In the Warden's Court
At Gunnedah in the
State of New South Wales
J.A. Bailey Mining Warden
21 May 2009

Application under the provisions of Section 155 Mining Act 1992 to Review a Determination of an Aribtrator

Case No:	Applicant	Respondent
2008/57	Margaret Alice Alcorn and Leslie James Alcorn	Coal Mines Australia Pty Ltd
2008/58	Thomas Bailey	Coal Mines Australia Pty Ltd
2008/59	Geoffrey Brown and Sharon Brown	Coal Mines Australia Pty Ltd
2008/60	Anthony Mark Clift	Coal Mines Australia Pty Ltd

Appearances:
Mr. Bannon S.C. with Mr Scruby and Mr Lang of Counsel appeared for applicant in case 2008/57 and 2008/59, instructed by Kemp Strang Solicitors
Mr P Long Solicitor and Ms. A. Weinthal Solicitor, from Long Howland, appeared for applicant in case 2008/58 and 2008/60
Mr Beasley of Counsel instructed by MinterEllison appeared for the Respondent

Hearing Dates: Evidence: 30th March, 1 – 4 April 2009 at Gunnedah
Submissions: 28 April 2009 at Gunnedah

Decision Handed Down at Gunnedah on 21st May 2009

Background

On 12 April 2006, the Minister for Mineral Resources of the State of New South Wales granted Exploration Licence No. 6505 (EL6505) to Coal Mines Australia Limited (CMAL)(the licence holder). The activities of the mining company pursuant to EL6505 has been referred to as the "Caroona Project". The exploration area embraces about 344 square kilometres and incorporates the land owned by Leslie and Margaret Alcorn, Geoffrey and Sharon Brown, Thomas Bailey and Anthony Clift (the landholders). Prior to entering the land, the licence holder is required, pursuant to S.142 of the Mining Act 1992 (the Act), to seek an access arrangement with each of the landholders. CMAL were not successful in obtaining a consent arrangement. Subsequently, following the appointment of an arbitrator under S144 of the Act, a final determination, pursuant to S155 of the Act was made on 15 November 2008.

Before proceeding into my decision, a word of caution. The Mining Act 1992 was amended on 7th April 2009. That is, after hearing evidence and prior to hearing submissions in this case. However, due to saving clauses in the amending Act, this decision is determined on the legislation as it was prior to 7 April 2009. Any reference to any section in the Act is a reference to the section as it was prior to 7 April 2009. From that amending date, some of the sections referred to in the decision have been altered and some of the section numbers also have been altered.

Decision

1. Following an arbitrator's final determination, an application for a review of that determination was lodged pursuant to the provisions of section 155 of the Mining act 1992. That section provides as follows;

155 Review of determination

(1) A party to a hearing who is aggrieved by an arbitrator's final determination (other than a determination referred to in section 147 (2)) may apply to a Warden's Court for a review of the determination.

(2) An application:

(a) must be accompanied by a copy of the determination to which it relates, together with a copy of any access arrangement forming part of the determination, and

(b) must be filed in a Warden's Court:

(i) in the case of an interim determination that has become a final determination—within 28 days after a copy of the interim determination was served on the applicant, or

(ii) in the case of a final determination—within 14 days after a copy of the final determination was served on the applicant.

(3) An application for review may not be made:

(a) during the period of 14 days within which an application may be made to an arbitrator, or

(b) if such an application is made, until the arbitrator has made a final determination with respect to the application.

(4) The applicant must cause a copy of the application to be served on each of the other parties to the determination to which the application relates.

(5) Subject to any order of a Warden's Court to the contrary, an application for review of a determination operates to stay the effect of any related access arrangement in relation to a party to the arrangement from the time when a copy of the arrangement has been served on the party until the decision of a Warden's Court on the review.

(6) In reviewing a determination under this section, a Warden's Court has the functions of an arbitrator under this Division in addition to its other functions.

(7) The decision of a Warden's Court on a review of a determination is final and is to be given effect to as if it were the determination of an arbitrator.

2 The hearing of evidence of the review took place over a period of five days at Gunnedah Courthouse commencing the 30th March 2009. A view of the Alcorn and Brown property was taken on the afternoon on the 31st March 2009. At the request of the Solicitor for Mr Clift and Mr Bailey, no view was undertaken of their properties.

3 That view assisted the court to understand the layout of the properties, as well as to understand evidence produced later. It also resulted in the mining company agreeing to alter some matters in respect of each property visited.

4 Although there are four separate distinct matters that are being reviewed, they were all heard together due to a great deal of common matters relating to all properties.

Can this Court Refuse Access?

5 It is clear from the evidence of all the landholders that they do not want the mining company entering their property and drilling exploratory holes. It was submitted that there is power in the Act for this court to refuse access. Before looking at further matters that were raised, it is necessary at this point of time to outline the history of exploration licenses commencing with the *Mining Act* 1906. Section 83(G) and section 83(H) of the *Mining Act 1906* set out certain restrictions placed upon holders of exploration licenses. Those sections provide as follow

83G. (1) No exploration license shall, except with the consent of the owner,(emphasis added) extend to the surface of any land –

(a) within fifty yards of any land bona fide in use as a garden or orchard; or

(b) within two hundred yards of the principal residence of the owner or occupier of any land whether or not it is the land in respect of which the exploration license is applied for; or

(c) whereon is any substantial building, bridge, dam, reservoir, well or other valuable improvement, other than an improvement effected for mining purposes and not bona fide used for any other purpose.

The Minister shall determine whether any improvement referred to in paragraph (c) of this subsection is substantial or valuable etc..

83H. No exploration license shall, except with the consent of the owner and occupier,(emphasis added) extend to the surface of any land under cultivation when the application for the exploration license was made; and without such consent no surveys or operations under such exploration license shall be carried out or conducted, except with the authority of the Minister, and at such depth as the Minister may, after full inquiry, deem to be sufficient to prevent damage to the surface;

Provided that –

(a)cultivation for the growth and spread of pasture grasses shall not be deemed to be cultivation with the meaning of this section unless, in the opinion of the Minister, the circumstances so warrant; and

(b) in the case of dispute as to whether land is or is not under cultivation within the meaning of this section, the Minister's decision thereon shall be final.

6 The *Mining Act* of 1973 did not see the same restrictions placed upon an exploration license that existed in the 1906 act. However, pursuant to the provisions of section 46 of the *Mining Act 1973*, an owner or occupier was able to object to the granting of a prospecting license on the grounds that the land over which the lease is sought is agricultural land.

Section 46 of the Mining Act 1973 states, inter alia:

An owner or occupier…may, not later than thirty days after the date on which that notice is so sent…object to the granting of the prospecting licence…on the ground that…the land…is agricultural land.

7 Part 3, division 3 and 4 of *Mining Act 1992* outlines the power in relation to the granting of exploration licenses. Section 24(1) states "an exploration license may be granted over land of any title or tenure." Nothing in that Act prevents the granting of an exploration licence over agricultural land. However, section 31 provides, inter alia:

The holder of an exploration licence may not exercise any of the rights conferred by the licence…on which…is situated a dwelling house that is the principle place of residence…on which ….is situated any garden, or on which is situated any improvement….except with the written consent of the owner.

8 In summary, the 1906 Act places a prohibition upon the granting of an exploration licence over gardens, principle residences and valuable improvements unless there is written consent of the owner and occupier; and a prohibition over the granting of an exploration licence

over land that is under cultivation, without written consent of the owner and occupier, except with the written permission of the Minister. The 1973 Act reduced the rights of the owner/occupier to the right to object only upon the basis that the land was agricultural land. Whereas the 1992 Act gives no right of objections by landholders to exploration licence applications. The only relief a landholder receives under the 1992 Act is that there is a restriction on a licence holder in respect of exercising rights over a principal place of residence, a garden or over an improvement, unless there is consent of the landholder.

9 It is clear that as the *Mining Act* progressed from 1906 to 1992, the intention of parliament was that holders of exploration licenses have a right to enter land to explore, without being hindered by any objection raised by the landholder. That is not to say that the landholder has no rights upon the granting of an exploration licence.

