SUBSIDENCE MANAGEMENT PLAN*

Maitland Main Collieries Pty Limited v Hunter Valley Coal Corporation Pty Limited [2006] NSWCA 258 (Mason P, Handley JA and Beazley JA)

Second workings in coal mine – deed of release and indemnity – s 138 Coal Mines Regulation Act 1982 – subsidence management plan

Facts

Hunter Valley Coal Corporation Pty Limited (*HVCC*) (now called Xstrata Mount Owen Pty Ltd) operates a coal mine at Mt Owen. In 1995-1996 it sought approval to construct a spur railway line for moving its coal to the main rail network. Maitland Main Collieries Pty Limited (*MMC*) objected to that application as they were concerned that it would restrict mining of their coal reserves.

HVCC and MMC entered into a Deed of Release and Indemnity (*Deed*) requiring, among other things, MMC to withdraw its objection to the rail line, MMC to advise HVCC of its proposed second working applications and plans so as to give at least 6 months notice of extraction near the rail line and HVCC agreed that it would not object to these proposed second working applications. In addition, the Deed contained a broad release and indemnity from HVCC from losses connected with damage to the rail line due to subsidence arising from MMC's mining activities.

Since 2003 an applicant has been required to first obtain the Director-General's approval to a subsidence management plan (*SMP*) prior to the Minister granting an approval under section 138 of the *Coal Mines Regulation Act 1982*. In July 2005 MMC applied for SMP approval for its longwall operations known as longwalls 7 to 9. HVCC wrote directly to the Department objecting to the SMP application.

Trial Judge decision

MMC alleged that the making of the objection by HVCC was a breach of the Deed and sought a declaration to that effect and an order to prevent future breaches.

Young CJ at first instance ([2005] NSWSC 1327) held that whilst HVCC had objected within the terms of the Deed, this did not matter as MMC's SMP application was not a "second working application". The reason given was that it differed in character from a s 138 application and followed a different approval process. He found no breach of the Deed. MCC appealed.

The Court of Appeal decision

The Court of Appeal held that MMC's application for SMP Approval was not an end in itself, but rather a step towards obtaining s 138 approval and whilst the Deed did not define "second working

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* Tony J Wassaf, Partner, Allens Arthur Robinson. Allens Arthur Robinson (J Parker, Partner) are representing MMC in these proceedings.

applications and plans" or "second working", the meaning of the phrase was well known in the coal industry. Longwall mining is one method used as a second working activity.

MMC's July 2005 SMP application was therefore a second working application for the purposes of the Deed. Refusal of the SMP application would mean that MMC would be unable to apply for the required s 138 approval. HVCC's objection was therefore a breach of the Deed.

By the time the appeal was heard by the Court, MMC had gained its SMP approval. HVCC argued that there was therefore no utility in making any of the orders sought. In rejecting this argument, the Court noted that the decision appealed against operates as an issue estoppel binding the parties to a particular construction of the Deed. HVCC was asserting this point in other proceedings against MMC relating to the Deed.

The Court declared that HVCC breached the Deed and ordered that HVCC be restrained from making an objection to any further second workings applications by MMC for the extraction of coal from longwall panels 7-9 inclusive at the Glennies Creek Coal Mine. However the Court refused to order HVCC to withdraw the objection already made as that was considered futile.

NORTHERN TERRITORY

PROOF AND EXTINGUISHMENT OF NATIVE TITLE IN NORTHERN TERRITORY TOWNS[*]

***Griffiths v Northern Territory* [2006] FCA 963** (Federal Court of Australia, Darwin, Native Title Applications NTD6016/99,NTD6008/00andNTD6012/00, 17 July 2006, Weinberg J).

Aboriginals – Native Title – Native Title Act 1993 (Cth) – no evidence rights amounting to exclusive possession – application of section 47B Native Title Act 1993 (Cth) – relevance of principles of descent to finding of continuing tradition.

There have been three native title decisions of the Federal Court handed down in the Northern Territory this year. Following on from the decisions of Mansfield J in *Risk v Northern Territory*[1] and Sackville J in *Jango v Northern Territory,*[2] Weinberg J has now handed down his decision in *Griffiths v Northern Territory*.[3] The latest decision involves the small town of Timber Creek in the north west of the Territory on the banks of the Victoria River. The town is completely surrounded by land held under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.).

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[*] Raelene Webb QC, William Forster Chambers; and Matthew Storey, Senior Solicitor, NT Department of Justice.

1 [2006] FCA 404 (Darwin).

2 [2006] FCA 318 (Yulara).

3 [2006] FCA 963 (*Grifiths*).