LAND COURT OF QUEENSLAND

CITATION:	*Peabody West Burton Pty Ltd & Ors v Mason & Ors* [2012] QLC 0023
PARTIES:	Peabody West Burton Pty Ltd, CITIC West/North Burton Pty Ltd and Talbot Group Exploration Pty Ltd (applicants) v. Edward Peter Mason, Mora Ellen Mason and Valda Ann Mason (respondents)
FILE NO:	MRA788-11
DIVISION:	Land Court of Queensland - General Division
PROCEEDING:	Determination of compensation payable to the respondents under Schedule 1 of the *Mineral Resources Act 1989* and related matters
DELIVERED ON:	31 May 2012
DELIVERED AT:	Brisbane
HEARD AT:	Mackay
MEMBER:	Mr PA Smith
ORDER:	**1. Pursuant to section 22(3) of Schedule 1 MRA, the Court determines the applicants' future compensation liability to the respondents for an authorised activity to be carried out by the applicants, in relation to Lot 8, in the total sum of Three Thousand, Two Hundred and Twenty Dollars ($3,220).** **2. Pursuant to section 363 MRA, the respondents permit the applicants access to Lot 8 in accordance with the terms of the Conduct and Compensation Agreement to be entered into between the applicants and the respondents, in the form of Exhibit 6, with the inclusion at Schedule 2 of the Court's determination of compensation.**
CATCHWORDS:	MINING — determination of compensation liability for exploration activities — heads of compensation — diminution of value — whether compensation payable for

future risk of mining — claim for experts' fees

Mineral Resources Act 1989, Schedule 1, ss 13, 22

APPEARANCES: H Bowskill of Counsel for the applicants
G Houen, agent, for the respondents

SOLICITORS: McCullough Robertson, Lawyers for the applicants

Background

[1] On 10 November 2011 Peabody West Burton Pty Ltd,[1] CITIC West/North Burton Pty Ltd and Talbot Group Exploration Pty Ltd ("the applicants") commenced proceedings in the Land Court by way of originating application against Edward Peter Mason, Mora Ellen Mason and Valda Ann Mason ("the respondents"). Subsequently, and without objection from the respondents, the applicants filed an amending originating application. The purpose of the amending application was to more appropriately set out the orders sought by the proceeding. By the amended application, the orders that the applicants seek are as follows:

> "1 Pursuant to section 22(3) of Schedule 1 MRA, an order that the Court decide the Applicants' future compensation liability to the Respondents for an authorised activity to be carried out by the Applicants, in relation to Lot 8, in terms consistent with the valuation report prepared by Taylor Byrne which is annexure '**C**' to this application.
> 2 Pursuant to section 363 MRA, an order that the Respondents permit the Applicants access to Lot 8 in accordance with the terms of the Conduct and Compensation Agreement to be entered into between the Applicants and the Respondents, in the form of Exhibit 6, with the inclusion at Schedule 2 of the Court's determination of compensation."

[2] It is noteworthy that, although other matters have been filed in the Land Court seeking a determination of compensation under the relatively new provisions of Schedule 1 of the *Mineral Resources Act 1989* (the MRA), this is the first such matter to proceed to full hearing and decision.

[3] A pleasing aspect of this matter is that there is essentially no factual dispute as between the parties. The dispute relates to expert opinion as to what compensation is properly payable by the applicants to the respondents.

[4] In their originating application, the applicants set out a useful summary of the facts which gave rise to the making of the application. Those facts are as follows:[2]

> "1 The Applicants are the joint owners of EPC 708.
> 2 Peabody West Burton Pty Ltd (PWBC) is the principal holder of EPC 708, with a 65% interest, and is a wholly owned subsidiary of Macarthur Coal Ltd ACN 096 001 955.
> 3 The Respondents are the registered lessees of Lot 8 on GV807254 (**Lot 8**). EPC 708 wholly or partially overlaps the geographic area of Lot 8.

[1] It is noted that the first applicant was originally named as West Burton Coal Pty Ltd. However, by letter dated 7 March 2012 from the applicants' solicitors, the Court was advised that West Burton Coal Pty Ltd had changed its name to Peabody West Burton Pty Ltd.

[2] See applicants' originating application of 10 November 2011, with necessary name change.