10 A landholder has the right to negotiate access arrangements and compensation. If no agreement is reached, an arbitrator determines the aspect of access and compensation, with a further right of review to a warden's court. The licence holder is also curtailed from unrestrained exploring due to the numerous conditions that are inserted in the exploration licence.

11 The Mining Act 1992 has obviously deliberately taken away from landholders the right to object to an exploration licence. Not only is that obvious from comparing prior legislation, but also by observing Schedule 1 of the Mining Act 1992. That clearly gives landholders the right to lodge objections to applications for assessment leases and mining leases, but that schedule makes no mention of similar rights in respect of exploration licence applications. And furthermore, CMAL submitted S29 Mining Act 1992 in giving permission to prospect under an exploration licence, gives unqualified permission under the section. That is correct, but the section must be read in conjunction with the rest of the Act.

12 Section 149(1)(b) of the *Mining Act 1992,* states, in part, …*if the arbitrator determines that the holder of the prosecting title should have such a right to access…*. It has been submitted that this provision gives an arbitrator the right to exclude a mining company from land. I have ruled before and still maintain that S.149 (1)(b) allows an arbitrator to refuse access, if, for instance, the land which is sought to be entered is not land which is within the area covered by the exploration licence. I am aware that such a circumstance happened when a matter went to arbitration some years ago. In that instance, when the arbitrator became aware that the landholders land was not within the area covered by the licence, the arbitrator refused access.

13 In the matters before the court on this occasion, the landholders have all indicated they do not want the mining company upon their land at all. To that end, Mr Bannon questioned the mining company witness, Mr David, about the Brown's property. It was ascertained that CMAL has no intention to mine under that property. Mr. David was asked why he needed to drill one exploratory hole on that land. I have referred to that evidence elsewhere in this decision. However, if, for instance, Mr David had indicated that there was no reason to drill on the Brown's land and that sufficient exploration could be achieved by drilling one extra hole on someone else's land, then perhaps that could be another reason as to why access should not be granted.

14 Other than those unusual circumstances outlined above, I do not interpret S.149 (1)(b) as giving a general right to an arbitrator to override the rights that have been given by the Minister, to a mining company, pursuant to an exploration licence. I say that particularly in regard to the fact that the Mining Act 1992 does not provide for the right of a landholder to object to the granting of such licence. Having regard to Section 155(6), the powers of the court in conducting a review is that of an arbitrator. Consequently, the court, similarly to an arbitrator, does not have the power to refuse access to the holder of an exploration licence.

15 There were other submissions that were raised on behalf of the Brown's in the final submission, urging the court to deny access. One issue is that no plans have been put forward as to the construction details of the above ground tanks that CMAL intend to use on the property. It was submitted: "*The Browns desire and are entitled to have plans and specifications of the new proposal presented to them so they can consider them with the assistance of experts"*.[1] The submission goes on to say: *"Refusal of access on this application would not prevent CMAL from obtaining access at some later time when it had addressed the above concerns".*

16 Parties to proceedings are entitled to have some finality. To refuse access on these grounds would no doubt mean once again going through the process of 1) attempting to obtain an access agreement 2) arbitrate on access and then 3) review the arbitrators determination before this court. This would be, in my mind, an intolerable situation for both CMAL and the landholder.

17 CMAL in its submission[2] put forward a proposed condition in respect of the above ground tanks. That suggested condition would, hopefully, satisfy the concerns of the Browns and obviate the necessity for further negotiation/litigation on access. I propose to adopt that condition.

18 Another issue wherein it was submitted that access should be refused is in respect of Section 31(1) of the Mining Act 1992. That section provides:

> **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

[1] Submissions of 17 April 2009 paragraph 36.
[2] See paragraph 123 of submission dated 24 April 2009

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).

19 The submission makes reference to the evidence of Mr Brown and suggests that the area where CMAL intends to drill is a "water disposal area" and a "valuable work" or both.

20 When questioned by Mr Bannon, the following appears at pp575, 576 of the transcript: *Q: And that area of the drill site, I think you described it the other day as an area which was – is this right, gently graded from west to east? --- That's correct. Q: Why is it graded that way? ---To drain the water to a low point, to keep it away from the shed. Q: In the circumstances where there is bigger rain? --- Bigger rain. Q: So in those bigger rain areas, that operates as a water disposal area? --- It does. Q: And graded for that purpose? --- It is.*

21 Questions following outline the concern that Mr Brown would have if above ground tanks are installed due to the possibility of water diversion in that area in times of heavy rain falls, creating trenches and erosion. Nothing was put to the court, through Mr Brown or another witness, which would indicate that the area in question is in fact a water disposal area. Indeed the only reference is in the leading question put above by Mr Bannon and agreed to by Mr Brown.

22. There was no reference prior to the hearing of the case to Section 31 of the Act. There was no reference during the hearing of the case nor during the site visit to Section 31. The first mention comes with the written submission. There are two matters need to be said. Firstly, as to whether or not the area where CMAL intends to drill on the Browns

land is a “water disposal area” or “improvement” is a question of fact. As it has not been previously raised as an issue in this case, CMAL has been deprived of questioning Mr Brown about it and calling, if necessary, an expert to give an opinion as to whether it is a “water disposal area” or “improvement”. Consequently, on the evidence before the court, it is not possible to make a determination as to whether it is a “water disposal area” etc. Secondly, even if there were evidence, a proceeding under S.155 is not the place to make a determination under Section 31 of the Act.

23 Consequently, I do not propose to refuse CMAL access to the Browns land on the grounds that the area in which they intend to drill is allegedly a “water disposal area” or an “improvement” or both.

24 There was a challenge from all of the landowners to the validity of these proceedings. That challenge was based upon the provisions of Section 142 of the Mining Act 1992.

25 The Section 142 Notices – Jurisdiction of the Court

Evidence was received from all of the landholders that each property was subject to a mortgage by a bank. It appears that no notice, under the provision of Section 142, was given to the mortgagees.

Section 142 (1) provides:

The holder of a prospecting title may, by written notice served on each landholder of the land concerned, give notice of the holder’s intention to obtain an access arrangement in respect of the land.

26 In submissions in respect of the landholders Alcorn and Brown and also in respect of Bailey and Clift, the court was urged to rule that because no notices were sent to the relevant mortgagees, the arbitration was a nullity and consequently invalid. Accordingly, if the arbitrator’s access arrangement was invalid, this court has no jurisdiction to review the same.

27 Mr. Long, solicitor for Bailey and Clift, made reference to a matter heard by this court where it was ruled that the arbitrator's determination was invalid and there was no jurisdiction to review under Section 155. With respect, the facts of that were different; in that case the registered titleholder was not notified. These matters are different, in that the registered titleholders were notified, but the mortgagees were not.

28 The submissions on behalf of all of the landholders rely upon the definition of **landholder** in the Mining Act 1992, which states at the relevant part:

Landholder means, in relation to any land:

(g)a person identified in any register or record kept by the Registrar-General as a person having an interest in the land, or…

29 Mr Beasley submitted that none of the mortgagees were landholders within the definition referred to above.

30 He cited the Real Property Act as the basis of his submissions, referring to Section 56(1), the definition of "mortgage" under Section 3, and Section 57(1) of that Act. Mr Beasley submits that upon registration, a mortgage becomes a charge upon the land for the sum of money (or other liability) intended to be secured. He states that the registration does not record the mortgagee as being "*a person having an interest in the land"* as in the definition of landholder.

31 Further, he cited also the case of **Mabo v. Queensland (No.2) (1992) 175 CLR 1.** He also refers to the Crown Land Act 1989 and the Western Lands Act and makes the following statement:

These matters make it clear…that if there is an owner of an estate in fee simple, only that "landholder" need be served with a Section 142 notice. In other words, once the "top" of the hierarchy has been served with a S.142 notice, there is no need for further service. It simply cannot have been the intention of the legislature, for example, that a mortgagee must be served with a S.142 notice if the owner of the land already has been.

32 Although appearing to be somewhat persuasive, I have some grave reservations about those submissions of Mr Beasley. For instance, if it was the intention of Parliament that a mortgagee ought not be notified if the holder in fee simple is notified, then in this example, there would be some difficulties: Consider for instance an uncle who has transferred his farm to a nephew, on the basis that the uncle would place a mortgage over the property, with the nephew repaying that mortgage debt over the years from profits extracted from the farm. A situation arises where the nephew doesn't enjoy farming and leaves to tour the world. The uncle is left with no income (from the repayment of the mortgage). With the consent of the nephew, he enters upon the farm and commences farming. He does nothing to change the title deeds.

33 In those circumstances, the mining company ought to be negotiating principally with the uncle. However, if a mining company sends a notice pursuant to Section 142 Mining Act 1992 to the holder in fee simple (the nephew) and not to the uncle (the mortgagee), then in all likelihood the uncle would not be aware of the mining company's intention. Surely the legislation did not intend, in those circumstances, that a mining company could proceed to arbitration.

34 It is my view that any mortgagee entered in the records of the Registrar General ought to be notified under the provisions of Section 142 Mining Act 1992.

35 The question that remains now if whether or not, without notification under S.142 to the mortgagees, the arbitration conducted in respect of each of these landholders is a nullity.

36 All parties have made reference in their submission to the celebrated case of **Project Blue Sky[3],** where the High Court indicated that matters done in breach of conditions regulating the exercise of statutory power do not necessarily invalidate proceedings.

[3] Project Blue Sky v. ABA [1998]HCA28

At [91] the High Court said:

> *An act done in breach of the conditions regulating the exercise of the statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statue, its subject matter and objects, and the consequences to the parties of holding void every act done in breach of the condition…there is no decisive rule that can be applied…there is not even a ranking of relevant factors or categories to give guidance on the issue."*

At [93] the High Court made reference to the classification of statutory provisions as being "mandatory" or "directory". It went on to say:

> *A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provisions should be invalid.*

In **Attorney General of New South Wales v. World Best Holdings,**[4] Spigelman CJ, when considering the High Courts decision In **Project Blue Sky,** referred to the phrase *"to invalidate **any** act that fails to comply"(emphasis added)* which appears in paragraph [91] and the phrase *"**an** act done in breach"(emphasis added)* that appears in paragraph [93]. His Honour goes on to say:

> *I do not understand the word "any" to be used in the sense of "every". The word "an" indicates that the court must look at what Parliament intended to be the consequences of the particular breach under consideration.*

37 It is necessary to consider the particular circumstances of these cases to determine whether it was Parliament's intention to invalidate the arbitration determination on the basis that section 142 notices were not forwarded to the mortgagees.

[4] [2005]63NSWLR557

38 We know that the mortgagees are Banks. Nothing has been put to the court as to any concern the relevant Banks may have as the result of not receiving notices. If, for example, the Banks wanted to have an active part in an access arrangement, then that evidence would be considered by the court, for the purposes of determining whether a S.142 notice to a mortgagee Bank was critical to the arbitration process.

39 I have nothing from either the landholders or the mining company on this issue, other than a submission from the mining company. At paragraph 65 (d) of the submissions of Mr. Beasley, the following is put:

what possible relevance could any of the matters set out in S141(1) of the Act have to any of the mortgagees? Are they going to care about access times? Routes of access, compensation, etc? Of course not.

40 I am aware of my office, over the past 13 years, receiving telephone calls from mortgagee banks that had received hearing notices of matters before the court, seeking details about the hearing. They were not notices received under S.142, but notices of hearing concerning applications for assessment of compensation, to my recollection under S265. Invariably the caller would be advised to seek legal advice. In over 13 years of hearing cases in the warden's court, not one mortgagee bank has appeared at a hearing. I can assume they had no interest in attending.

41 I cannot automatically assume however, that because prior mortgagee banks had no interest in compensation assessment cases, that the mortgagee banks relevant to these proceedings, who have not received notices under S.142, would have no interest.

42 In the absence of evidence from those banks, it is necessary to consider what interest such mortgagees may have in proceedings. I agree with Mr Beasley that there could be no possible interest in a bank wanting to have input into access conditions such as what particular road or track

should be used by the mining company; what hours of the day should they enter etc. I do believe however, that the only interest a bank may have is to ensure that its asset, the subject of the mortgagee is still secure.

43 The proceedings in this court do no concern a mining lease, wherein a mining company may enter and occupy a portion, sometimes a very large portion, of an owners land. This occupation is usually for a period of 20 years of more. One can understand why a mortgagee bank may have an interest in compensation proceedings in such circumstances. Notwithstanding that, my experience is that such banks have never attended a proceeding in the warden's court.

44 Assume that a S 142 notice has been sent and the mortgagee bank appeared. What can the bank achieve in the proceedings? No doubt the fertile minds of the legal profession may be able to put forward a submission that the bank may suffer some compensable loss as the result of drilling on the land. Unfortunately, my wildest imagination cannot conceive a situation where a court would award a sum of money to a mortgagee bank for compensable loss it may suffer from exploratory drilling. But then again, nothing is impossible.

45 There could be a situation that a landholder who is an occupier may not engage legal assistance in court proceedings. A bank may possibly be concerned about that and decide to appear at a hearing, possibly to assist a mortgagor, on the basis of hoping to ensure the mortgagor will not be placed in a position where he or she is unable to meet the mortgage payments to the bank. I personally think this is highly unlikely, but as Young J said in **Ross v. NRMA Life Ltd** (1993) 7 ANZ Insurance Cases 960:

"*Hardly anything in this life can be said with certainty".*

There are reasons as to why the above scenario would not occur in the matters now before the court:

- The landholders are extremely well legally represented

- Unlike the time in which a mining company would occupy land under a mining lease, the occupation of these properties will be for an extremely short period of time, a matter of a few weeks at the most
- There is no threat to the land secured under the mortgage
- Relatively speaking, the compensable loss of the landholder, as the result of the drilling would be of no interest to the mortgagee bank

46 I agree with the submission of Mr Beasley that the mortgagee banks would have no interest in the proceedings. That being so, did Parliament intend that an arbitrator's determination be invalidated when bank mortgagees are not notified under S.142? The only answer I can give to that question is, No.

47 Accordingly, I find that the failure of CMAL to notify, under the provisions of Section 142 Mining Act 1992, the Bank mortgagees that are noted on the Registrar General's register, in respect of each of the landholders, does not invalidate the arbitrator's determination on access. Consequently, this court does have the power to review those determinations under S.155 Mining Act 1992. I must say that this issue should have been raised as a preliminary point. The first inkling was raised evidentially in the last hours the 5 day hearing, and then later in written submissions. If the court had ultimately ruled that it had no jurisdiction, then a lot of court time and expense to all parties would have been lost.

Contamination of Aquifers

48 The next concern to the landholders was the issue concerning the possibility of contamination of the aquifers by:

1. cross contamination of the poorer quality water in one aquifer with the better quality water in another aquifer

2. contamination of aquifers with fluids used during the drilling process.

49 Hand in hand with 2 above is the issue of contamination of the soil and water drains with fluids, which are stored in drilling sumps by either:

- seepage through the sump area
- overflow of sump liquid in times of rain.

50 Notwithstanding condition 23 of Exploration Licence 6505, which outlines the obligation upon the licence holder to drill so that there is no contamination or cross contamination of aquifers, it was submitted that the applicants were of the opinion that the mining company would not meet those obligations, to the ultimate detriment of the aquifers and their future farming. The landholders relied, in part, upon a report of Dr. Gavin M. Mudd (exhibit 1).[5]

51 To this end evidence was produced in respect of the type of drilling that will take place.

52 Exhibit 3 was a report prepared by Mr Errol Briese, of Australasian Groundwater & Environmental Consultants Pty Ltd. Mr Briese prepared his report upon instructions from CMAL.

53 Mr Briese outlines at paragraph 4.4.1 of that exhibit the procedures for drilling through the Alluvium and grouting the annulus so that any alluvial aquifer would be sealed. Dr Gavin Mudd was called on behalf of the landholders Alcorn and Brown. There is no challenge as to the type of procedure outlined by Mr Briese, however, on page 6 of Dr Mudd's report, the following appears:

[5] Caution must be exercised in reading Dr Mudd's report. The assumptions upon which he based many of his opinions were assumptions that are not in accordance with the conditions upon which the respondent must comply with under the conditions of EL6505. In other words, his assumptions would often be the worst case scenario of drilling, contrary to all current standards of "best practise" and contrary to the licence conditions. Other than that, his report and evidence was advantageous to the Inquiry. Furthermore, as outlined in Mr Briese's summary, "most of Dr Mudd's recommendations have been implemented from commencement of the drilling program"

Depressurisation is the loss of groundwater pressure (or head or level). This can occur due to differences in water pressure between aquifers, leading to flow out of one aquifer and into another. Assuming that exploration bores are not sealed during drilling, the potential for depressurisation or significant changes to groundwater levels is therefore exacerbated.

54 Much time was spent on this issue. In summary, the consensus of the experts is that the drilling fluid in the drilling hole is of such viscosity that it prevents the flow of any water from an aquifer into the drilled hole, whilst the fluid is in the hole. The insertion of a sleeve prior to grouting then keeps the water from flowing in; once grouted, the seal is complete. This risk, however, is minimal.[6]

55 The fluid in the drilled hole was another concern. It is beyond question that there could be circumstances arising that on occasions, the fluid from a hole being drilled might drain into an aquifer at a greater rate than expected. The concern was the contamination of the aquifer with drilling liquid. Mr Briese was questioned in relation to both the cross contamination of aquifers and the contamination by drilling fluids. It commences at page 155 of the transcript: *Q: Millions of litres of water in the aquifer? – Yes, quite – and – yes. Q: And we're talking about more than 100 square kilometres of aquifer? – Correct, yeah.* Then later on page 156: *Q:..even if we assumed a small amount of say shallow groundwater – saline shallow groundwater through a crack ended up somehow getting down to the alluvial aquifer, what impact would that have on the alluvial aquifer? – I would doubt whether it would be detectable, given that there is, as I said, dispersion and dilution as it moves through the system. It's a* ***miniscule*** (emphasis added) *amount that actually seeps through the crack. Q: Would your answer be the same in relation to if a small amount of diluted driller's mud got down into the alluvial aquifer? – That's correct.*

[6] Transcript p67, commencing at 14: Q: There's a risk of cross contamination of alluvial aquifers during the drilling process, before there is grouting of the alluvial part of the hole? A: The risk is minimal. And later, Q: But it exists? A: I guess there's a risk in everything, there's – nothing is 100 per cent.

56 Questions were put to Mr Briese concerning such contamination. In answering questions by Mr Bannon, Mr Briese indicated that if something like 10% of drillers mud was lost in the hole, (in other words it would be seeping into the aquifer) N-Seal would be used. Mr Briese's report indicates that N-Seal contains up to 1% of crystalline silica. At point 11 of the document[7], under the heading of "Toxicological Information", it reads: *Inhaled crystalline silica in the form of quartz or cristobalite from occupational sources is carcinogenic to humans.* It must be remembered that if the product finds its way into the waterways, it is extremely diluted.

57 In further questioning about the drillers mud being used, concerning the amount that may find its way into an aquifer, Mr Briese indicates that the amount would virtually be undetectable. He said that 1 to 2 litres is diluted in about 1000 litres of water in the drill hole. If any escapes into the aquifer, it would be into about 60,000 megalitres of water.

58 Concerning the seepage of contamination into the ground through the sump area. The mining company, prior to the hearing, agreeing to line all of the drilling sumps to ensure there is no leakage, has alleviated this matter. The integrity of such a system was challenged in evidence given by Mr Leonard O'Brien, a retired exploration driller who gave evidence as to his experience in drilling in respect of the "Caroona" project. Mr O'Brien said that when sludge comes from the drill hole and drains to the sump, a shovel is used to push the sludge along. If the drain area from the drill hole to the sump were lined, the shovel used to push the sludge from the drain to the sump would, according to Mr O'Brien, tear holes in the lining material. No other evidence was put to the Inquiry concerning that issue. An appropriate clause will be inserted in the arrangement to cover this concern.

59 The overlow of the sump area was the subject of evidence. From the mining company's point of view, the driller would leave a freeboard of 20

[7] Appendix 5 of exhibit 3

cms whenever the sump was left with liquid overnight, and a greater freeboard if left over a weekend. Furthermore, a bund would be created on the high side of the sump, to divert any rainwater from the sump area. Assuming the bund was successful, the only water to enter the sump would be the rain falling directly into it. Evidence was that the freeboard depth was based upon a one in a hundred year rainfall.

60 The concern of the landholders was such that it was suggested that an above ground sump tank be created in lieu of an in ground one. It would appear from the mining company's point of view, an in ground sump has more stability and consequently more environmentally sound. This issue raised its head when a site visit was made to the Brown's property. It was evident that the area selected to drill on that land was the lowest on the property. It was clear standing on the ground that water had ponded there in recent times and an inground sump would create difficulties if rain occurred.

61 Following the site visit, the mining company indicated to the Inquiry that it intended to utilise above ground sump tanks on the Brown property. However, in giving evidence, Mr O'Brien was asked about that issue, having been shown a photo of a drilling rig that is currently used. He indicated that due to the configuration of the drill and the outlet of the hole, there would be no gravity flow from the hole to the above ground sumps. Consequently, above ground sumps could not be used. He did, however, add a statement, that is, the drilling company, although not using such a drill currently on the Caroona project, does in fact have a drill rig which is capable of being used and is suitable for an above-ground sump tank.

62 Mr Brown, both when on site and in giving evidence, is concerned about contamination by overflow in heavy rainfall. Notwithstanding the concession given by the mining company after visiting the site, of installing above ground sump tanks, he is concerned about rainwater flowing across the top of the drilled hole, and taking with it the

contaminated water left in the drill hole.

63 Mr Brown states in paragraph 4 of his affidavit [8]

The Land is flat and is situated in the centre of a large flood plain. During times of heavy rainfall the Land quickly becomes inundated with water.

This was evident during the site visit. The area where the hole will be drilled on Mr Brown's land is clearly the lowest part of his land and the cracked mud in that area was indicative of water ponding there some time ago. Of all the sites viewed, this one would be the most likely to be affected by water flowing over the drill hole in time of heavy rainfalls.

64 The principle concern of Mr Brown is that he and his wife are endeavouring to have their farm certified as an organic farm. Exhibit 46, is a document headed "NASSA Organic Standard". It is a 120 page document which sets the current standard required to be adopted by a producer before becoming certified as an organic producer. At paragraph 10 of his affidavit he indicates they are aiming to achieve organic certification within a period of approximately five to eight years.

65 As one would expect, the standards set out in exhibit 46 are very strict and detailed. There is no suggestion from the mining company that the products used in drilling liquids would be compatible with products used in organic farming.

66 What was challenged was the possibility of flooding rainwater, passing over a drill hole, drawing the drilling liquid from that hole. Mr. David was questioned at some length about that issue. He maintains that the density of the liquid in the drill hole is such that rainwater flowing over the hole would not draw the liquid out. No "expert" was called to give evidence on this point. It may very well be that if the flow of water were not swift, the liquid in the drill hole would not be drawn out. On the other hand, if the flow of the flooding rainwater over the hole were so

[8] Marked Exhibit 45

fast that the water is drawn out of the drill hole, the question remains as to what damage, if any, would be done to the Brown's property. Mr David did indicate that the casing of the hole has to be higher than the above ground tanks (to obtain gravity flow from the hole to the sump), thus making it a very high floodwater to be flowing over the top of the drill hole casing.

67 As I mentioned, there is no expert evidence on this point, but one could assume that the greater the water flow over the top of the drill hole, the greater the chance of water be drawn from that drill hole. However, the greater the amount of water flowing over the hole also means the greater the dilution of the drilling fluid once it mixes with that flooding rainwater. This water, we are informed by Mr Brown, would flow into a channel that is used by him for re-cycling purposes. So, according to his concerns, he would be re-cycling contaminated water onto the crops.

