: J. A. Bailey

Chief Mining Warden

Representation: Applicant: Mr. P. Holland, Solicitor.

Respondent: Unrepresented

Reasons for Decision

- 1 The Applicant mining company, made application pursuant to the provisions of Section 252 Mining Act 1992, for a permit to enter land to carry out an environmental assessment.

Section 252 Mining Act 1992 provides:

252 Environmental assessment

- (1) A warden may, on the application of a person who proposes to undertake an assessment (for the purposes of this Act or the *Environmental Planning and Assessment Act 1979*) of the likely effect on the environment of the activities to be carried out under an authority or a mineral claim, grant a permit to the applicant to enter any land so as to enable the person to undertake the assessment.
 - (2) For the purpose of determining an application for a permit, a warden may hold an inquiry into any matter arising under, or in connection with, the application.
 - (3) The holder of a permit under this section, and any employee or agent of the holder, may, in accordance with the permit:
 - (a) enter the land to which the permit relates, and
 - (b) do on that land all such things as are reasonably necessary to carry out the assessment to which the permit relates.
 - (4) The rights conferred by the permit may not be exercised within land in an exempted area except with the consent of the Minister.
 - (5) Such consent may be given unconditionally or subject to conditions.
 - (6) In the case of land within a national park, state recreation area, regional park, historic site, nature reserve, state game reserve, Aboriginal area, protected archaeological area, wildlife district, wildlife refuge, wildlife management area or Aboriginal place within the meaning of the *National Parks and Wildlife Act 1974*, such consent may not be given except with the concurrence of the Minister administering that Act.
 - (7) In the case of land within a marine park under the *Marine Parks Act 1997*, such a consent may not be given except with the concurrence of the relevant Ministers within the meaning of that Act.
2. The matter first came before the Warden's Court at Picton on 15 June 2006, at which point of time the applicant mining company tendered affidavits referring to what was intended to be done in respect of an Environmental Impact Statement. At that point of time, Ms. Craig notified the court that she did not want the mining company being involved further with the property, which is owned by the RTA and of which she has been the occupier for over 30 years. She indicated that prior difficulties with the same mining company gave her great concerns for her animals which are kept on the land. The court on that occasion made directions that the Respondent itemise her concerns and communicate them to the Applicant's Solicitor, on or before 14 July 2006.

3. In response to that request, Ms. Craig filed a document itemising a sum of money for compensation and adding what she refers to as “further conditions”. One could infer from those conditions that they were matters of concern to Ms. Craig; however, the claim for compensation was for matters that occurred in the past, not as to expected “compensatory loss” that may be involved with the Environmental Impact Study. To obviate any misunderstanding, Ms. Craig was requested to outline, at the next court hearing, the concerns she had in respect of the application before the court.

4. When the matter came before the court on 31 July 2006, Ms. Craig outlined the following matters that were of concern:
 - There were aboriginal sites on the property, including an eel farm, which were in imminent danger and she required a representative of the Wadi-Wadi tribe, who were traditional owners of the site, to be involved in any Environmental Impact Study

 - Clarification of the number of days the study would take place upon her property

 - The loss of privacy if entry was via the Moreton Park Road

 - She required time to have bulls removed from her property before the inspections began

Ms. Craig was also pursuing matters raised in her letter following the court directions of the 15 June 2006, i.e.:

- No fluorescent clothing or jackets to be worn on the property

- No access to property before 11am or after 3.30pm

- No person to sleep on property overnight

- No entry by any persons to residences on the property

5. The mining company produced evidence firstly from Gary Mark Brassington, an Environmental Manager employed by the applicant company. He attested to the accuracy of his affidavit, Exhibit 1 in the proceedings. In the affidavit he set out the basis of the application before the court, including the unsuccessful attempts by the mining company to obtain consent from Ms. Craig to enter the land for the purposes of an Environmental Impact Statement.
6. He outlined the difficulties that would occur if the company were restricted to being on the land only between the hours of 11am and 3.30pm. Firstly, the difficulty in co-ordinating the number of groups involved with the study to be present each and every time; secondly, the inconvenience, both to the company and also to the landholder, due to the necessity to attend the property on far more occasions than expected.
7. According to Mr. Brassington, and this was also confirmed by the affidavit of Marcelle Buist, the survey will be conducted by foot and no machinery will be taken onto the land. GPS readings and photographs will be taken. Both of the witnesses gave evidence of the need for those on the land to wear protective fluorescent vests, for safety reasons and to satisfy Occupation, Health and Safety requirements.
8. In giving her evidence, Ms. Buist informed the court that the time allocated in her affidavit was reasonable and based upon research conducted over a similar size area. She confirmed that the survey would only be conducted over that portion of the land that is outlined in the diagram, which is attached to the application before the court. (a copy of that plan, upon which Ms. Craig made various notations, was marked Exhibit 4 in the proceedings). She indicated to the court that it would be extremely unusual for the survey to move outside that area.
9. Both Mr. Brassington and Ms. Buist indicated to the court that access to the property could be via boat on the Nepean River and then survey the property by foot.
10. In giving evidence, Robin Craig was concerned that the survey would be undertaken on the land before she was able to remove bulls from her property. These animals are upon the land and are unable to be secured in a particular area due to the inadequacy of the

fencing. She said she is making arrangements to have them sent for sale, but this will take 3 weeks. On that point, the mining company advised the court it was willing to wait that period of time before entering upon the property.

11. Robin Craig spent some time explaining to the court how she takes in injured animals and has concern for the dogs that are upon her property. At the moment there are four of her own dogs and five others. Some of the dogs are recuperating from injuries and her concern is that she must exercise the dogs daily. That exercise takes place before 11am and after 3pm. To confine the dogs longer, according to Ms. Craig, would be a breach of the Cruelty to Animals Act. She did not want the dogs to be roaming the property whilst the survey was being undertaken, out of concern for the safety of those on the land.

After some questioning, it appears the dogs are exercised under her supervision and accordingly she has not had any trouble to date in respect of the dogs menacing the bulls or other animals on the property.

12. Ms. Craig informed the court that she wished to be on the property on those occasions when the survey was being undertaken. One wonders as to what difficulties could arise with the dogs when she is on the property to supervise their exercise time.
13. Her concern on the wearing of reflective vests is that they may startle animals on the land.
14. One of the principle concerns of Ms. Craig is that the survey to be undertaken will not take sufficient notice of Aboriginal concerns. She brought to the court a witness, Mr. Carriage in respect of this issue. Allan Carriage gave evidence of being from the Wadi-Wadi tribe, who are the traditional ancestors of the subject land. It is his tribe only, he says, who can accurately identify matters of significance upon the land. He wanted to be involved in the survey that is to be undertaken on the property occupied by Ms. Craig. In his evidence he made mention of the eel farms, which are upon the land. Under cross-examination, he conceded that he had already been involved in inspecting other property in the area that has been the subject of an Environmental Impact Study.

15 In his submissions to the Court, Mr. Holland conceded many of the matters that were of concern to Ms. Craig. That is:

- A willingness for a member of the Wadi-Wadi tribe to be present during the survey to be undertaken upon the land
- A willingness to enter the land via the Nepean River and survey the land on foot
- To delay the survey for three weeks to allow Ms. Craig to remove the bulls from the property
- The survey or assessment to be conducted will be conducted by a body independent of the mining company
- A willingness to give reasonable notice to Ms Craig as to when attendance will be required on the property; together with a description of the survey to take place and list those who will take place in the survey
- The company will ensure no person sleeps overnight on the property
- The company will make good any physical damage occasioned during the survey
- No person will enter the residence of Ms. Craig unless invited to do so
- A total of five (5) days will be required to undertake the survey. If more time is required, that will either be by agreement or with an order of the Warden's Court

16. Mr. Holland informed the court that the area to be surveyed has been identified in some detail, however, if, in remote circumstances, there is a need to go outside that area, the company will advise Ms. Craig accordingly.

17. The mining company, submitted Mr. Holland, could not agree to working between the hours of 11am and 3.30pm, for the reasons outlined by the witnesses. Furthermore, he

could not concede to personnel not wearing reflective safety vests whilst on the property, principally for Occupation Health and Safety requirements.

18. Notwithstanding the agreement not to enter the property via Moreton Park Road, he seeks a clause in the permit allowing access via that road if a medical emergency arises. He also seeks provision to be made to undertake work during the evening if a need so arises.
19. In her final submission to the Court, Ms. Craig re-iterated her concerns of having people come onto the property and indicated she has no confidence in believing that the mining company will follow any agreements, as they have never been kept previously. On that point, I would like to point out to Ms. Craig that what is occurring in the court at the moment is not an agreement between her and the mining company. It is a permit issued to the mining company, by the court, allowing them to enter the property and undertake certain things in accordance with conditions that are set down by the Court. The ramifications upon the mining company in failing to comply with those conditions are far greater than non-compliance with any agreement entered with landholders.
20. Concerning the matters in dispute, I cannot see any valid reason as to why the survey should be reduced to the hours between 11am and 3.30pm. The only reason put forward by Ms. Craig is the need to exercise the dogs; however, as I mentioned above, with her being present at the time of the survey, she can exercise the dogs without any concern of them attacking any member of the survey party. To reduce the hours between 11am and 3.30pm would place undue inconvenience upon the applicant and furthermore, extend the time in which the survey would be undertaken, thus causing further inconvenience to the landholder. For those reasons I intend to permit the hours of entry to be between 7am and 5pm.
21. It is my opinion that the harm that may be occasioned by the wearing of reflective safety vests is far less than the harm that may be obviated by the wearing of the same. Consequently, I propose to permit members of the survey team to wear reflective safety vests.

22. Ms. Craig has put nothing forward as to compensatory loss in respect of this survey. One would expect that there would be no compensatory loss. However, I will include a clause which will allow her to make application if such loss occurs.
23. In the face of no objections to a clause outlining access via Moreton Park Road in medical emergencies, I propose to insert a clause to that effect.
24. Finally, although it is not in dispute, it is trite to say that there is a requirement for this assessment to be undertaken.

A signed and sealed copy of the Permit to Enter Land to carry out an Environmental Assessment will be forwarded to the parties next week. The permit shall include those matters sought by Ms. Craig and consented to by the mining company and those matters that the court has determined ought to be provided for, including an indemnity clause protecting, inter alia, Ms. Craig.



MINING ACT 1992

SECTION 252

PERMIT TO ENTER LAND

I, John Anthony Bailey, Chief Mining Warden for the State of New South Wales, having held an enquiry into an application by **Illawarra Coal Holdings Pty Ltd** (herein after called "the holder") hereby grant to the holder a permit to enter land the subject of **Consolidated Coal Lease 767** (herein called "the lease"), to undertake an assessment of the likely effect on the environment of the activities to be carried out under the subject lease.

The exercise by the holder is subject to the following conditions:

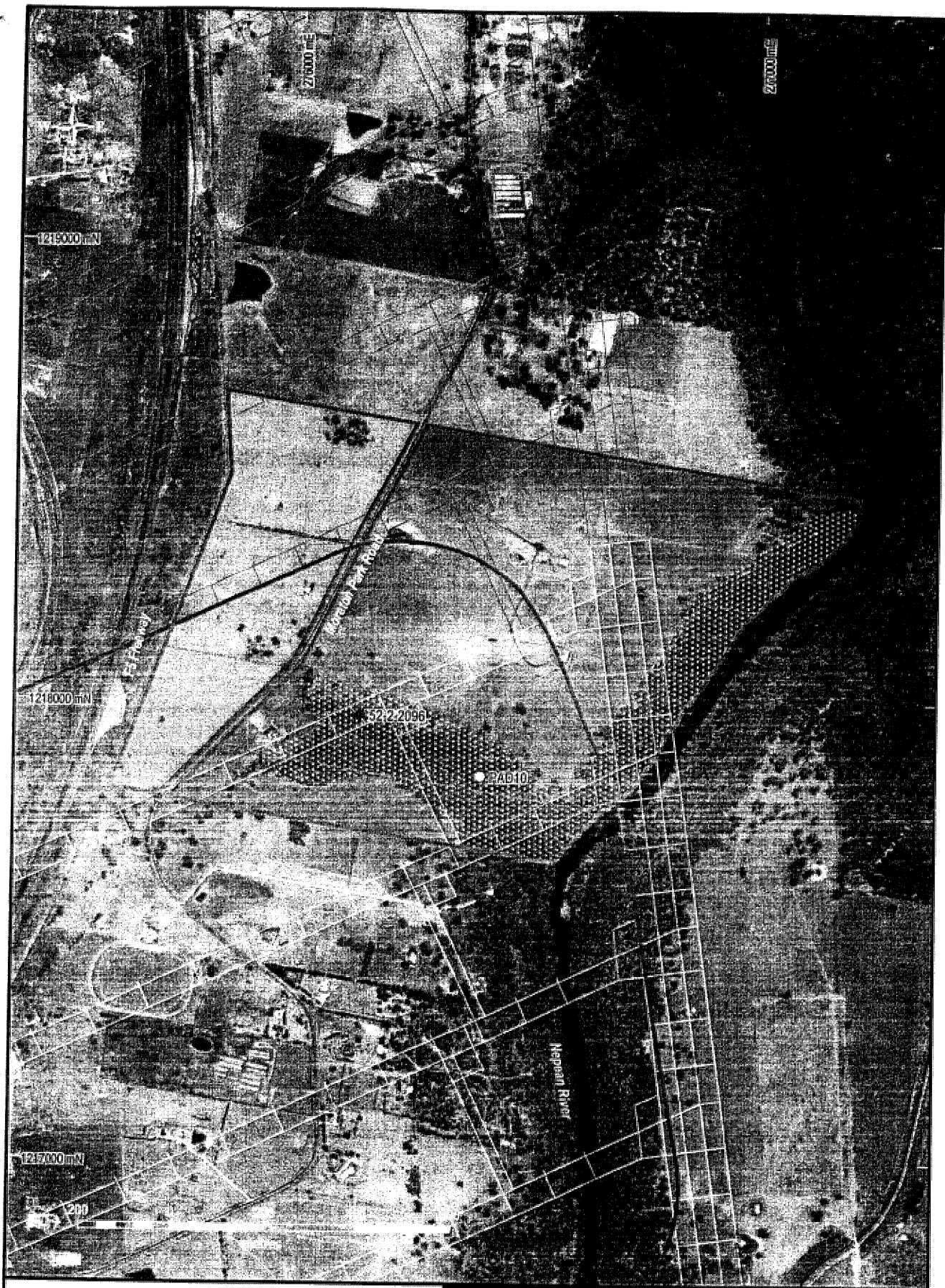
1. The permit is granted in respect of lots 1, 3 and part 4 in DP231728; and lots 7, 9 and 11 in DP249218 Moreton Park Road, Douglas Park, as per diagram attached, marked "A", and is restricted to the "proposed survey area" outlined on such diagram. Provided however, that if circumstances dictate a larger area to be surveyed, the holder shall advise Ms Craig accordingly.
2. It shall operate for a period of six (6) months from the 1st September 2006.
3. Entrance to the property will be via the Nepean River and then the property to be traversed by foot. Provided however, that in the case of a medical emergency, vehicles may enter and exit via Moreton Park Road.
4. Existing roads and tracks are, as far as possible, to be used.
5. All disturbed earth or vegetation shall be restored or revegetated to the satisfaction of the Warden.
6. All gates shall be left either open or closed, that is, in the position that they are found, and fences are to be left as found.
7. No dogs, animals or fire arms shall be taken onto the area, nor shall any fires be lit.
8. No livestock shall be interfered with by the holder.
9. The survey or assessment shall be conducted by a body which is independent of the holder.
10. The holder shall give reasonable notice to the occupier, Ms Robin Craig, as to when access will be required on the property; together with a description of the survey to take place and list those who will take place in the survey.
11. The holder shall ensure that no person sleeps overnight on the property.






12. The holder shall ensure that no person enters the residence of Ms Craig unless invited to do so.
13. The holder shall ensure that the survey will take no more than a total of five (5) days. If more time is required that shall be either by agreement or by an order of the Warden's Court.
14. The holder shall compensate the occupier, Ms Robin Craig, for any damage which occurs as a result of the survey. The quantum of such damages shall be in accordance with any agreement between the parties or assessed by the Warden's Court.
15. Personnel shall not be on the subject property prior to 7a.m. nor after 5p.m. Provided however, that if it becomes necessary for a survey to be conducted at night, that shall be permitted subject to the holder giving adequate notice to Ms Craig. Such evening survey would still be subject to Condition 11.
16. This permit is granted on the basis that none of the land is land to which Section 252(6) Mining Act 1992 applies.
17. The Minister for Primary Industries, Robin Craig and the Minister for Transport 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 permit. 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.
18. The terms of this permit may be varied, amended or revoked by the Chief Mining Warden.


Dated at Sydney this **Eighth** day of **August 2006**.


J.A. Bailey
Chief Mining Warden

A



 Mining application area ● ○ Archaeological site (and site ID) to be visited
 Potential future mining area
 RTA property
 Landowner affliction area (based on surface projection of 35° angle of draw and predicted lens of 20 mm subsidence -MSEC 10 10.05)
 Proposed survey area





NSW Integrated Survey Grid, zone 56T

ILLAWARRA COAL

**Douglas Area 7
RTA
Cultural Heritage - Proposed Survey Area**

File: P:\Hansen Consulting\Power\Douglas\RTA layout cultural heritage
Date: 2-2-08

**Figure
1**

Notes: Mine plan subject to change