

### **Oversight of Mines**

There are provisions for the appointment of the chief inspector, inspectors, mine safety officers and investigators and their functions and powers are broadly similar to their current functions and powers.

### **Codes of Practice**

The Act contemplates mining industry codes of practice being prepared and approved by the Minister. If the Minister thinks appropriate, there is to be consultation with relevant persons and organisations on the code contents. Any such codes may be relevant in prosecutions of an offence under the Act.

## **JUST AND EQUITABLE COAL COMPENSATION\***

*The Nardell Colliery Pty Ltd v NSW Coal Compensation Board* (CCRT Number 1999/11)

*Just and Equitable Compensation – Coal Acquisition Act 1981 – Coal Acquisition (Re-Acquisition Arrangements) Order 1997*

### **Court of Appeal Final Orders**

The decision of the Court of Appeal has been reported in this Journal.<sup>1</sup> That report should be read in conjunction with this note.

The Court of Appeal made final orders on 30 March 2004 and those orders were that directions 3, 4 and 5 of the Coal Compensation Review Tribunal's decision on 17 April 2002 be set aside and that the Tribunal reconsider the matter according to law. The Court of Appeal also confirmed that in re-determining the direction relating to "r", the super royalty is to be included where applicable in the calculation of compensation and that so much of the front end payment as is attributable to coal appropriated from Nardell is to be included in the compensation calculation.

Nardell requested the Court of Appeal to make specific directions concerning the use of the WACC formula but the Court declined to do so saying it would go beyond the Court's role to do so in judicial review proceedings.

### **Tribunal Consent Orders**

As mentioned, directions 3, 4 and 5 were sent back to the Tribunal for reconsideration. The appeal before the Tribunal was finally disposed of on 7 September 2004 with Consent Orders. Those Consent Orders included the following directions to replace the original directions:

- “ 3. In respect of ‘r’ the Respondent is to apply a value based on 7/8ths of the relevant royalty rate for coal for each relevant period including super royalty where applicable in the calculation up to the commencement of the Mining Amendment (Royalties) Regulation 2004, and thereafter at a value determined by the Board based on 7/8ths of the royalty that in the Board’s opinion has been or will be payable in each relevant period for coal that in the Board’s opinion has been or will be extracted from the land

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\* Tony Wassaf, Partner, Allens Arthur Robinson (who acted for Nardell in the proceedings).

<sup>1</sup> (2004) 23 ARELJ 15-16.

to which the application relates. The value is then to be adjusted down according to the corporate tax rate applying at each past relevant period for which compensation is calculated and the corporate tax rate applying at the date of re-determination for each future relevant period.

4. So much of the front end payment of \$121,788 paid in respect of the Bloomfield Coal Lease No. 352 as is attributable to coal in the land to which the application relates, plus interest thereon calculated in accordance with the Board's policy on the calculation of interest from the date when the front end payment would have been payable to the claimant but for the provisions of the Coal Acquisition Act 1981 to the date of payment, shall be included in the calculation of compensation.
5. In respect of 'e' the Tribunal accepts that the current method used by the Respondent in determining the base discount rate, which is in accordance with CCB Minute Paper 786C (Exhibit 6), involves a proper and correct procedure. Accordingly, the Tribunal directs that this method be applied to the re-determination of the base discount rate SUBJECT TO THE QUALIFICATION AGREED TO BY THE PARTIES AS FOLLOWS:-
  - (i) The formula used by the Board for Weighted Average Cost of Capital Calculation referred to at paragraphs 2.1 and 2.2 of the CCB Minute Paper 786C (Exhibit 6) shall be replaced by the formula:

$$WACC = E/V * Re * (1-t) / (1-t(1-y)) + D/V * Rd(1-t)$$

However, in establishing the final discount 'e' the Tribunal directs that the adjustment to the base rate shall be as follows:

- Mine rating based on profitability = +3.0%
- Size of operation = 0%
- Marketability = 0%
- Firmness of contracts = +0.5%
- Miscellaneous adjustments = 0%

SUBJECT TO THE QUALIFICATION AGREED TO BY THE PARTIES AS FOLLOWS:

- Each adjustment to the base rate shall be multiplied by a value:  
 $(1-t)/(1-t(1-y))$

### Comment

This test case which commenced in December 1999 when the notice of appeal was lodged with the Tribunal has now been finalised and the Coal Compensation Board will now make determinations for claims made under clause 10 of the 1997 Order for refusal of restitution applications in accordance the above directions, as applicable.

There are also claims made under clause 6 of the 1997 Order for coal re-vested in the Crown and it is likely that the directions set out above will be applied (with any necessary changes) to the clause 6 claims by the Coal Compensation Board but this has not been decided by the Board and no announcement on how they will determine clause 6 claims has been made to date.

The above directions reflect the following points in respect of compensation payable under the 1997 Order.

- (a) In the 1997 Order schedule 1 formula, "r" is defined as 90c or such other amount as the Board considers just and equitable in the circumstances of the case. The Coal Compensation Board sought to use 90 cents in the original coal compensation determination. The effect of the Court of Appeal decision and the Consent Order is that 7/8ths of the actual royalty payable under a mining lease is the starting point for calculating "r" rather than 90 cents. For periods up to 30 June 2004, in the case of open cut mines where the mining lease requires payment of a super royalty, the royalty is generally \$2.20 per tonne and in the case of other mines the royalty is generally \$1.70 per tonne. From 1 July 2004, a new royalty system applies in New South Wales and the royalty is 5%, 6% or 7% of the value of coal extracted depending on the method of coal mining used.
- (b) Front end payments paid pursuant to mining lease conditions have to be included in the compensation calculation as a just and equitable adjustment.
- (c) The effect of directions 3 and 5 above is to accept a weighted average cost of capital (WACC) formula which does not take account of dividend imputation (known as the Officer line 1 WACC) with a cash flow that does not take account of dividend imputation (known as the Officer line 1 cash flow). The two components are therefore matched.
- (d) The adjustments to the base discount rate remain. They are used based on the Tribunal finding that actual production from coal mining is asymmetrical and that making adjustments to the base discount rate is the appropriate way of taking account of that asymmetry. There is an agreed qualification to the adjustments which maintains the numerical effect of the different WACC formula which took account of dividend imputation (known as the Officer line 2 WACC) previously used by the Board.

#### **NEW ROYALTY SYSTEM FOR COAL IN NEW SOUTH WALES\***

The *Mining Amendment (Royalties) Regulation 2004* changed the base rate of royalty for coal from \$1.70 per tonne to 7% of the value of coal recovered by open cut mining, 6% of the value of coal recovered by underground mining and 5% of the value of coal recovered by deep underground mining with effect from 1 July 2004.

For the above purpose, deep underground mining means mining carried out at a mine in which coal situated at a depth of 400 metres or more is extracted by means other than open cut methods. Open cut mining means mining carried out at a mine in which coal is extracted by open cut methods. Underground mining is defined as mining (other than deep underground mining) carried out at a mine in which coal is extracted other than by open cut methods.

If coal is recovered by the holder of a mining lease by more than one method of mining or if there is a dispute as to the method by which coal was recovered, then the Minister may determine how it was recovered and may determine what value of coal was recovered by what method.

The Minister has made a determination dated 25 June 2004 which has been published in the *Government Gazette* which sets out the manner in which the value of coal is to be calculated.

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\* Tony Wassaf, Partner, Allens Arthur Robinson.