68 So, in the event of the worst unexpected scenario, if water does flow from the drill hole on the property, one wonders as to the extent of damage that may be occasioned by the Browns if this event occurred. Mr Brown gave evidence of rain falling further up the valley from his property. Indicating how heavier it was there,..*where we might have 90 mils on that day, they might have 200 mils…* He indicated that that water travels fast, possibly over 20 to 25 miles, reaching their property in six hours. He indicated his concern over that, as none of the properties over that stretch of 20 to 25 miles are organic. One would expect that the damage caused by water "contaminated" by flowing over non-organic farms over a distance of some 20 or so miles before reaching Mr Brown's property would be far more catastrophic than the amount of contamination that may flow from a drill hole on the property. I am not saying for one moment that if there were an escape of contaminated water from a drill hole it would not be a matter of concern.

69 However, if an event such as that occurred, it would need to occur at

some point of time over a period of some two to three weeks whilst drilling was taking place. An event such as that may very well impact upon the Browns ability to achieve accreditation as organic farmers. However, it would appear that that impact would be minor compared to the impact of flooding waters from non-organic farms above the Brown's over the next 5 to 8 years.

70 Prior to the hearing of evidence, I challenged the landholders as to the basis of wanting to produce evidence concerning drilling etc. It was put to the court that the basis was the provisions of Section 141(1)(e) of the Mining Act 1992, which states:

141 (1) An access arrangement may make provision for or with respect to the following matters:

(e) the things which the holder of the prospecting title needs to do in order to protect the environment while having access to the land and carrying out prospecting operations in or on the land.

71 The aspect of contamination was a predominant feature of the 5 days hearing. The hearing adjourned on 3 April 2009 with directions concerning written submissions. Those submissions from the landholders, although wanting the court not to grant an access arrangement, in the alternative urged the court, inter alia, to insert certain conditions in any access arrangement which would "protect the environment" from the drilling process.

72 There was a suggestion in the submissions of CMAL that amending legislation introduced on 7 April 2009, that deleted Section 141(1)(e) contained no savings clause. However, it was conceded at court on 28 April 2009 that there was a savings clause and that the subsection is applicable to these proceedings.

73 As to what conditions ought to be inserted under S.141 (1)(e), I will determine later in this decision. [see from paragraph 118]

The Necessity to Drill on the Brown's Land.

74 Mr David was cross examined about a document prepared by the mining company, indicating there would be no longwall mining in certain areas. He indicated that it was not the intention of the mining company to either open cut or use longwall mining under the Brown's land.

75 An issue then arose as to the necessity to drill upon the Brown's land when there is no intention of mining that land. Many questions were put to Mr David, to which he replied that it was necessary to determine the geology and hydrogeology of the region and explained at some length the information that may be gained from the drilling. He was questioned about the relevance of that information gained on the alluvium flats when mining will only take place on the ridges. Among other answers, he replied at one point of time: *it's something that needs to be determined…to allow later on, if somebody wants to model the potential impacts of a mine development, you need that data to be able to adequately carry out your responsibilities.*

76 Mr David indicated that the drilling was done on a grid pattern (although such pattern has not been placed before the court). The proposed hole on the Brown's property is part of that grid and is necessary, according to Mr David, to allow an accurate as possible understanding of what is beneath the land over the area of the exploration licence.

77 Nothing was put to the court on behalf of the Browns' to indicate that the grid pattern was not necessary, nor that the one proposed hole on the Brown's land was not necessary.

78 I accept the evidence put to the court on behalf of CMAL that although mining will not take place under the Brown's land, it is necessary for CMAL to drill to understand the geology, hydrogeology and the variations in the coal seam over the area.

Concerns of Mr & Mrs Alcorn

79 During the site visit Mr Alcorn pointed out the area where he desired the mining company enter his land. He outlined the area where he wanted the mining company to construct a gate, wide enough for heavy farming equipment to pass through. He did not want the mining vehicles to pass, on the existing track, his cattle yards. Agreement was reached to by pass the stockyards to reach hole C39. He expressed concern about the bund that would be above hole C39 on his land. His concern was that water would be channelled either side of the sump and could possibly create erosion. The mining company manager was of the opinion that due to the closeness of the sump to the top of the ridge in the area, very little rain would be channelled off. No other evidence from any expert was given in respect of this matter. From viewing the area, I must agree that there would appear to be a minimum amount of water flowing from the bund. That, together with the relatively short time in which the mining company will be occupying the area, appears to present a very remote chance of any erosion. However, the mining company is aware of its obligation to rehabilitate upon completion of drilling, which will include rehabilitation of any erosion that occurs.

COMPENSATION

80 Section 141 sub-section 2 of the Mining Act 1992 provides that any access arrangement that is determined must specify compensation and it then refers to division 1 part 13 of the Act.

81 Division 1 of part 13 in relation to compensation outlines, in Section 262, the meaning of compensable loss. It is the criteria set out in the sub sections of that section which must be considered by either the arbitrator or in this case the Court in determining the relevant compensation pursuant to any access arrangement.

82 Section 262 of the Mining Act provides:

262 Definition

In this Division:

compensable loss means loss caused, or likely to be caused, by:

(a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or

(b) deprivation of the possession or of the use of the surface of land or any part of the surface, or

(c) severance of land from other land of the landholder, or

(d) surface rights of way and easements, or

(e) destruction or loss of, or injury to, disturbance of or interference with, stock, or

(f) damage consequential on any matter referred to in paragraph (a)–(e),

but does not include loss that is compensable under the *Mine Subsidence Compensation Act 1961*.

83 The difficulty that is occasioned in respect of determining a compensable loss for a mining company to enter the land of a landholder and drill, for example, one or two holes, is quantifying the compensable loss. This difficultly is highlighted in exhibit 17. That is a report prepared by Mr John Austin, a certified practising valuer, on behalf of the mining company.

84 In his report, Mr Austin outlines that the compensable loss in respect of Section 262(a), 262(c), 262(d), 262(e) is nil. Furthermore it is his opinion that Section 262 (f) is not applicable in these circumstances.

85 Consequently he is of the opinion that the only relevant section so far as the land holders in this matter is concerned, is Section 262(b) of the Mining Act 1992. He goes on to state, in respect of that sub section, after determining a compensable loss at the rate of $15 per week, the following: *This sum does not, in my opinion, adequately compensate the land owner of "deprivation of the possession of the use of the surface of land or any part of the surface". Whilst it might comply with the strict wording of the Act, such sum does not allow for the obvious disturbance*

and inconvenience during the period of occupation of part of the property.

86 Of page 13 of his report Mr Austin expresses an opinion that the compensable loss that has been determined by the arbitrator at the rate of $330.00 per week per drill hole was *"seemingly generous...not unreasonable."*

88 There has traditionally been some difficulty in placing evidence before a warden's court in respect of compensation pursuant to exploration. Presumably due to the words expressed by Mr Austen and cited in paragraph 85. The manner of determining compensation in respect of exploration, by relating a sum of money to a certain type of drill hole, was in vogue in 1974 (and perhaps earlier). I have read determinations of a warden from that year; regrettably I have not been able to locate any reasons given for the determination. One assumes it may have been determined after accepting some expert evidence such as that given by Mr Austen and relating that back to the number of drill holes intended upon the property. The difficulty in some circumstance, not in these cases before the court, is that a mining company does not know, at the time of a court hearing, the exact number of drill holes it will require to make. It would appear, from what I have read in past records, that over the years, there were agreements struck for compensation that were in accordance with a criteria of a certain amount of money for each particular drill hole. The most simplest and less intrusive of all drill holes would attract a small amount of compensation and the most intrusive, such as a diamond drill hole, would attract a larger amount of compensation.

89 Notwithstanding that, the Court is then left with the expert report of Mr Austin where he expresses an opinion of a compensable loss of $15 per week for each drill hole. That was an estimation made by Mr Austin in compliance with Section 262 of the Mining Act 1992.

90 In the application for a review of the decision of the arbitrator the land holders have indicated at point 6 of their grounds, the following: *The arbitrator erred in that she failed to award compensation to be paid to any land holder of the land as a consequence of the holder of the prospecting title carrying out prospecting operations in or on the land in conformity with Section 262 of the Mining Act 1992.* On Mr Austen's evidence, the arbitrator should have awarded less!

91 Nothing was put to this Court on behalf of the landholders, other than submissions following some questions of a witness, justifying a claim for compensation pursuant to the provisions of Section 262 of the Mining Act 1992. It would appear from reading the arbitrators determination, that it was suggested to her a rate of $15.50 per person per hour on the land was a fairer method of calculation and reflected the nuisance/disturbance caused by strangers on the land and vehicle movement. It appears nothing was put to her that would justify how that figure would be relevant to a "compensable loss". It would appear from her determination that CMAL did not challenge her interim determination of $330 per week per drill hole which she stated *"generously reflecting the land's value for agistment or other possible use of the land".* I note that the draft access agreement forwarded to the parties by CMAL[9] suggested compensation at "*The sum of $330 per week or part thereof for each drilling rig…."*

92 I refer to a submission on behalf of the landholders suggesting that compensation ought to be granted in the sum of $35,000 per drill hole. A number of reasons were put forward for that proposition. One proposition was: *"The imposition of an access arrangement, and the exercise of rights under it, deprives Landholders of the opportunity to bargain with CMAL for access on arms length terms. This lost opportunity is "compensable loss" within the meaning of S262(b) and/or 262(f)."*[10]

[9] copies are contained in exhibit 37
[10] See para 78 of written submissions dated 17 April 2009

93 If that is accepted, it appears to mean that because of the fact that no agreement was reached as to compensation, then the "lost opportunity" is "damage consequential" to matters referred to in paragraph (a) to (e) of Section 262. With respect I cannot accept that proposition. Section 263 dictates that the holder of an exploration licence may agree with a landholder as to the amount of compensation payable. Nothing at that point of time restricts the matters that may be taken into account by the parties. If there is no agreement, the onus is then upon the arbitrator to make provision for, inter alia, "the compensation to be paid to any landholder".[11] There is no suggestion that an arbitrator may go outside the provisions of the Mining Act when considering compensation. Indeed S 141(2) expressly limits the arbitrator to assessing in accordance with Division 1, Part 13 of the Act. It appears that the "lost opportunity" which the landholders had has been lost forever once there is an arbitration process in place.

94 The next area of submission was that "*Mr Austen agreed that….$35,000 per borehole was a reasonable figure"*. The submission, by Mr Bannon on behalf of the Alcorns and the Browns, made reference to the transcript. It is necessary to look at that evidence of Mr Austen. When being questioned by Mr Bannon, the following exchange took place: *Q: Can I suggest a way which would reflect the reasonableness of my $35,000 figure as a way of engaging in this rather difficult process, is if you accept $330 a week is fair, if you extrapolated that out over a two year period, reflecting the fact that in effect they've got to keep it generally available for the two year period, that would give you $330 by 52 is about $17,500, by two is about $35,000?…Yes. Q: I'm just asking a question as to – that would be – would you agree that that would be a way, if the figure for compensation –* ***again assuming my assumption is to be adopted*** *(emphasis added)----? Yes. Q: That would be a way, in circumstances where you have to identify the compensation, before we know when it is they're actually going to come on, that would be one way of saying well, that's a reasonable figure? –*

[11] Section 141(1)(f) Mining Act 1992

Yes, that's a way a landowner may look at it, yes. Q: You'd accept that as a reasonable way? ---Yes.[12]

95 With respect, I think it is fanciful to think that Mr Austen, in that exchange with Mr Bannon, is saying that he agrees that a sum of $35,000 per borehole per week is a reasonable figure pursuant to the criteria set out in section 262.

96 Submissions also referred to the "special value" of the land and the fact that "the drilling sites had special value to CMAL". But the special value to CMAL is for mining purposes. When one looks at Section 272(1)(c) of the Act[13], although it is referring to "market value" it appears it is expressly excluding any market value of a "special" nature, such as mining purposes. It is my opinion that "compensable loss" under the Act does not refer to any "special value" to either the landholder or the mining company.

97 Finally reference is made to the fact that CMAL has outlayed some $91 million for the exploration licence and that there are substantial costs involved in drilling, "*the Court would infer that CMAL would be prepared to pay substantially more than $330 per week per borehole during drilling."* The fact is that CMAL has not offered to pay a greater figure and nothing in the Act supports a proposition that compensation ought to be geared to the amount of money expended by a mining company.

98 If a Court is to strictly determine compensation of the basis of Section 262, then the only information that has been placed before me would necessitate me to award compensation at a rate of $15 per week for each drill hole drilled upon a land holders property.

99 On one hand a Court could award that amount as suggested by Mr Austin, with the land holders having the knowledge that if at some other

[12] Transcript page 406
[13] "must not exceed the market value (for other than mining purposes) of the land etc."

time that they are able to determine a compensable loss which would be applicable in their instance then they could make an application under Section 276 of the *Mining Act 1992* for additional compensation. The concern I have with that proposition is that I am of the opinion that a land holder may never be able to make a determination as to what his or her compensable loss may be and consequently they would be awarded an amount of money which in the opinion of Mr Austin, and frankly in the Courts opinion, would not adequately compensate the owner for the deprivation of the possession or of the use of the land.

100 CMAL has no objection to the Court awarding the amount awarded by the arbitrator.

101 If the Court awards $330 per week per drill hole to each landholder, it is still open to the land holders, at some other time, to bring forward an application for additional compensation under Section 276 of the Mining Act 1992. Naturally, there would be a necessity to establish additional loss. Consequently, no irreparable harm could be occasioned upon the Court not interfering with the compensation awarded by the arbitrator.

102 In respect of the compensation concerning the Clift land, in the affidavit of Anthony Mark Clift[14] he expressly states he does not want compensation. Mr Long also stressed this desire in his submissions to the court on 28 April 2009. Accordingly, at the request of Mr Clift I will assess his compensation as "Nil".

103 On the other hand, Thomas Noel Bailey, in his affidavit[15]outlines in some detail the amount of compensation sought. He gives no reason for the sums outlined, nor did he give evidence before the court. The compensation sought is greater than that determined by the Arbitrator. In the final submissions to the court, Mr Long supported the claim put forward by Mr Bannon on behalf of Alcorn and Brown that

[14] Exhibit 55, dated 26 February 2009
[15] Exhibit 54, dated 25 February 2009.

compensation ought to be determined in the sum of $35,000 per drill hole.

104 In the circumstances, I propose to determine compensation in respect of the Alcorn, Brown and Bailey properties at the same rate as determined by the arbitrator. I propose to determine the compensation for the Clift property as "nil".

105 The difficulty that has arisen in these cases over compensation is the difficulty that has arisen over the past years in respect of Exploration Licences. It may be time for Parliament to consider a special provision being inserted into the Mining Act 1992, to provide for compensation for exploration licences, and not to rely upon the current Section 262

The Evidence of Robert Banks – The Integrity of cement core

106 Mr Banks, a soil scientist, prepared a report "Discussion of Soil and Environmental Properties at a proposed Exploration Drilling Site on "Goodgerwirri", Quirindi".[16] Exhibit 14 is a document prepared by both Mr. Banks and Mr Briese, outlining the matters, which they agreed upon. Item 6 of that document states: *Possible Point of Disagreement: EHB considers water table at 1m due to heavy rainfall in Dec/Nov 2008 where Mr Banks states mostly always at the level.* Both witnesses agreed that they have different fields of experience, Mr Banks a number of times indicating, when he was giving evidence, that he could not express opinion on a certain matter as it was outside his field of expertise.

107 The examination of Mr Banks however, centred upon his expertise in relation to soil down to the level of 8 metres. He indicated that in times of severe drought, cracks in the soil could penetrate to that particular depth. He expressed opinions at to the possibility of cemented boreholes being under stress in times of drought.

[16] Exhibit 13

108 Mr Banks was genuine in presenting the correct opinion evidence before the court, when questioned about the effect of drought upon a cement core in a borehole below 8 metres in time of drought, he expressed some concern but conceded that it was not within his range of expertise to give a definite opinion.

109 He returned some days later to give evidence of power poles leaning as the result, he says, of drought conditions. These poles would be inserted in holes, I assume, less than 8 metres deep in the ground, and have the longest part of the pole out of the ground.

110 Mr Beasley submitted that the evidence of Mr Banks was of marginal use, in that he couldn't assist the court in what would occur below the 8-metre level. I must agree with Mr Beasley, I fail to see how I can interpret the evidence of Mr Banks as proof of the possibility of the integrity of a cement core, some being some 400 metres beneath the surface, being reduced due to drought conditions.

The Evidence of Leonard O'Brien – Challenges to drill procedures

111 Mr Leonard O'Brien gave evidence on behalf of the Alcorns and the Browns. McDermotts, the drilling company that has been contracted by CMAL to drill exploratory holes in respect of the Caroona Project, employed him. He had 10 years drilling experience until 1972 and then spent 32 years as a beekeeper. Mr O'Brien said he always maintained his interest in drilling and was "approached" by McDermotts to drill for them on the Caroona project.

112 Mr O'Brien was with the company for some three and a half months, he drilled two holes before being dismissed from that company. His evidence is that there was no grouting in those two holes. He challenged his superiors in relation to that and received a response to the negative.

113 Whilst in the witness box, Mr. O'Brien was shown a "business document" kept by the drilling company, which indicated the hole was grouted. Mr O'Brien suggested the document was a fabrication.

114 Evidence was then given by Mr Aiden Price on behalf of the mining company. Mr Price had been a supervisor of drilling at the time when Mr O'Brien was drilling. He said that, according to his diary, he attended the same drill hole that Mr. O'Brien was working on. He informed the court that same hole was in fact grouted.

115 The document recording the fact that the hole was grouted was not the document prepared by O'Brien, but was a document put together at another point of time. Mr O'Brien was at odds with the suggested hole number on the form – but that apparently related to a numbering system which is peculiar to the drilling company.

116 It is not up to this court to determine whether the records and recollection of Mr Price are better than the recollection of Mr O'Brien.
If the drilling company did not grout when required, that would place CMAL in a position where it would be in breach of the conditions of EL6505. This could lead ultimately to cancellation of the licence.

117 The landowners want the evidence of Mr O'Brien to be used for the purpose of requesting a condition of access be inserted concerning the drilling. This would enable immediate action to be taken against CMAL through the courts rather than, what they say is a slower process, of seeking relief through the Minister. That issue will be attended to below.

What Conditions may be Included in Access Arrangement?

118 From the landholder's point of view, they request far more conditions that that granted by the arbitrator. By way of example, some of the matters, which, I assume they believe, come under S.141(1)(e), are set out in the Alcorn's "list of disagreements", dated 6 March 2009. For

instance:

(c) the arbitrator's failure to impose an appropriate water testing regime having regard to the particular contaminants at issue, the nature of the groundwater beneath the Alcorns' land and the Alcorns' usage of their land; (d) the arbitrator's failure to impose any soil testing regime; (e) the arbitrator's failure to impose any slurry testing regime; (f) the arbitrator's failure to impose appropriate conditions on the drilling process, including as to grouting, bunding, above-ground sumps and the provision of information as to the qualifications of drillers (g) the arbitrator's failure to impose a condition for the provision of comprehensive information on the composition and manner of use of drill muds;

119 What must be determined is what conditions can be inserted into an access arrangement in accordance with Section 141, more particularly S141(1)(e)? The issue is twofold; firstly, to what extent may an access arrangement include matters of an environmental nature, which are already in the exploration licence?

and secondly, what exactly does S141(1)(e) refer to?

120 I will consider the first issue, by looking at some of the conditions of EL6505 (relevant to these proceedings):

Condition 11 – Environmental Management – General

(a) Environmental management of operations must be carried out according to a specific Environmental Management Plan covering all exploration activities (including categories 1 to 3) prepared by the licence holder, which is acceptable to the Department.

Condition 18 - Erosion and Sediment Controls

(a) all operations must be planned and carried out in a manner that minimises erosion and controls sediment movement. The licence holder must observe and perform any instructions given by the Department in this regard.

(b) For operations requiring approval under Condition 2 the licence holder must document in any Review of Environmental Factors required a plan setting out the proposed methods of minimising erosion and controlling sediment movement.

(c) The procedures undertaken to minimise erosion and control of sediment

movement must be included in reports prepared in accordance with condition 28(a).

Condition 19 – Prevention and Monitoring of Pollution.

(a) Operations must be planned and carried out in a manner that does not cause or aggravate air pollution, water pollution (including sedimentation) or soil contamination. For the purpose of this condition, water shall be taken to include any watercourse, waterbody or groundwaters. The licence holder must observe and perform any instructions given by the Department in this regard.

(b) For operations requiring approval under Condition 2 the licence holder must document in any Review of Environmental Factors required the proposed methods for minimising air pollution, water pollution and soil contamination.

(c) The licence holder must carry out environmental monitoring in accordance with the Environmental Management Plan in relation to prevention of pollution and rehabilitation of affected areas.

Condition 20 – Refuse, Chemicals, Fuels and Waste Materials

The following subclauses are relevant:

(d) Precautions must be taken to prevent spills and soil contamination. All chemicals, fuels and oils must be stored in sound containers and kept in spill trays or in a bunded area. A supply of appropriate spill and dust prevention and oil absorbent materials must be maintained at drill sites.

(e) All drill cuttings and fluids must be contained in aboveground or in-ground sumps. To prevent contamination of the groundwater or soils in-ground sumps must be plastic lined whenever toxic or non-biodegradable drilling fluids are used or when drilling into rock potentially containing high concentrations of toxic metals or metalloids.

(f) Any soil contaminated by chemicals, oils and fuels, or drilling mud or drill core containing toxic materials must be collected and remediated or disposed of in an approved manner, and the site rehabilitated with clean soil.

Condition 20 – Drilling

(b) If the licence holder drills exploratory drill holes he must satisfy the Department that during and after the activity:

i) all holes cored or otherwise are constructed and/or sealed to prevent the collapse of the surrounding surface;

ii) if any drill hole meets natural or noxious gases it is plugged or sealed to prevent their escape;

iii) if any drill hole meets an artesian or sub-artesian flow it is effectively sealed to prevent contamination or cross-

contamination of aquifers, and is permanently sealed with cement plugs to prevent surface discharge of groundwater;

iv) potentially hazardous tools or logging equipment dropped in holes and unable to be recovered must reported to the Regional Inspector of Mines and if directed to do so the licence holder must recover the equipment;

v) waters flowing from any drill holes must be managed and contained. Disposal of any such waters must be in accordance with the ANZECC/ARMCANZ 2000Water Quality Guidelines so as to meet the environmental values of the receiving watercourse or stock dam, or must be disposed of in accordance with a licence issued by the Department of Environment and Conservation;

vi) once any drill hole ceases to be used the land and its immediate vicinity is to be rehabilitated to its former condition;

Condition 28 - Environmental Reporting

(a) An **Environmental and Rehabilitation Report** must be submitted to the Department as follows:

iii) The reports must be prepared to the satisfaction etc.…….They should include sufficient information to demonstrate that the requirements of conditions 1 to 6 and 9 to 27 or those of them included in the licence have been satisfied.

Condition 28 (c) or a condition very similar exists in respect of most of the conditions, I have not included them above. However, what is clear is that when certain conditions are imposed to protect the environment, it is necessary for the licence holder to report to the Department pursuant to Condition 18 (a)(iii).

121 In looking at the above conditions, it is obvious the Minister, when granting the Exploration Licence, was aware of the need to impose certain conditions to protect the environment and he did so.

122 In satisfaction of condition 11 above, a document called **Exploration Environmental Management Plan for the Caroona Project – EL 6505 (EEMP)** is before the court as part of exhibit 37. That document consists of some 110 pages, prepared by Environmental Consultants and is very detailed. The document supports and enhances the

conditions of the licence, to further protect the environment. For example, at 6.5.2.2 it states, inter alia:

- All holes that are drilled for monitoring groundwater will be drilled by an appropriately licensed water driller;

At 6.13.1 it states, inter alia:

Conditions 53 to 57 of the EL require that the licence holder:

- Establish a Caroona Coal Project – Community Consultative Committee.

123 Following upon 6.13.1 of the EEMP, attached to Exhibit 5, the affidavit of Mr David, is a document headed **Independent Expert Review of Proposed Groundwater Investigations and Monitoring, Regional Exploration Phase of Caroona Coal Project by W. A Timms.** The clients name on that document is listed as "Caroona Coal Project Community Consultative Committee". That document outlines that "The aim of the Independent Expert Review (IER) is to provide technical guidance to the CCC (i.e. the Caroona Community Consultative Committee) by peer reviewing the hydrogeological studies and methodologies conducted by BHP Billiton for the Caroona Coal Project and to make relevant recommendations." The document contains some 9 recommendations.

124 As can be seen from the above paragraphs, there are a number of conditions, safeguards and independent oversighting of what is being done by CMAL pursuant to EL 6505.

125 It is submitted on behalf of the mining company that adequate conditions are imposed in EL6505 to protect the landowners from environmental damage and there is simply no need to repeat similar clauses in any access arrangement. It was also submitted that some of the conditions sought by the landholders would not prevail because of the provisions of Section 141(3), which states:

(3) In the event of an inconsistency between:

(a) a provision of an access arrangement, and

(b) a provision of this Act, of the regulations or of a condition of a prospecting title,

the provision referred to in paragraph (b) prevails.

It was often cited during the proceedings that if the mining company breaches any condition of the exploration licence, then it leaves itself open to action by the Minister which can include cancellation.

126 The general thrust of the landholders submission in respect of that issue is that circumstances may arise where something is being done contrary to the licence in Gunnedah, which is remote from Sydney, and the landholder has no control over it (unless it is included in an access arrangement). They pose questions such as who is going to report the breach to the Minister in Sydney etc.

127 I find it hard to accept that without the conditions inserted, as requested by the landholders, the landholders are left powerless. Section 141(4) provides:

(4) If the holder of a prospecting title contravenes an access arrangement, a landholder of the land concerned may deny the holder access to the land until:

(a) the holder ceases the contravention, or

(b) the contravention is remedied to the reasonable satisfaction of the landholder.

128 The landholders involved in these matters and indeed other landholders within the Caroona area, are astute people. They form part of a community, which is active in ensuring that their land is not ruined by the exploration work of CMAL. They have lobbied (and demonstrated) consistently since CMAL came into the area. They are doing their utmost to ensure that CMAL is "kept on its toes" in relation to its performance under EL6505. Furthermore, CMAL has indicated that it has no objections, subject to some concerns over OH&S matters, of conditions being inserted allowing landholders to enter upon the drilling site to observe operations. Coupled with the protective tenacity of the landholders is the fact that, as evidenced in exhibit 59, the Department of Primary Industries conducts environmental compliance audits in

respect of the Caroona Exploration Program.

129 With that in mind, together with the provisions of S141(4), I can see no point in repeating, in the access arrangement, clauses which exist in the exploration licence and other supporting documents.

130 To the second issue, what then, does S.141(1)(e) refer to? To my mind it must incorporate matters, "in order to protect the environment" which are not included in an exploration licence or supporting documents. These are generally, but not restricted to, matters of concern that are raised by individual landholders and/or matters of a generic nature – such as washing of vehicles entering upon properties, if necessary; ensuring that noxious weeds are not conveyed into the particular property.

CHALLENGES TO OTHER CLAUSES

131 The landholders Alcorn and Brown, submitted additional clauses ought to be included if access is granted. CMAL has opposed some of those sought. In relation to the suggested clauses 7A and 7B, the mining company submits:[17] *"This court does not authorise prospecting operations – the Minister does in an exploration licence."* I totally agree with that comment. However, I intend to include those clauses, as I am of the opinion that it clarifies, beyond any doubt, the limits within the mining company may drill when upon the land.

132 The request by the landholders for a 28 days notice before entering is, to my mind, not reasonable. I can see a number of possible scenarios arising, if the suggested clause is inserted, which would lead to intolerable delay and inconvenience to the mining company and frankly I cannot see how such a long notice would be required. However, it appears not unreasonable to indicate the exact day the company intends to enter (with a necessary proviso for wet weather etc)

[17] See para 115 of submissions of 24 April 2009

133 CMAL also opposes the suggested clause 7D. CMAL has suggested a variation of the suggestion that I propose to adopt. I agree with the submissions of CMAL that the suggested clauses 8 and 9 have no place in an access arrangement in respect of EL6505.[see paragraph 129 and above].

134 The suggested clause 10 is covered by Condition 20 (e) of EL6505. However, as it is quite clear that an inground sump is not suitable to the Brown's property, a clause in their access arrangement will include an above ground sump. CMAL has no objection to the insertion of the suggested clauses 12, 12A, 13 and 14. In respect of suggested clause 11, there appears to be no reason as to why a sump should be completely drained if left for more then 3 days. However, I propose to insert a clause, which may alleviate any concerns.

135 I can see no reason as to why suggested clauses 15 to 26 should be inserted in an of these access arrangements. In respect of clause 27, CMAL concern is that of an OH&S nature. I propose to insert the clause taking that into account.

136 Although I don't consider that the insertion of a clause in respect of water testing is required in the circumstances of this case, as CMAL agreed as to conditions concerning water testing, then it ought to be inserted. I propose to insert a condition which I consider appropriate having regard to the evidence and documentation tendered at the hearing. I am aware, as submitted by CMAL, that Dr Timms suggests it is sufficient to test bores within a radius of 100m of the drill site, however to restrict to 100m could lead to no testing if the closest bore is, for eg, 150m away.

137 Condition 20(f) of EL6505 adequately attends the any concerns of soil contamination.

138 I don't propose to insert suggested conditions 36, 37, 40 or 42. There is an agreement to insert the proposed clause 43, and 46 to 49, as well

as 45(a) with a proviso. Concerning proposed clause 44, there has been no evidence produced that would ground the basis for the inclusion of that clause. Clause 41 will be inserted in respect of all Landholders. Naturally, the numbering of the clauses will not be as those suggested in the submissions.

139 Individual access arrangements are attached in respect of each of the landholders subject to these cases.

140 For clarification of the immediate aforementioned paragraphs, The footnote below outlines the suggested clauses.[18]

[18] Suggested 7A and 7B: An amended version exists in condition 2
Paragraph 132 above relates to proposed condition 7C and refers to condition 3.1.1.of the access arrangement
Suggested Clause 7D – "After the commencement of drilling, CMAL to provide 24 hours notice prior to access of the time at which it will access the property and shall use its best endeavours to minimize disruption to, or interference with, the Landholders' operations.
Suggest Clause 10 refers to the use of above ground storage vessels (in lieu of in ground)
Suggested clause 11 refers to completely draining sumps if left 3 days or more. (now see condition 6(m)
Suggested clauses 12, 12A, 13 and 14 are incorporated in condition 6(n)(o)(p)(q)
Clauses 15 to 26 refer to various matters associated with drilling, suggesting the type of material to be used, providing landholder with certain information and other matters which I consider are adequately dealt with in the conditions of the EL and associated obligations.
Clause 27 is repeated, with an addition, in clause 6(p)
Suggested clauses 8 to 35 refer to testing. The only testing included in the conditions relate to water.
Suggested clauses 36, 37, 37A and 37 B relate to costs, compensation and supply of data. The extent to which those clauses are accepted are incorporated in the arrangement
Suggested clause 40 refers to water and soil testing. Water has been included. Suggested clause 41 is provided for in condition 6(j)
Suggested clauses 38 and 42 refer to refusing access to Brown and Alcorn properties.
Suggested clauses 43 is now clause 6(r) of the Alcorn arrangement. Suggested clause 44 relates to the appointment of an expert and arbitrator to consider whether there is a risk to the lagoon near site C39