



Land and Environment Court
New South Wales

Case Name: Martin v Hume Coal Pty Ltd

Medium Neutral Citation: [2016] NSWLEC 51

Hearing Date(s): 30 March 2016

Date of Orders: 10 May 2016

Decision Date: 10 May 2016

Jurisdiction: Class 8

Before: Preston CJ

Decision: Orders as set out at [121]

Catchwords: APPEAL – appeal against Commissioner for Mining’s decision on questions of law – exploration licence – “rights conferred by the licence” – whether accessing land to prospect is a right conferred by licence – “significant improvement” – whether certain works and structures are significant improvements – formed roads and driveways – paddocks with improved pastures – equestrian cross-country event course – cattle laneways – irrigation piping – fences – Commissioner’s determination that accessing land for prospecting not an exercise of rights an error of law – Commissioner’s consequent determination of no jurisdiction to determine whether particular structures or works significant improvements an error of law – Commissioner’s determination that certain works and structures not significant improvements were errors of law

WORDS AND PHRASES – “rights conferred by the licence” – Mining Act 1992, s 31 – “significant improvement” – Mining Act 1992

Legislation Cited: Civil Procedure Act 2005 s 98
Interpretation Act 1987 ss 34, 35
Land and Environment Court Act 1979 s 56A
Mining Act 1992 ss 22, 29, 31, 142, 383B, Pts 3, 8,
Sch 1, Sch 2
Uniform Civil Procedure Rules 2005 r 42.1, Sch 1

Cases Cited: Goode v The Valuer General (1979) 22 SASR 247
Kayuga Coal Pty Ltd v Ducey [2000] NSWCA 54
Lightning Ridge Miners Association Ltd v Slack-Smith
[2013] NSWLEC 1063
Martin & Ors v Hume Coal Pty Ltd [2015] NSWLEC
1461
Parramatta City Council v Brickworks Ltd (1972) 128
CLR 1
Parramatta City Council v Shell Company of Australia
Ltd [1972] 1 NSWLR 483; (1972) 26 LGRA 25
Ulan Coal Mines Ltd v Minister for Mineral Resources
[2007] NSWSC 1299

Category: Principal judgment

Parties: Mr Peter Martin (First Applicant)
Mr Phillip Pollicina (Second Applicant)
Fesen Pty Ltd (Third Applicant)
Mr Ross Alexander (Fourth Applicant)
Ms Kathleen Roche (Fifth Applicant)
Hume Coal Pty Ltd (Respondent)

Representation: Counsel:
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Decision under appeal:

Court or Tribunal: Land and Environment Court

Jurisdiction: Class 8

Citation: Martin & Ors v Hume Coal Pty Ltd [2015] NSWLEC 1461

Date of Decision: 13 November 2015

Before: Dixon C

File Number(s): 80405 of 2015

JUDGMENT

Nature of appeal and outcome

- 1 Mr Martin and the four other applicants are landowners whose properties lie within the area of an exploration licence A349, authorising the exploration for coal in the Southern Highlands, held by Hume Coal Pty Ltd ('Hume Coal'). Hume Coal had given notice, under s 142 of the *Mining Act 1992*, to the applicants of its intention to obtain an access arrangement relating to each of the applicants' properties. A dispute arose between Hume Coal and the applicants as to whether access could be granted over, and exploration could be carried out on, parts of the applicants' properties on which, or within certain distances of which, are situated various works or structures.
- 2 Section 31 of the Mining Act precludes a holder of an exploration licence from exercising any of the rights conferred by the licence over the surface of land on which, or within certain prescribed distances of which, are situated a dwelling-house, a garden or any significant improvement, which includes certain identified substantial improvements as well as any "other valuable work or structure". The applicants contended that certain formed roads and driveways, paddocks with improved pastures and lucerne, an equestrian cross-country event course, cattle laneways, irrigation piping and fences were significant improvements. The applicants contended that amongst the rights conferred by this exploration licence was the right to access land within the exploration licence area but that s 31 precluded Hume Coal from accessing those parts of the land within the exploration licence area on which those significant improvements were situated. Hence, an access arrangement could not be made that permitted access over these parts of the land without the written consent of the landowner. Hume Coal disagreed.

- 3 The applicants commenced proceedings, by summons, in the Court to resolve the dispute, as s 31(5) of the Mining Act permits. They sought declaratory relief that the various works or structures in dispute are significant improvements and that Hume Coal is not permitted to exercise rights conferred by the exploration licence on those parts of the land on which, or within certain distances of which, the works or structures are situated.
- 4 The proceedings were heard by a Commissioner for Mining, who dismissed the summons: *Martin & Ors v Hume Coal Pty Ltd* [2015] NSWLEC 1461. The Commissioner:
 - (a) decided that gaining access by vehicle over the land was not the exercise of any right conferred by the exploration licence (at [54], [56], [57], [67], [119], [120]) and hence there could be no dispute under s 31(5) as to whether s 31 precluded Hume Coal from accessing any part of the applicants' properties by vehicle (at [55], [56]);
 - (b) as a consequence of this construction, did not decide whether the formed roads and driveways were significant improvements (at [55], [56], [68]);
 - (c) decided that the paddocks with improved pastures and lucerne were not significant improvements (at [90], [92], [93], [94]-[100]);
 - (d) decided that the equestrian cross-country event course was not a significant improvement (at [90], [92], [93], [101], [102]);
 - (e) did not decide whether the cattle laneways were significant improvements (at [55], [56], [104]);
 - (f) decided that the irrigation pipes under the cattle laneways or elsewhere on the applicants' properties were not significant improvements (at [105], [106]); and
 - (g) decided that s 31 did not apply to any fence erected after the date that Hume Coal gave notice to the applicants under s 142 (at [109]-[112]) but did not decide whether any fences erected before that date were significant improvements (at [108], [116]);
- 5 The applicants appealed under s 56A of the *Land and Environment Court Act 1979* against the Commissioner's decision on questions of law. The grounds of appeal concern misdirection as to and misconstruction of the relevant statutory provisions and a constructive failure to exercise jurisdiction by not deciding certain matters.

6 I find that the Commissioner did err on questions of law. The Commissioner misconstrued and misdirected herself as to the relevant provisions of the Mining Act, including s 31 and the definition of “significant improvement”, and the application of those provisions to the disputed works and structures. The Commissioner failed to decide whether certain works or structures were significant improvements. The appeal should therefore be upheld and the Commissioner’s decision and orders be set aside. The matter needs to be remitted to the Commissioner to be decided in accordance with these reasons.

The key statutory provisions

7 The dispute between the parties under s 31(5) was whether or not s 31(1) of the Mining Act applied in the particular cases of various works and structures on the applicants’ properties. Subsections (1), (2) and (5) of s 31 of the Mining Act provide:

(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 any garden, or

(c) on which is situated any significant improvement other than an improvement constructed or used for mining purposes only,

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).

(2) The prescribed distance is:

(a) 200 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1)(a), and

(b) 50 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1)(b).

(5) If a dispute arises as to whether or not subsection (1) applies in a particular case, any party to the dispute may apply to the Land and Environment Court for a determination of the matter.

8 The term “significant improvement”, referred to in s 31(1)(c), is defined in the Dictionary to the Mining Act to mean:

any substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure.

- 9 The phrase “rights conferred by the licence” in the chapeau of s 31(1) refers to s 29(1) of the Mining Act, which provides:

The holder of an exploration licence may, in accordance with the conditions of the licence, prospect on the land specified in the licence for the group or groups of minerals so specified.

- 10 The word “prospect” is defined in the Dictionary of the Mining Act to mean:

to carry out works on, or to remove samples from, land for the purpose of testing the mineral bearing qualities of the land, but does not include any activity declared not to be prospecting by a regulation under section 11A or by a declaration made under such a regulation.

- 11 The phrase “prospecting operations” is defined to mean:

operations carried out in the course of prospecting.

Ground 1: The rights conferred by the licence

- 12 Hume Coal had argued, and the Commissioner decided, that the rights conferred by the exploration licence did not include gaining access to or driving over land within the exploration licence area in order to carry out prospecting operations (at [46]-[54], [56]-[67]). The rights conferred by the exploration licence are limited to the right to prospect on the land specified in the licence for the minerals so specified that is conferred by s 29 of the Mining Act. Rights of access are conferred by the grant of an access arrangement agreed or imposed pursuant to Pt 8 of the Mining Act.

- 13 As a consequence, Hume Coal argued and the Commissioner decided, s 31 does not preclude Hume Coal from gaining access to or driving over any part of the applicants’ properties, regardless of whether any significant improvements are situated on the land over which access is to be gained (at [55], [56], [68], [104]). Section 31 does not prevent Hume Coal from driving vehicles, in order to carry out prospecting on land, within the prescribed distances of the applicants’ dwelling-houses or gardens or over land on which significant improvements are situated. Section 31 only prevents Hume Coal from undertaking the defined acts of prospecting on those improved lands, namely the carrying out of works on or removing samples from the land for the purpose of testing the mineral bearing qualities of the land.

- 14 Hume Coal had said to the Commissioner that it did not intend to carry out those defined acts of prospecting on land on which or within the prescribed

distance of which any dwelling-house or garden of the applicants is situated, or on land on which any formed road, driveway or cattle laneway is situated (at [70]). Hence, the Commissioner decided that there was no dispute under s 31(5) of the Mining Act which needed to be decided about these improvements (including whether some were significant improvements) (at [55], [56], [68], [70], [104], [116]).

- 15 The applicants submitted that the Commissioner misconstrued the legislation. They submitted that, on a proper construction, the rights conferred by the exploration licence held by Hume Coal included permitting Hume Coal to access the applicants' properties by vehicle in order to carry out prospecting. The applicants gave two reasons.
- 16 First, an exploration licence gives the holder the right to "prospect on the land specified in the licence for the group or groups of minerals so specified" in accordance with the conditions of the licence: s 29(1) of the Mining Act. To "prospect" is "to carry out works on, or to remove samples from, land for the purpose of testing the mineral bearing qualities of the land ...". The land specified in an exploration licence is typically a large area and includes many properties. The exploration licence granted to Hume Coal was no exception. It included all of the applicants' properties. The right to prospect conferred by the exploration licence under s 29 of the Mining Act permitted Hume Coal to carry out works on, or remove samples from, any or all parts of the various properties within the exploration licence area. (These rights conferred by the licence are subject to the restrictions imposed by s 31, which of course is at the heart of the dispute between the applicants and Hume Coal).
- 17 The purpose of prospecting is to obtain as much geological information about the group or groups of minerals specified in the licence, over as much of the exploration licence areas as practicable, to ascertain whether mining of the mineral resource is technically, practically and economically feasible. It is almost inevitable, therefore, that exercising the right to prospect conferred by an exploration licence will involve carrying out works and removing samples from multiple locations within the exploration licence area.

- 18 In order to carry out these works and remove these samples, it is necessary for the holder of the exploration licence not only to access (most commonly by vehicle) the land and each location on which works are carried out and samples are removed but also to transport the plant and equipment that is necessary to carry out the works and remove the samples between and from those locations as well as transport the extracted samples to the laboratory for testing their mineral bearing qualities. The nature and extent of such access and transport will depend on, amongst other things, the nature and extent of the prospecting operations, including the prospecting methods used.
- 19 The applicants submitted that, although the definitions of “prospect” and “prospecting operations” do not expressly identify gaining access to various locations on the land, transporting plant and equipment to carry out works on or to remove samples from the land or transporting extracted samples, such access and transport is necessarily implied. Carrying out operations in the course of prospecting necessarily implies such access and transport. The carrying out of works on, and the removal of samples from, the land are never capable of being severed from the coming onto or going off the land.
- 20 Hence, in s 31(1) of the Mining Act, “the rights conferred by the licence” include the implied right to access the land and to transport plant and equipment and samples that have been removed from the land.
- 21 Second, the applicant drew attention to the chapeau of s 31(1): “The holder of an exploration licence may not exercise any of the rights conferred by the licence ...”. This focuses on the particular licence in question and the rights conferred by that licence. The particular licence is subject to conditions. Section 29(1) requires the holder of the particular licence to prospect “in accordance with the conditions of the licence”. Hence, it was necessary for the Commissioner, in order to determine the rights conferred by the exploration licence A349 held by Hume Coal, to examine the terms and conditions of that licence.
- 22 The first condition of Hume Coal’s exploration licence provides:

Prospecting operations permitted under this exploration licence

1. The licence holder may conduct Category 1 prospecting operations on the exploration licence area subject to the conditions of this licence.

23 “Category 1 prospecting operations” are defined in the licence as “development to which clause 10(2) of the Mining SEPP applies”. Amongst the development to which subcl 10(2) of the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (‘the Mining SEPP’) applies is:

(b) low intensity activities associated with mineral exploration or petroleum exploration, including the following:

- (i) geological mapping and airborne surveying,
- (ii) sampling and coring using hand-held equipment,
- (iii) geophysical (but not seismic) surveying and downhole logging,
- (iv) accessing of areas by vehicle that does not involve the construction of an access way such as a track or road.

Hence, one of the rights conferred by Hume Coal’s exploration licence is accessing of areas within the exploration licence area by vehicle.

24 Hume Coal disputed both of these arguments. As to the first, Hume Coal reiterated the submission that had found favour with the Commissioner that the only right conferred on a holder of an exploration licence is the right to prospect under s 29. The reference in s 31 to the “rights conferred by the licence” must be read in the legislative context in which it appears. The immediate context of s 31 is Div 4 of Pt 3 of the Mining Act, comprising ss 29-32. When regard is had to that context, it is apparent that the “rights conferred by the licence in s 31 are the rights conferred by s 29 on the holder of an exploration licence to “prospect on the land specified in the licence for the group or groups of minerals so specified”, in accordance with the conditions of the licence. The two sections, appearing in the same division of the Mining Act should be read together.

25 Hume Coal also submitted that the heading to Pt 3 and the heading to Div 4 of Pt 3 are part of the Mining Act: s 35(1) of the *Interpretation Act 1987*. The headings to individual sections, while not taken to be part of the Mining Act (s 35(2) of the Interpretation Act), are part of the extrinsic material relevant to the ascertainment of the meaning of the provisions (s 34(1) and (2)(a) and s 35(5) of the Interpretation Act). The “rights conferred by the licence” in s 31 are the

rights referred to in the heading to Div 4 (“Rights and duties under an exploration licence”) and the heading to s 29 (“Rights under exploration licence”). Those headings clarify and confirm that s 29 gives content to the word “rights” when it appears in Div 4 with reference to exploration licences, including in s 31(1).

- 26 Having identified that the “rights identified by the licence” in s 31 are the licence holder’s rights under s 29 to “prospect on the land specified in the licence for the group or groups of minerals so specified”, it is necessary to identify the content of those rights. Hume Coal submitted that the definitions of “prospect” and “prospecting operations” are confined to only the carrying out of works on, or the removal of samples from, land within the exploration licence area and confer no other rights, including the right to access land. Accessing areas by vehicle does not fall within the words of the definitions of “prospect” or “prospecting operations”.
- 27 The source of the right to access land within an exploration licence area is an access arrangement agreed or imposed pursuant to Pt 8 of the Mining Act. Unless and until the holder of an exploration licence has an access arrangement in place, it has no right to enter land within an exploration licence area (and hence cannot exercise any of the rights to prospect conferred by the exploration licence).
- 28 Hume Coal submitted that the grant and content of exploration licences are dealt with in a distinct and separate part of the Mining Act from that part addressing access to land. The separation reflects the different nature and source of the entitlements conferred.
- 29 As to the second argument, Hume Coal submitted that the right conferred by condition 1 of the licence should be read down in two ways. First, Hume Coal submitted that conferral of such a right of access by vehicle was outside power. An exploration licence granted under s 22 only confers the right to prospect under s 29 of the Mining Act. The right to prospect does not and cannot include any right of access. Although an exploration licence may be granted subject to conditions, the conditions can only regulate the right to prospect and not grant any other rights, including any right of access.

30 Second, Hume Coal submitted that condition 1 of its licence should be read together with conditions 2 and 3. When those conditions are read together, Hume Coal submitted, the intention was not to confer rights, but to impose conditions relating to further Ministerial approval on the exercise of rights.

31 Condition 1 of the licence provides that: "The licence holder may conduct Category 1 prospecting operations on the exploration licence area subject to the conditions of the licence". It has the heading "Prospecting operations permitted under this exploration licence". There is no reference to any requirement for further approval of the Minister before conducting those prospecting operations. Conditions 2 and 3 are headed "Prospecting operations requiring further approval". They provide:

2. The licence holder must obtain the Minister's written approval prior to carrying out any of the following prospecting operations on the exploration licence area:

- (a) Category 2 prospecting operations; and
- (b) Category 3 prospecting operations.

3. The licence holder must comply with the conditions of an approval under condition 2 when carrying out these prospecting operations.

32 The licence defines Category 2 prospecting operations and Category 3 prospecting operations. "Category 2 prospecting operations" means:

- (a) Development of a kind described in clause 10(2) of the Mining SEPP but that is not exempt development because it will not take place on land that is described in clause 10(1);
- (b) Construction of an access way such as a track or road;
- (c) Excavations (including bulk samples) totalling less than 100 cubic metres;
- (d) Non-intensive drilling of boreholes;
- (e) Construction of water monitoring bores required in connection with prospecting operations; and
- (f) Seismic surveys.

"Category 3 prospecting operations" means:

Development, not being development to which clause 10(2) of the Mining SEPP applies, which is:

- (a) Excavation totalling more than 100 cubic metres, including bulk samples, but not if the bulk sample is permissible only with consent under the [*Environmental Planning and Assessment Act 1979*];
- (b) Intensive drilling of boreholes;

- (c) Shaft sinking or tunnelling; and
- (d) Any other prospecting operations not being Category 1 prospecting operations or Category 2 prospecting operations.

33 There is a reference in par (a) of the definition of Category 2 prospecting operations to cl 10(1) of the Mining SEPP, which provides:

This clause applies to development that is on land that:

- (a) is not within an environmentally sensitive area of State significance, or
- (b) is within a state conservation area but is not land referred to in paragraphs (a)-(e) or (g)-(i) of the definition of *environmentally sensitive area of State significance*.

This has no application to the applicants' properties within the exploration licence area of Hume Coal.

34 Hume Coal submitted that conditions 2 and 3 of the licence do not use any language of permission or grant, but rather mandate the obtaining of, and compliance with, further approval. Hume Coal submitted that condition 1 should be construed in the same way notwithstanding the use of the permissive "may": it should also be construed as not granting permission to conduct Category 1 prospecting operations.

35 I agree with and adopt both of the applicants' arguments concerning the construction of the legislation and the licence. First, the right to prospect conferred by ss 22 and 29 of the Mining Act necessarily implies the right to do all such things as are necessary in order to be able to exercise the right to prospect. This includes being able to access by vehicle all locations on the lands within the exploration licence area on which the licence holder seeks to and does carry out works on or remove samples from the land in the course of prospecting, transport plant and equipment for prospecting to and from those locations and transport the samples removed from the land for the purpose of testing their mineral bearing qualities.

36 The existence in Pt 8 of the Mining Act of a particular regime for obtaining an access arrangement over land does not necessarily deny this conclusion that carrying out prospecting necessarily implies undertaking associated activities such as gaining access to and from the land in order to carry out prospecting. Part 8 is to be understood as establishing a regime that regulates the exercise

of the rights conferred by the licence. The licence holder must obtain an access arrangement under Pt 8 prior to exercising rights conferred by the licence to prospect on lands within the exploration licence area, including the implied right to access areas by vehicle in order to prospect.

- 37 Second, the rights conferred by the exploration licence granted to Hume Coal expressly included the right to conduct Category 1 prospecting operations, which included the accessing of areas by vehicle (condition 1 of the licence).
- 38 I reject Hume Coal's first argument that condition 1 of the licence was outside power. The rights conferred by the licence to prospect include the implied right to access areas by vehicle in order to prospect. A licence can be subject to conditions regulating the exercise of rights conferred by the licence, including the implied right to access areas by vehicle. Condition 1 of the exploration licence was within power.
- 39 Another problem with this first argument is that Hume Coal did not, of course, contend that its exploration licence was invalid because condition 1 of the licence granted Hume Coal the right to conduct Category 1 prospecting operations on the land, which was defined to include accessing of areas by vehicle. Hume Coal needs the exploration licence to be valid in order to carry out prospecting operations and enter an access arrangement to allow it to do so. Unless and until a court of competent jurisdiction sets aside or declares invalid the exploration licence, it remains valid and effective in granting whatever rights on a proper construction the licence says it grants. This includes the right of "accessing of areas by vehicle that does not involve the construction of an access way such as a track or road" (cl 10(2)(b)(iv) of the Mining SEPP).
- 40 The Commissioner was required to assume the validity of the licence and construe its terms. The terms of the licence expressly conferred the right to conduct Category 1 prospecting operations, which included accessing land within the exploration licence area by vehicle.
- 41 I also reject Hume Coal's second argument that the licence holder must obtain the Minister's written approval prior to conducting Category 1 prospecting operations. The submission flies in the face of the clear words of condition 1 of

the exploration licence on the one hand and conditions 2 and 3 on the other hand.

- 42 Conditions 2 and 3 of the exploration licence are clear in requiring Hume Coal to obtain the Minister's written approval prior to carrying out Category 2 prospecting operations or Category 3 prospecting operations, but condition 1 does not require Hume Coal to obtain the Minister's written approval prior to carrying out the different Category 1 prospecting operations.
- 43 Condition 1 is express in permitting Hume Coal to conduct Category 1 prospecting operations: the words are clear and confirmed by the heading. Conditions 2 and 3, although not using express words of permission or grant, nevertheless permit the licence holder to conduct Category 2 prospecting operations and Category 3 prospecting operations (they fall within the defined terms of "prospect" and "prospecting operations"). However, conditions 2 and 3 impose a condition subsequent that must be satisfied prior to carrying out those permitted prospecting operations, namely that the licence holder must obtain the Minister's written approval. The Minister's written approval does not concern the right to carry out those prospecting operations; rather, it enables the exercise of the rights conferred by the licence. I therefore reject Hume Coal's argument that condition 1 of the licence does not grant the right to conduct Category 1 prospecting operations, including accessing of areas by vehicle.
- 44 For these reasons, the Commissioner erred on questions of law in holding that "the rights conferred by the licence" in s 31(1) of the Mining Act did not include accessing lands within the exploration licence area by vehicle. I uphold ground 1.

Grounds 2-7: Significant improvements

- 45 The Commissioner held that various formed roads and driveways, paddocks with improved pastures and lucerne, an equestrian cross-country event course, cattle laneways, irrigation piping and fences were not "significant improvements" to which s 31(1)(c) applied. Her reasons differed depending on the work or structure.

Ground 2: Formed roads and driveways

- 46 The Commissioner did not decide whether the formed roads, including Carters Lane, and driveways were significant improvements. The Commissioner had decided that the rights conferred by the licence did not include gaining access to or driving on the lands within the exploration licence area, including on the formed roads or driveways. Hence, s 31(1) did not operate to prevent Hume Coal from accessing these roads or driveways. As I have determined that the Commissioner erred in law in so deciding, her failure to decide whether formed roads and driveways were significant improvements was affected by this error of law and involved a constructive failure to exercise jurisdiction. Ground 2 should therefore be upheld.
- 47 The applicants sought for me to decide, on the facts found by the Commissioner in her judgment, that Carters Lane and other tracks and driveways on the applicants' properties are "significant improvements". I do not consider I have sufficient facts to be in a position to decide whether each road or driveway is a "work" or "structure" and, if so, whether it is "substantial" and "valuable" so as to fall within the definition of "significant improvement". The matter should be remitted to the Commissioner to be decided according to this judgment.

Grounds 3 and 5: Paddocks with improved pastures and lucerne

- 48 The Commissioner decided that the defined term "significant improvement" does not include "improved pastures": at [94] of the judgment. The Commissioner gave two sets of reasons.
- 49 The first set of reasons was in dealing with the meaning of "significant improvement". The Commissioner said that to have "regard to improved pastures and crops for a cross-country event course as 'valuable works' where the emphasis in the text of the definition is on substantial and valuable structures, built items simply ignores orthodox principles of statutory construction": at [90]. The Commissioner then gave a consequentialist reason:
- ... if the Court were to declare the improved pastures, lucerne paddocks, cross-country course, Araluen parking areas to be significant improvements, the consequence would be that Hume [Coal] cannot conduct any prospecting operations over the surface of the land on which it is [sic] situated those significant improvements: s 31(1): at [92].

The Commissioner continued at [93]:

Such a declaration has alarming consequences for mineral exploration on vast areas of rural land in New South Wales, and in my assessment the potential to frustrate the object of the Act “to encourage and facilitate the discovery and development of mineral resources in New South Wales in [sic] having regard to the need to encourage ecologically sustainable development”: s 3A of the Act. In my opinion an orthodox construction of the section in the context of the Act as a whole which promotes the purpose or object underlying the Act should be preferred to a construction that would not promote that purpose or object: s 33 Interpretation Act; *Warkworth (Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; (2014) 86 NSWLR 527) at [323].

- 50 The second set of reasons dealt in particular with improved pastures and lucerne crops. Here, the Commissioner gave two reasons. First, the drafter of the definition of “significant improvement” did not include “improved pastures”: at [95]. Second, there are other statutory provisions in the Mining Act which refer to “improved pastures”. The term “agricultural land” is defined in cl 1(1)(f) of Sch 2 to include “land that has a preponderance of improved species of pasture grasses”. Schedule 1 of the Mining Act allows a landholder to object to the granting of a mining lease on two grounds, one that the land is agricultural land (cll 22 and 23) and the other that something on the land is a significant improvement (cl 23A). The Commissioner considered that if she were to determine that improved pastures were not only agricultural land but also a significant improvement, under s 31(1), then the provisions of cll 22 and 23 of Sch 1 to determine whether land was agricultural land could be circumvented: at [99].
- 51 The applicants challenged the Commissioner’s construction that the term “significant improvement” could not include “improved pastures”. They started with the first set of reasons. The error in [90] of the Commissioner’s reasons included the circularity of the reasoning. The word “built” is not part of the definition. The definition includes the expression “building” as one item in a list that concludes by treating “work” and “structure” as different things. Something need not be a “structure” in order to be a “work”. The phrase “work or structure” is not an hendiadys.
- 52 The consequentialist reasoning in [92] and [93] is based on an inaccurate reasoning premise and takes the use of the objects provision in s 3A of the

Mining Act too far. The consequence would not be a prohibition on prospecting operations totally but rather a prohibition on prospecting operations without the consent of the landowner. The statutory scheme involves that element by way of the balance sought to be achieved by the Act. There is nothing “alarming” in this consequence unless one tendentiously reads the Mining Act as one designed to minimise the role of landowners’ consent. Rather, the relevant provisions of the Mining Act state the cases where it is required. Construing those stipulations should not be undertaken with a bias one way or the other to expand or contract the cases in which consent is required.

- 53 The applicants next dealt with the Commissioner’s second set of reasons. As to the first reason in this set, the applicants submitted that the inclusion of “soil conservation work” in the list of works or structures that are defined as significant improvements supports the applicants’ argument that improved pastures can potentially be significant improvements. The expression “soil conservation work” manifestly describes and comprehends the result of a range of activities which notoriously includes the use of plants. It follows that the expression “and other valuable work” cannot be read as the Commissioner appears to have read it at [95] to exclude the beneficial and costly introduction and tending of plants.
- 54 As to the second reason in this set of reasons, the applicants submitted that the Commissioner’s reference in [96]-[99] of her reasons to the other statutory provisions in the Mining Act in which reference is made to improved pastures involved error. The distinct use of that description in relation to objections to the grant of mining leases is by no means circumvented by the applicants’ argument. In terms of the policy and purpose of the Mining Act, in striking the relevant balances of social, public and private interests, the protection given by those other provisions to agricultural land in the face of the proposed grant of a mining lease certainly does not contradict the possibility of improved pastures also being a significant improvement within the meaning of s 31 in relation to anterior explanations.
- 55 Hume Coal supported the Commissioner’s reasons. As to the Commissioner’s first set of reasons on the meaning of the term “significant improvement”, it

submitted that the Commissioner's resort to the objects of the Mining Act, and particularly the encouragement of the discovery and development of mineral resources, was proper and orthodox.

- 56 Hume Coal submitted that the word "work" in the context of the whole definition of significant improvement refers to the "product of exertion, labour or activity" or "an engineering structure, as a building, bridge, clock, or the like" (*Macquarie Dictionary*, meanings 9 and 10). Further, these products of labour or structures must be "substantial" and "valuable". The adjective "substantial" qualifies all subsequent nouns in the list, including "other work or structure": *Kayuga Coal Pty Ltd v Ducey* [2000] NSWCA 54 at [16]. So too does the adjective "valuable" qualify the list of nouns, including "other work or structure": *Ulan Coal Mines Ltd v Minister for Mineral Resources* [2007] NSWSC 1299 at [31]: "The word 'valuable' adds emphasis and a qualitative element To be valuable an improvement must be more than minimal or little value".
- 57 Understood in this way, Hume Coal submitted, improved pastures and lucerne paddocks fall outside the concept of "substantial ... other valuable work or structure" within the definition of "significant improvement".
- 58 As to the Commissioner's second set of reasons, Hume Coal supported the Commissioner in submitting that the use of land for sowing improved pastures and crops seems a fairly obvious thing to include in the list of items in the definition had their inclusion been intended. Hume Coal also supported the Commissioner's reference to the other provisions in the Mining Act, such as the defined term "agricultural land", where improved pastures are referenced.
- 59 Clause 22 of Sch 1 to the Mining Act enables a landholder to make an objection to the grant of a mining lease if it is to cover agricultural land. In cl 23A of that Schedule, separate provision is made for landholders to claim that a certain item on land is a "significant improvement". Hume Coal submitted that if "agricultural land", such as improved pastures and lucerne paddocks, was also a "significant improvement", the provisions of cl 22 and the detailed assessment pursuant to cl 23 to determine whether land was "agricultural land" could be circumvented.

- 60 Hume Coal submitted that it would not be expected that agricultural land such as improved pastures would be sterilised from exploration (as distinct from mining). Indeed, it makes sense that a landholder can lodge an objection with respect to the grant of a mining lease over agricultural land, but not for the far less invasive activities involved in exploration.
- 61 I find that the Commissioner did err on a question of law in deciding that paddocks with improved pastures or lucerne can never be significant improvements. I agree with and adopt the applicants' submissions as to the errors of law in the Commissioner's reasoning. I also add the following error in the Commissioner's reasoning.
- 62 The Commissioner misdirected herself by asking whether an "improved pasture" as a concept is a "significant improvement". That was an irrelevant inquiry. The relevant inquiry was whether the particular paddocks of the applicants, in which there were improved pastures or lucerne crops, were significant improvements. That required an examination of and making factual findings about whether each particular paddock fell within the concept of a "work" or "structure" or both and, if so, whether it was "substantial" and "valuable". It is all a question of fact and degree.
- 63 The concept of a work refers not to a process but rather to the physical result of labour done on land: *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1 at 24-25. Whether what has been done to the land is sufficient to be described as a work will depend on the nature and extent of what has been done and its significance in relation to the site on which it is situated. The depositing of fill on land, for example, may or may not be of such significance as to be regarded as a work. It will depend on the quantity of the filling and its significance in relation to the site: *Parramatta City Council v Shell Company of Australia Ltd* [1972] 1 NSWLR 483 at 489-490; (1972) 26 LGRA 25 at 31-32.
- 64 Labour could be done to land that might or might not make the land capable of being regarded as a work. For example, significant earthworks could be undertaken to level land and install drainage and irrigation pipes and channels on the land to make it suitable for some agricultural purpose, such as irrigated crops. The paddocks may be sown with crops, such as rice or cotton. The

crops may be irrigated through an irrigation system installed in the paddocks. The paddocks that are the product of these labours might be able to be regarded as works. On the other hand, the broadcast application of fertiliser to paddocks, although leading to improvement in pasture productivity, might not cause the paddocks to become works.

- 65 The Commissioner was in error in inquiring whether “improved pastures” or “lucerne crops” as concepts could be included in the definition of “significant improvement”. It involved misdirection to ask why the drafter did not include the concept of “improved pastures” in the list of items that could be significant improvements. There was no need for the legislative drafter to have done so. The end phrase “other valuable work or structure” is sufficient to catch paddocks which are the product of sufficient labour done to or on the land so as to cause the paddocks to be a work or structure that is substantial and valuable.
- 66 It similarly involved misdirection to refer to the statutory regime for a landowner to object to the grant of a mining lease on the ground that the land was agricultural land. It is true that the definition of “agricultural land” in cl 1 of Sch 2 in terms uses different criteria to the criteria used for the definition of “significant improvement”. It is also true that a landholder may object to the grant of a mining lease under cl 22(1) of Sch 1 on the ground that the land is agricultural land and also make a claim that something on the land is a significant improvement under cl 23A(1) of Sch 1. These different provisions may make it unlikely in practice that particular land that is agricultural land will also be a significant improvement. But it does not make it impossible. The physical result of labour done on land might not only constitute a work that is substantial and valuable (within the definition of “significant improvement”) but also be agricultural land (within the definition of that term).
- 67 The Commissioner’s inquiry into the concept of “improved pastures” and its place in the statutory regimes for “significant improvement” and “agricultural land” was therefore misguided. The inquiry was of no assistance to understanding whether a particular product of labour on land could be regarded

as a work (or a structure) and if so whether it was “substantial” and “valuable”, so as to fall within the definition of significant improvement.

- 68 I uphold grounds 3 and 5. The Commissioner will need, on the remitter, to examine and make factual findings about whether the paddocks of the applicants with improved pastures or lucerne crops are works that are substantial and valuable so as to be significant improvements.

Ground 4: Equestrian cross-country event course

- 69 The Commissioner decided that the equestrian cross-country event course was not a significant improvement. The first set of reasons was given in [90], [92]-[93] to which I have earlier referred when dealing with improved pastures. The second set of reasons was in [101] and [102]. The Commissioner accepted Hume Coal’s submission that a cross-country event course is not a “structure” or a “work” within the meaning of the definition of “significant improvement”. The Commissioner determined that the eventing business operated by one of the applicants should not be considered for the purpose of deciding whether the cross-country event course was a significant improvement. The Commissioner also decided that she could only look at what is on the surface of the land: “The Act is directed toward identifying improvements or things on the surface of the land or items which are substantial and valuable – not uses to which land is put from time to time”: at [101].
- 70 The applicants repeated their submissions that the first set of reasons revealed error on questions of law. The applicants submitted that the Commissioner’s second set of reasons in [101] and [102] also involved error on a question of law. The Commissioner accepted the evidence of Dr Roche of the substantial work that went into creating and maintaining the equestrian cross-country event course for events on the Roche property: at [87]. Notwithstanding the facts as found by the Commissioner, she concluded that a cross-country event course is not a “structure” or “work” within the meaning of the definition of “significant improvement”, but rather was a “use of land”. That was an error on a question of law. On the facts as found by the Commissioner, the cross-country event course is the physical result of labour done on land. It is thus a “valuable work” falling within the definition of “significant improvement”.

- 71 Hume Coal supported the Commissioner's reasons, repeating the submission it made regarding improved pastures.
- 72 I find the Commissioner did misdirect herself in deciding that the equestrian cross-country event course was not a significant improvement. The Commissioner's first set of reasons in [90]-[93] reveal error on questions of law for the reasons I have earlier given.
- 73 The Commissioner's second set of reasons in [101] and [102] reveal error on questions of law in two respects. First, the Commissioner failed to ask herself the right question as to whether "the substantial work that has gone into creating and maintaining and preparing the equestrian event courses for events on the property at 'Araluen'" (that the Commissioner noted had been done: at [87]) resulted in works or structures on the land and, if so, whether those works or structures were "substantial" and "valuable", so as to be significant improvements.
- 74 Second, the Commissioner misdirected herself by not considering the use to which any works or structures on the land may be put. The use to which works or structures on the land are put informs the assessment of whether they are valuable. Barrier and hurdle structures, water jumps and constructed obstacles are valuable works or structures for an equestrian cross-country event, but would not be for agricultural uses of the land. The use of the land in between the works and structures comprising the course for the event makes sense of the use of, and gives value to, the works and structures. Collectively, depending on the facts of the case, barrier and hurdle structures, water jumps and constructed obstacles and the land in between them, which are adapted for use as an equestrian cross country event course, may constitute works or structures or both that are substantial and valuable. The Commissioner erred in looking only at the things on the surface of the land and ignoring the use to which those things, and the land on and around the things, is put.
- 75 I uphold ground 4.

Grounds 6 and 7: Cattle laneways and irrigation pipes

- 76 The Commissioner found that the cattle laneways on the applicants' properties were cleared spaces within paddocks and a category of existing path or

accessway: at [104]. The Commissioner accepted Hume Coal's statement that it only intended to use the cattle laneways for the purpose of access by vehicle. Consistent with her earlier decision, the Commissioner held that a right to access the cattle laneways was not a right conferred by the exploration licence and that as Hume Coal had no intention to prospect in the cattle laneways, there was "no s 31(5) dispute arising on the facts": at [104].

77 The Commissioner rejected the applicants' argument that the irrigation piping running underneath the cattle laneways is a valuable work and thereby a significant improvement because the Commissioner considered that s 31 of the Mining Act "only relates to the exercise of rights over the surface of land on which is situated a significant improvement": at [105]. Because Hume Coal said that it did not intend to prospect in the cattle laneways, the Commissioner decided that no dispute arose under s 31(5) in respect of the irrigation piping underneath the cattle laneways: at [105].

78 The applicants submitted that the Commissioner made the same error as she had made in respect to formed roads and driveways in holding that the right to access the cattle laneways by vehicle in order to carry out prospecting operations was not a right conferred by the exploration licence and that there was no dispute under s 31(5).

79 The applicants submitted that the Commissioner was required to, but failed to, decide whether the cattle laneways were significant improvements to which s 31 applied. The applicants noted the Commissioner had found that the cattle laneways were cleared spaces within paddocks. As such, the applicants submitted that they were valuable works: see *Lightning Ridge Miners Association Ltd v Slack-Smith* [2013] NSWLEC 1063 where Moore SC (as his Honour was then) found at [62] that the clearing of land to create firebreaks was "other valuable work".

80 The applicants submitted that the Commissioner also erred in finding that the irrigation piping system underneath the cattle laneways was not a significant improvement and that no dispute under s 31(5) arose. The applicants submitted that the properties have their own water reticulation system commencing at tanks above ground, attached to poly pipes and connecting to

troughs in each of the paddocks. The troughs are above ground. As Mr Lucas described, the function of the water in the reticulation system is to deliver high quality water to grazing livestock in the paddocks. If the Commissioner were to be right, and the pipes were not significant improvements, Hume Coal would be able to drill through them without the consent of the landholder.

81 Hume Coal supported the Commissioner's decision that s 31 does not apply to access by vehicle on the cattle laneways, for the reasons given in respect to formed roads and driveways.

82 In relation to the irrigation piping, Hume Coal contended that the applicants' submissions to this Court are incorrect to the extent that they suggest that the Commissioner held that underground irrigation pipes were not significant improvements. The Commissioner found that underground pipes are not on the surface of land. As s 31(1)(c) of the Mining Act is concerned with significant improvements situated "on the surface of land", the underground pipes are not within s 31.

83 I find that the Commissioner erred on questions of law in deciding that s 31 did not apply to Hume Coal's proposed access by vehicle on the cattle laneways. The right to access the cattle laneways by vehicle in order to carry out prospecting operations within the exploration licence area is a right conferred by the exploration licence, for the reasons I have given earlier. Section 31 would operate to prevent Hume Coal from exercising that right on any cattle laneway if it is a significant improvement, without the written consent of the landholder concerned. The Commissioner was therefore required to, but failed to, determine whether each cattle laneway was a significant improvement. This required determining whether the cattle laneway was a work or structure and, if so, whether it was substantial and valuable. The Commissioner did not embark on this task. The Commissioner therefore erred on questions of law by misdirecting herself and failing to exercise jurisdiction.

84 The Commissioner also erred on questions of law in her decision on the irrigation piping in the cattle laneways in two respects.

85 First, the Commissioner misdirected herself and asked herself the wrong question in finding that "underground irrigation pipes are not situated over the

surface of the land and are thereby outside s 31(1) and s 31(5) of the Act”: at [106]. The relevant inquiry under s 31 is whether the significant improvement in question is situated “on” the land specified in the exploration licence, not whether it is “over the surface of the land”. The phrase “over the surface of the land” is used in s 31(1) with reference to the exercise of the rights conferred by the licence, not in relation to the significant improvement.

- 86 Section 31(1) uses two prepositions. The preposition “over” is used in the chapeau of s 31(1) and is placed before the nouns “surface of the land” to indicate their relation to the earlier words in the chapeau of “[t]he holder of an exploration licence may not exercise any of the rights conferred by the licence”. The chapeau thereby restricts the holder of an exploration licence from exercising any of the rights conferred by the licence (being the right to prospect, including doing all such things that are necessary to be able to prospect) over the surface of the land.
- 87 The preposition “on” is used in pars (a), (b) and (c) of s 31(1) to indicate a different relationship between the word “land” and the words “dwelling-house”, “garden” or “significant improvement” respectively, namely “land ... on which ... is situated” a dwelling-house, garden or significant improvement.
- 88 The Commissioner was therefore required to determine the question of whether the water reticulation system (of which the irrigation piping was a component) was a significant improvement situated “on land” specified in the exploration licence. Instead, however, the Commissioner determined the different question of whether the irrigation piping system was “over the surface of land”. This was to ask the wrong question.
- 89 Second, the Commissioner incorrectly adopted a reductionist approach, focussing on the parts rather than the whole of the irrigation piping system. On the facts, the irrigation piping underneath the cattle laneways is part of a water reticulation system that includes components on and over the surface of land, including water tanks and troughs in the paddocks. The function of the water reticulation system is to deliver high quality water to grazing livestock in the paddock. The relevant inquiry is whether this water reticulation system as a whole is a significant improvement and not whether each component part of

the water reticulation system is a significant improvement by itself. Each of the component parts combine to make up a structure that extends across the cattle laneways and paddocks of each property.