4 On or about 25 November 2010, the Applicants gave a Notice of Intention of Entry on Occupied Land to the Respondents in respect of Lot 8 for the period 3 December 2010 to 31 December 2010.
5 On or about 15 December 2010, the Applicants gave the Respondents a Renewal and Converted Entry Notice in respect of Lots 8 for the period 1 January 2011 to 31 March 2011.
6 In February 2011, the Applicants commenced informal negotiations, on a without prejudice basis, with the Respondents for a conduct and compensation agreement, pursuant to Schedule 1 of the MRA. The negotiations contemplated compensation for activities on Lot 8.
7 On 18 February 2011, the Applicants gave the Respondents a Notice of Intention to Negotiate an Agreement in relation to Lot 8.
8 On 9 March 2011, representatives of the Applicants met with a representative of the Respondents to negotiate a conduct and compensation agreement in relation to Lot 8. It was also agreed by those representatives that the minimum negotiation period would be 20 business days from 9 March 2011.
9 On 11 March 2011, the Applicants received an amended version of the draft conduct and compensation agreement from the Respondents.
10 On or about 21 March 2011, the Applicants gave the Respondents a Renewal and Converted Entry Notices in respect of Lots 8 for the period 1 April 2011 to 30 June 2011.
11 On 25 March 2011, representatives of the Applicants met with a representative of the Respondents to conduct further negotiations in relation to a conduct and compensation agreement in relation to Lot 8.
12 Subsequent to 25 March 2011, the parties' representatives engaged in without prejudice correspondence regarding a conduct and compensation agreement in relation to Lot 8.
13 On 5 April 2011, the minimum negotiation period agreed on by the parties expired. During the negotiation period, the parties used all reasonable endeavours to negotiate a conduct and compensation agreement.
14 On 5 May 2011, the Respondents engaged P.J. Jinks & Associates to undertake a valuation for compensation pursuant to Schedule 1 MRA, in relation to Lot 8.
15 On 6 May 2011, the Applicants engaged Taylor Byrne to undertake a valuation for compensation pursuant to Schedule 1 MRA, in relation to Lot 8.
16 On 15 May 2011, the Respondents provided the Applicants with the valuation of P.J. Jinks & Associates.
17 On 17 May 2011, the Applicants provided the Department of Employment, Economic Development and Innovation (**DEEDI**) with an Election Notice for a relevant officer to call a conference to negotiate a conduct and compensation agreement, in relation to Lot 8.
18 On 8 June 2011, the Applicants received a copy of the valuation report prepared by Taylor Byrne. A copy of this valuation report was provided to the Respondents in person on 24 June 2011.
19 On 6 June 2011, the Applicants received notice from DEEDI that a conference had been scheduled for 20 June 2011.
20 On 20 June 2011, representatives of the Applicants, representatives of the Respondents and Deborah Wood of DEEDI attended a conference to negotiate a conduct and compensation agreement, in relation to Lot 8. At the end of the conference there was no conduct and compensation agreement between the parties.
21 On about or about 20 June 2011, the Applicants gave the Respondents a Renewal and Converted Entry Notice in respect of Lot 8 for the period 1 July 2011 to 31 August 2011."

[5] The applicants are seeking to undertake advanced exploration activities on the respondents' land under the authority of EPC 708. The respondents undertake pastoral activities on the subject land. For the purposes of the MRA, the respondents are the owners of the land.[3]

[3] See MRA Schedule 2 Definition of owner at (g).

The Legislative framework

[6] As indicated, this matter principally arises as a consequence of Schedule 1 of the MRA. Schedule 1 was inserted into the MRA by the *Geothermal Energy Act 2010*, and commenced operation on 10 December 2010.

[7] Pursuant to s.129(1)(a)(i) of the MRA, the holder of an exploration permit is authorised to enter land contained within the area of an exploration permit for the purpose of carrying out authorised activities.[4] However, the holders' right of entry under s.129 is stated to be "subject to compliance with section 163".

[8] Section 163 is in the following terms:

> "**163 Access and compensation provisions—sch 1**
>
> Schedule 1 contains provisions about access, compensation and related matters for exploration permits."

[9] I now turn to the provisions of Schedule 1 of the MRA. In this regard, I should note that some general observations as to the operation of Schedule 1 were made by the Land Court in the recent decision of *Endocoal Limited v EMIN Pastoral Company Pty Ltd & Ors*.[5]

[10] Schedule 1 is concerned with two types of activities, namely "preliminary activity"[6] and "advanced activity".[7] The case at hand concerns advanced activities. Section 10 of Schedule 1 then goes on to provide as follows:

> "**10 Conduct and compensation agreement requirement for particular advanced activities**
>
> (1) A person must not enter private land an exploration tenement's area to carry out an advanced activity for the tenement (the ***relevant activity***) unless each eligible claimant for the land is a party to an appropriate conduct and compensation agreement.
>
> Maximum penalty—500 penalty units.
>
> (2) The requirement under subsection (1) is the ***conduct and compensation agreement requirement***.
>
> (3) In this section—
>
> ***appropriate conduct and compensation agreement***, for an eligible claimant, means a conduct and compensation agreement about the holder's compensation liability to the eligible claimant of at least to the extent the liability relates to the relevant activity and its effects."

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4 Except for land which is the surface area of a reserve, to which special provisions in sub paragraph (ii) apply.
5 [2012] QLC 0011.
6 See Schedule 1, s.2.
7 See Schedule 1, s.3.

[11] