of the values derived from 'well recognised asset valuation methodologies' (sub-paragraphs (a) to (c)), which must then be weighed comparatively (sub-paragraph (d)). The balance of the additional factors falling for consideration under s 8.10 (sub-paragraphs (e) to (k)), may lead to some adjustment of the final ICB figure, but are only to be considered after the range of values has been established following the process described in sub-paragraphs (a) to (d).

The court's decision regarding the manner in which an ICB is to be determined largely turns on the specific language of s 8.10 of the Gas Code. That is, the court found that there was nothing in the natural meaning of the words used in the provision or its structure that would permit recognised valuation methods to be put to one side. The court therefore found that using an input from a recognised asset valuation methodology, such as an ORC, and adjusting it in a novel way was not permissible under s 8.10.

The Commission's submissions that it's novel methodology for calculating the ICB could be 'fitted' into the statutory criteria set out in s 8.10 when these criteria were viewed 'collectively' was rejected by the court. The joint judgment of Gummow and Hayne JJ in particular suggests that the objects and words of the relevant statutory regime must be the guide for the manner in which a decision maker evaluates statutory criteria, and that to seek to fit a decision into a set of statutory criteria is to approach the decision making process back to front.

Conclusions

This decision emphasises the importance of regulatory certainty in preventing distortion of infrastructure investment decisions in the context of regulated access.

A further lesson to be drawn from this case is that it is of fundamental importance for a decision maker to give careful consideration, by reference to the relevant statute, to: the nature of the task he or she must perform; the objects that are to be achieved through the decision; and the powers and discretions accorded to him or her in order to make the decision.

NEW SOUTH WALES

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT OVERRIDES MINING ACT LANDHOLDER PROTECTION*

Ulan Coal Mines Ltd v Minister for Mineral Resources & Moolarben Coal Mines Pty Ltd [2007] NSWSC 1299 (Smart AJ)

Mining lease appeal – Major projects– Substantial and valuable improvement

Background

This case considers the interaction between the provisions of the *Mining Act 1992* (NSW) (Mining Act) and the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).

In 2005 and 2006, Moolarben Coal Mines (Moolarben) lodged two separate mining lease applications over land owned by an adjoining mine owner, Ulan Coal Mines Limited (UCML).

Under s 62 of the Mining Act, a mining lease cannot be granted over the surface of any land if there are substantial and valuable improvements on the land. An objection from a landholder

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claiming the existence of the improvements must be lodged within 28 days of the date they receive notice of the mining lease application.[1]

UCML lodged an objection under s 62 claiming that a large number of substantial and valuable improvements existed on the land (fences, dams, tracks and cleared land). However, the objections were lodged outside the 28 day period. The Department of Primary Industries refused to consider the objections on the basis that they were out of time.

UCML then commenced proceedings in the Supreme Court asserting that s 62 of the Mining Act prevented the Minister for Mineral Resources from granting Moolarben's mining lease applications. UCML also submitted that there were a number of procedural defects in the mining lease applications and that Moolarben had not given them proper notice of the applications.

In September 2007, 10 days prior to the hearing of the proceedings, Moolarben was granted project approval under Part 3A of the EP&A Act for the Moolarben Coal Project.

Decision

The court dismissed UCML's claim. UCML filed an appeal on 22 November 2007.

Substantial and Valuable Improvements

UCML claimed that some 49 items on their land were substantial and valuable improvements. After a lengthy and detailed factual consideration of each claimed improvement, the court concluded that only a limited number could be considered substantial and valuable.

The court followed the Court of Appeal's reasoning in *Kayuga Coal v Ducey & Ors*.[2] The court held that to gain protection an improvement must be both valuable and substantial. However, the item need not be particularly or especially valuable and substantial. The court also followed *Kayuga* in holding that s 62 (c) only applies to the improvements expressly stated in the s being dams, fences, contour banks etcetera and not any other type of improvement.

UCML argued that cleared land was a valuable and substantial improvement. However, the court concluded that cleared land cannot be considered a substantial and valuable improvement under s 62.

UCML also argued that the protection of s 62 extended to the area required to make use of the item. For instance, not only was a substantial and valuation dam protected but the catchment of that dam was also protected. That argument was rejected by the court. The court determined that the s 62 protection only applies to the land on which the substantial and valuable improvement is situated and not surrounding areas.

Time Limit for Filing an Objection

The Supreme Court held that UCML was precluded from making an objection under s 62 as they had failed to lodge their objections within 28 days of receiving notice of Moolarben's mining lease applications.

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1 *Mining Act 1992* (NSW) s 62(8) and Schedule 1, cl 23A(1).

2 [2000] NSWCA 54.

Accordingly, if a landholder does not make a claim that a particular improvement is a valuable work or structure within 28 days, s 62 does not preclude the Minister from granting a mining lease over the surface of the land where the protected item exists.

Procedural Implications

Ulan submitted that there were a number of procedural defects in the Moolarben mining lease applications and the notices of the applications given to UCML.

Firstly, the map lodged with the Moolarben mining leases was not a standard topographic map published by an official body as required by the *Mining Regulation* 2003 (NSW).[3] The court applied the principles in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority*[4] and held that the absence of topography on the map used by Moolarben was a technical breach which did not invalidate the lease applications.

Secondly, UCML submitted that the service of the mining lease applications at a registered post box at its mine was not permitted under the s 383 of the Mining Act. The court concluded that s 383 was facultative and permitted a corporation to be served by post at one of its places of business. The court held that UCML had been correctly served at a place of business by notices sent to its private mail bag.

Finally, after an examination of the facts, the court dismissed UCML's submission that a Moolarben newspaper advertisement giving notice of the lease applications was defective and misleading.

Interaction between Part 3A and the Mining Act

Part 3A of the EP&A Act was introduced with the aim of providing a single streamlined assessment process for major projects in NSW. To this end, s 75V of the EP&A Act provides:

> '75V Approvals etc legislation that must be applied consistently
>
> (1) An authorisation of the following kind cannot be refused if it is necessary for carrying out an approved project and it to be substantially consistent with the approval under this Part:
>
> (c) a mining lease under the Mining Act 1992.'

The court determined that because the Minister for Planning had already approved the Moolarben Coal Project under Part 3A, the prohibitions and restrictions under s 62 of the Mining Act no longer applied. Consequently, the Minister for Primary Industries cannot refuse to grant Moolarben's mining lease application. However, the compensation provisions of the Mining Act continue to apply.

This aspect of the court's decision makes the case a very significant decision in planning and mining law as the protections afforded to improvements by the Mining Act (and by extension agricultural land) are overridden for mining projects which obtain a major projects approval under Part 3A.

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3 *Mining Regulation 2003* (NSW) cl l.9.

4 (1998) CLR 335.