- 90 The Commissioner was required to determine whether this structure as a whole was substantial and valuable so as to be a significant improvement. If it was, the Commissioner was required to determine whether such a significant improvement could be said to be situated “on” the land specified in the exploration licence. The fact that some component parts of the significant improvement were underneath the surface of the land and some component parts were on or over the surface of the land did not necessarily cause the significant improvement not to be “on” the land specified in the exploration licence. It was a question of fact and degree. The nature and extent of the component parts that are above or below the surface of the land respectively and their significance to the structure that is the significant improvement are relevant factors to be considered in determining whether the significant improvement can be said to be situated “on” the land specified in the exploration licence.
- 91 For example, a dwelling-house or other building which for the most part is over the surface of the land might have some part or parts below the surface of the land, such as the foundations, an underground tank, a cellar or storage area, or underground car parking. Nevertheless, the dwelling-house or building would still properly be described as situated “on” the land. Take another example of a work that is excavated into land, such as a dam or reservoir (each of which is identified in the definition of “significant improvement”). The excavated work, such as the dam or reservoir, would properly be described as being situated “on” land, notwithstanding that it is substantially or even wholly under the surface of the land by reason of it having been excavated.
- 92 The Commissioner therefore failed to consider the right question of whether the water reticulation system (of which the irrigation piping was a part) was a significant improvement situated on land specified in the exploration licence. If it were to be, s 31 would prevent Hume Coal from exercising any of the rights

conferred by the exploration licence over the surface of the land on which that significant improvement was situated.

93 I uphold grounds 6 and 7.

Ground 8: Fences

94 The Commissioner dealt with the fences on the applicants' properties in two steps: first, the Commissioner considered the date for determining whether fences are significant improvements under s 31, and, second, the Commissioner determined whether there was any prospecting proposed on or within close proximity of any fence which was a significant improvement to which s 31 applied.

95 As the first step, the Commissioner held that "the date for determination of the existence of a 'significant improvement' for the purposes of s 31 must be the date of the service of the written notice pursuant to s 142(1) of the Act by the holder of the exploration licence on the landowner": at [109]. The Commissioner determined that s 31(1) "must be limited to a prohibition upon the exercise of rights conferred by the licence over a significant improvement situated on the surfaces of the land at the time a s 142 notice is served": at [112].

96 Based on this construction, the Commissioner implicitly determined that the fences on two of the applicants' properties, which were erected after the date of service of the s 142 notice on applicants, could not be significant improvements under s 31: at [108], [114].

97 In relation to the fences that were in existence before the date of service of the s 142 notices, the Commissioner accepted that Hume Coal did not intend to carry out prospecting on or within close proximity to those fences. Hume Coal did intend to cut particular fences on one of the applicant's properties to obtain access to boreholes: at [115]. However, consistent with what the Commissioner had earlier decided, gaining access through the fences did not involve the exercise of any right conferred by the licence and s 31 did not apply. The Commissioner therefore determined that no dispute arose under s 31(5) and she did "not have jurisdiction to determine whether the fences at issue are valuable works and thereby 'significant improvements'": at [116].

- 98 The applicants submitted that the Commissioner's decision on the date for determination of "significant improvement" under s 31 was an error of law. The applicants noted that s 31(1) is expressed in the present tense. Whether a significant improvement exists on the surface of land is determined at the date on which the rights conferred by the licence are sought to be exercised. That is the plain wording of s 31(1). The subsection does not state that the date should be the date of the service of the s 142 notice. There is no reason why Parliament should have intended that date (absent specific provision in the Mining Act). It may be years between service of that notice and the date of the exercise of rights by a (perhaps different) explorer. The Court should not construe such wording as to imperil improvements or expenditure by landowners during such periods. This is especially so given the broad extent of exploration areas and the business considerations governing explorers' programs of work.
- 99 The applicants submitted that the Commissioner also erred on questions of law by failing to determine whether the fences on the applicants' properties were significant improvements. The Commissioner had concluded, on the basis of the evidence before her, that the fences were stockproof fences and were well maintained. She found that Hume Coal intended to cut fences on one of the properties in three places in order to obtain access to the borehole. Notwithstanding this, the Commissioner failed to make any finding as to whether the fences were significant improvements. The Commissioner erred in law by not deciding this question. Furthermore, the applicant submitted that the Commissioner erred in law in not determining that the fences are valuable works and significant improvements because, having regard to the unchallenged evidence, and the facts as found by her, the fences plainly satisfied the statutory definition as a matter of law.
- 100 Hume Coal supported the Commissioner's finding that the date for determination of "significant improvement" under s 31 is the date of service of the s 142 notice.
- 101 Hume Coal submitted that it was not an error of law to read s 31(1), insofar as it relates to the exercise of rights conferred by the licence in accordance with a

particular access arrangement, as limited to a prohibition upon the exercise of rights conferred by the licence over a significant improvement situated on the surface of land at the time a s 142 notice is served. That reading meets the concerns of practicality, finality and the administration of justice, and reflects the structure and content of s 31 and the Mining Act as a whole.

102 Hume Coal submitted that s 31(1), on its face, is ambulatory: it speaks to significant improvements existing from time-to-time and exercises of rights by licence holders occurring from time-to-time. However, it is clear from the provision in s 31(5) for determination of disputes that the Mining Act contemplates that s 31(1), in respect of any particular exercise of rights, is capable of fixing upon claimed significant improvements at a particular point in time. Otherwise, it would be impossible for the scope of disputes to be crystallised and determined for the purposes of s 31(5). Further, any resolution of those disputes could be rendered futile by a dissatisfied owner simply creating an indisputable significant improvement (such as digging a dam or erecting a building) over land upon which a claimed significant improvement had been rejected by the Court.

103 Hume Coal submitted that s 31(1) is concerned with things situated on "the surface of land", and with prohibiting activities thereon without the written consent of "owners" (and in the case of dwelling-houses, occupiers) of things so situated. It is not concerned with such things where the owner is the licence holder or a related corporation: s 31(4). Wherever there is (or appears to be) a s 31(1) thing on land on which a licence holder proposes to exercise its rights, a licence holder will need to seek the consent of the owner of that thing. Consent (or its refusal) must be preceded by notice of the proposed exercise of rights. Wherever a licence holder proposes to exercise those rights on land that it does not own, the process under Division 2 of Part 8 must be followed, and any such exercise of rights will, necessarily, be preceded by an access arrangement. It is at the point of notice to the owner (of a dwelling-house, garden or significant improvement) that the scope of any potential s 31(5) dispute is fixed.

- 104 Hume Coal submitted that where the owner of the s 31(1) thing is also the landholder (as defined in the Dictionary to the Act), consent under s 31(1) will most conveniently be sought, to the extent it is necessary, as part of seeking an access arrangement pursuant to Division 2 of Part 8 of the Mining Act. Notice, therefore, will occur pursuant to the provisions of that Division, in accordance with s 142. Pursuant to s 142(2), that notice will set out, in addition to the licence holder's intention to obtain an access arrangement, "a plan and description of the area of land over which the access is sought sufficient to enable the ready identification of that area", and "a description of the prospecting methods intended to be used in that area".
- 105 Thus, when a s 142 notice is obtained, it will provide the landholder (and, usually, the owner of any s 31(1) things on the land) with formal, written notice of what is being proposed by the licence holder by way of an exercise of their rights under the licence, pursuant to access provided under an access arrangement. It is at this point in time that the landholder or s 31(1) item owner assesses their position and enters into negotiation (and, if necessary, arbitration) with the licence holder in relation to access. To the extent the landholder is also the owner of s 31(1) things on the land, this is also the point in time to consider whether consent will be given to the exercise of rights over those things.
- 106 Hume Coal submitted that it creates unfairness (and an incentive to sharp practice) if a landholder, having received such a notice, can set about altering their position. To allow such conduct frustrates the operation of the Mining Act's provisions for allowing access to and the exercise of rights over private land to further the Mining Act's purpose of "facilitating the discovery ... of mineral resources in New South Wales".
- 107 Hume Coal submitted that this construction that notice fixes the time at which any s 31(5) dispute crystallises is supported by reference to s 383B. That section relevantly provides:
- (1) This section applies in relation to:
 - (a) the requirements of section ... 31 ... that certain rights cannot be exercised ... except with the written consent of a person or persons specified in the relevant section, and

...

(c) the requirement of section 140 that certain operations may not be carried out otherwise than in accordance with an access arrangement agreed with each landholder or determined by an arbitrator as referred to in s 140(1)(b),

...

(2) If a landholder or other person whose consent or agreement must or may be obtained for a purpose mentioned in subsection (1)(a)-(e) ... cannot, after diligent inquiry, be found or identified:

(a) the rights may be exercised ... without the written consent of the landholder or person concerned, or

(b) the operations may be carried out without the consent of the landholder, or

(c) the operations may be carried out in accordance with any access arrangement made with, or determined in respect of, those landholders (if any) who have been found or identified without the agreement of a landholder who has not been found or identified ...

This section makes it clear that the prohibition in s 31(1) is removed where notice is not, as a practical matter, possible. The protection of s 31(1) is not boundless unless and until consent is obtained. This supports a reading of s 31 that reflects the inter-relationship between notice and the (not unlimited) scope of the protections s 31(1) affords.

108 Hume Coal submitted that the applicants' contention that whether a significant improvement exists "is to be determined at the date on which the rights conferred by the licence are sought to be exercised" is plainly impractical. The "determination" under s 31(5) requires a case be articulated and evidence prepared prior to that date, otherwise the scope of the dispute could forever be shifting. The Court exercising s 31(5) jurisdiction necessarily decides the case based on historical facts not present reality. It is also contrary to the interests of the efficient administration of justice. It cannot be the case that a significant improvement created between the close of their evidence before the Commissioner on 15 September 2015 and this Court's determination of their appeal could give rise to a fresh s 31(5) dispute, rendering any decision of the Court futile and defeating the purpose of these proceedings. The applicants' interpretation is not consistent with the purposes of the Mining Act or its structured approach to the exploration and exploitation of minerals.

- 109 Hume Coal also supported the Commissioner's decision that cutting fences to gain access to boreholes does not involve the exercise of any right conferred by the exploration licence, for the reasons they had given earlier.
- 110 I find that the Commissioner has erred on questions of law in the various ways submitted by the applicants. The time at which s 31(1) applies is clear from the terms of s 31(1): it applies at the time of exercise of any of the rights conferred by the licence. The provision prevents the holder of an exploration licence from exercising any of the rights conferred by the licence over the surface of the land on which is situated a dwelling-house, garden or significant improvement at the time of exercising that right. The provision does not need to be read with s 142 or any other provision of the Mining Act. It is self-contained and self-evident.
- 111 The purpose of the provision is clear. The identified improvements of dwelling-houses, gardens and other substantial and valuable works or structures that fall within the definition of "significant improvement" are to be protected from interference by the carrying out of prospecting operations on or within the prescribed distance of the improvements. This purpose is achieved if the relevant date for determining the existence of the improvement on the land is the date on which the prospecting operation is carried out on the land. Section 31(1) is indeed ambulatory: it continues to apply to whatever dwelling-houses, gardens and significant improvements exist on the land whenever the holder of an exploration licence exercises any of the rights conferred by the licence. The application of s 31(1) is not fixed on the service of a notice under s 142 of the Mining Act.
- 112 The Commissioner misconstrued s 31(1) and misdirected herself by asking what was the date for determining the dispute under s 31(5) of the Mining Act. That was an irrelevant inquiry. A dispute as to whether or not s 31(1) applies in a particular case may arise at any time and from time to time. Each dispute under s 31(5) as it arises will need to be determined on the facts that exist at the time the dispute arises. But that tells us nothing about the time at which s 31(1) applies. Only the terms of s 31(1) tell us the time at which it applies. This is the time of exercise of the rights conferred by the licence.

- 113 In this case, some fences were erected by some of the applicants after Hume Coal gave them s 142 notices. One of the issues in the dispute that arose was whether s 31(1) applied so as to prevent Hume Coal from exercising any of the rights conferred by the exploration licence over the surface of land on which those fences had been erected, without obtaining the written consent of the landowners concerned. The Commissioner clearly had jurisdiction to determine this dispute. It was to be determined by deciding whether those fences were significant improvements, and, if so, whether what Hume Coal was proposing to do on or in proximity to those fences involved the exercise of any of the rights conferred by the exploration licence. The Commissioner was in error in determining that she had no jurisdiction to determine this dispute.
- 114 The Commissioner also was in error in deciding that Hume Coal's proposed action of cutting fences to gain access to carry out prospecting operations did not involve the exercise of rights conferred by the exploration licence. Gaining access to boreholes that had been drilled in the course of prospecting operations is part and parcel of prospecting, for the reasons I have given earlier.
- 115 The Commissioner was required to determine whether each of the fences that had been erected on the applicants' properties was a significant improvement. This required determining whether the fence was a work or structure (more likely the latter) and whether it was substantial and valuable. The answers to these questions depend on the relevant facts and circumstances, including the nature, extent and other features of each fence and the property on which the fence is erected and the purpose of the fence on the property. Not all fences will necessarily answer the description of being substantial and/or valuable. To use the example given in *Goode v The Valuer General* (1979) 22 SASR 247 at 257, an internal fence erected on suburban residential land, "for no discoverable purpose, and without producing any betterment of the land for its present use", could not be called "valuable".
- 116 The Commissioner failed to make these determinations about the fences on the applicants' properties and thereby constructively failed to exercise jurisdiction.

117 I uphold ground 8.

Conclusion and orders

118 The applicants have established that the Commissioner erred on questions of law in numerous ways. The errors are material and vitiate the Commissioner's decision and orders. The Commissioner's decision and orders should be set aside and the proceedings remitted to the Commissioner for determination in accordance with my decision.

119 The usual order for costs on a s 56A appeal from the decision of a Commissioner in Class 8 of the Court's jurisdiction is that they follow the event: see s 98 of the *Civil Procedure Act 2005* and r 42.1 and Sch 1 of the Uniform Civil Procedure Rules 2005. There are no circumstances in this case justifying departure from the usual order. Accordingly, Hume Coal should be ordered to pay the applicants' costs of the appeal.

120 The applicants also sought an order for costs of the proceedings before the Commissioner. The Commissioner, applying the costs follow the event rule, had made an order that the applicants' pay Hume Coal's costs of the proceedings: at [122], [123]. That costs order should be set aside. I am not in a position, however, to make a substitute costs order for the proceedings before the Commissioner. The appropriate costs order will depend on the outcome of the proceedings on the remitter. The Commissioner can re-determine the costs order that should be made after she has re-determined the remitted proceedings.

121 The orders of the Court are:

- (1) Appeal is upheld.
- (2) The decision and orders made by the Commissioner on 13 November 2015 are set aside.
- (3) The proceedings are remitted to be determined by the Commissioner in accordance with the decision of this Court.
- (4) The respondent is to pay the applicants' costs of the appeal.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.