Implications of the amendments

The Government claims that the 90 cent formula in the Arrangements provides just and equitable compensation. It therefore remains to be seen what changes, if any, will be made to the Arrangements to give effect to the just and equitable requirement. That formula may provide just and equitable compensation in some circumstances but it may not do so in all circumstances.

Where coal is privately owned, seven eighths of any royalty paid on that coal by the holder of a mining lease is payable to the private owner of coal under the *Mining Act*. Where an owner of coal has his coal re-vested in the Crown, pursuant to the amendments made to the *Coal Acquisition Act*, then that owner will be deprived of that royalty. The owner will also lose the ability to sell that coal. However, that owner will be entitled to just and equitable compensation for that coal.

Where coal has been re-vested in an owner pursuant to the *Coal Ownership (Restitution) Act*, it is likely that such coal will be regarded as an asset subject to capital gains tax unless the owner can apply Section 160ZZL of the *Income Tax Assessment Act* by giving a notice to the Commissioner of Taxation. That Section allows the coal to be treated as an asset not subject to capital gains tax. The application of that Section depends on the Commissioner extending the period of time by which a notice needs to be given under that Section.

The royalty payable under a mining lease for coal (which includes consolidated coal leases) is currently at the prescribed base rate of $1.70 per tonne. An additional rate of 50 cents per tonne is prescribed in respect of coal recovered pursuant to a mining lease that contains a condition requiring the payment of additional royalty in accordance with Clause 56(2) of the Mining (General) Regulation 1992. The additional royalty has not been payable under some mining leases that relate to privately owned coal. In these cases, the mining lease conditions will need to be amended to include a condition about additional royalty before that additional royalty becomes payable. The Minister does not have the power to include such a condition in a mining lease at any time under the current *Mining Act*. He can only include that condition on the renewal or transfer of a mining lease. Consequently, in such cases, the additional royalty will not be payable until, at the earliest, the mining lease is renewed or transferred.

JUDICIAL REVIEW OF COAL COMPENSATION REVIEW TRIBUNAL DECISIONS*

In (1997) 16 AMPLJ pages 6 and 7, three NSW Supreme Court decisions relating to determinations of the above Tribunal were noted. Those three decisions were appealed to the NSW Court of Appeal and those judgements were handed down on 29 July 1997 and 5 August 1997. The decisions which are unreported are:

- *NSW Coal Compensation Board v NSW Coal Compensation Tribunal, JAA Gilder (No 1) Pty Ltd, JAA Gilder (No 2) Pty Ltd, Barama (Singleton) Pty Ltd and Buchanan Borehole Collieries Pty Ltd CA40732/96*,

- *NSW Coal Compensation Board v NSW Coal Compensation Review Tribunal and Bloomfield Collieries Pty Ltd CA40035/96* and

- *Buchanan Borehole Collieries Pty Ltd v NSW Coal Compensation Review Tribunal and Anor CA40033/97.*

The appeal judgments have clarified the operation of Section 5 of the *Coal Acquisition Act* (*CAA*), Clause 4 of Schedule 2 to the *Coal Mining (Amendment) Act 1981* (*CMAA*) and certain provisions of the Coal Acquisition (Compensation) Arrangements (the Arrangements). The principles derived from those judgments are as follows:

1. Section 5 of the *CAA* has the effect of frustrating or discharging the whole of a private coal lease including the rights to use the surface and the rights of surface access but subject to Clause 4 of Schedule 2 to the *CMAA*.

2. Those surface rights survived on 1 January 1982 by reason of Clause 4 of Schedule 2 to the *CMAA*. They continued in force until 30 April 1982 when a coal lease was granted over the private lease area. Clause 4(2) of Schedule 2 operated as an interim measure between 1 January 1982 and 30 April 1982 to preserve the surface rights. Once the operation of Clause 4(2) ceased on 30 April 1982, then Section 5 of the *CAA* was free to operate in a complete and uninhibited fashion on the remaining provisions of the private coal leases which were the surface rights. That is, Clause 4 had the effect of keeping the surface rights alive and not discharged until the coal lease was granted. But once that event occurred, Section 5 took its full effect and wholly discharged the leases including the surface rights.

3. The loss of surface rights contained in a private coal lease due to the termination of that lease by Section 5 of the *CAA* is a pecuniary loss.

4. For there to be a pecuniary loss which is directly attributable to the operation of Section 5 of the *CAA* there needs to be a causal connection but it need not be the sole or even dominant cause. In the *Bloomfields Case*, the loss to it was attributable to its need to acquire and pay for new surface rights and this loss was a direct result of the termination of the leases.

5. The loss of the right to receive front end payments under Section 128(4) of the *Coal Mining Act* 1973 arose from the operation of Section 5 of the *CAA* because after the *CAA* the Minister was no longer bound to cause front end payments to be made to the claimants (and this was the case even if Section 128(4) was not repealed by the *CMAA*).

6. Section 5 of the *CAA* refers to coal being freed and discharged from all trusts, leases, licences, obligations, estates, interests and contracts. There is no justification for limiting those items to only those that are burdened by or attached to the coal, which the Coal Compensation Board was seeking to do. Similar words appear in Clause 9 of the Arrangements and they also should not be limited in that way.

7. The process of vesting and discharge in Section 5 of the *CAA* is a single and simultaneous process.

8. Termination of the obligation to pay wayleave royalty under a private coal lease by virtue of Section 5 of the *CAA* was a benefit derived by the claimant under Clause 17C of the Arrangements.

9. The benefits to be taken into account under Clause 17C of the Arrangements are all benefits derived from the termination of obligations and not just those attributable to the claim area.

10. Double deductions could not be made under Clause 17C of the Arrangements because they were not authorised by that Clause and would be contrary to the duty of the Coal Compensation Board to act in accordance with equity, good conscience and the substantial merits of the case.

11. The reservation of coal in a transfer of land includes existing coal mines or underground coal workings. The air space created by the extraction of the coal was considered to be part of the coal reserved in that transfer.

NORTHERN TERRITORY*

PROSPECTS FOR URANIUM MINING AT JABILUKA

The Alligator Rivers Region of the Northern Territory, a vast area in the central north of the Territory, contains some of the most valuable deposits of uranium ore in the world. The land in the Region (including the minerals apart from uranium) was vested in the new Northern Territory body politic at the time of the grant of Self-government in 1978 and immediately thereafter compulsorily acquired back by the Commonwealth. Subsequently part of the Jabiluka area within this Region became Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act* 1976. An agreement was negotiated between the Northern Land Council and the Pancontinental Joint Venturers under that Act to allow mining to proceed. The Northern Territory then granted a mining lease under its new *Mining Act* to the Joint Venturers with Commonwealth concurrence, allowing mining for uranium and associated minerals. This area was made a "window" by exclusion from the surrounding Kakadu National Park. However actual mining did not proceed at that time, having regard to the federal "three mine" policy.

Subsequently the lease-holders assigned their interest to ERA, the holders of the adjacent Ranger uranium licence under the *Atomic Energy Act*. That Ranger mine has been operating for some years.

Recently a proposal has been made for mining at Jabiluka to proceed, but with a somewhat different method of operation. One option raised is for the ore to be trucked to Ranger for processing in the existing plant. This has raised interesting legal issues (including under the *Aboriginal Land Rights (Northern Territory) Act*), plus environmental issues as well as raising questions of the social impact of the proposal. It is still too early to say whether the mine will proceed on either the original basis or under the revised proposals, given the sensitivities involved.

NEW PRIORITY PROVISIONS IN *MINING ACT*: NATIVE TITLE

The Northern Territory *Mining Act* has been amended (No. 7 of 1997, yet to commence) to provide that where a purported grant of an exploration licence, exploration retention licence or mining tenement is found to be wholly or partly invalid due to the existence of native title which has not yet been the subject of a determination of title, the purported holder of the mining interest has priority, within the time fixed by the Territory Minister, to make a further application for the same kind of mining interest in respect of the same land. This amendment allows for the prospect that an existing grant of a mining interest could be held to be an "impermissible future act" under the *Native Title Act* 1993 as a result of it being granted on the assumption that no native title existed to the land, and hence without prior compliance with the

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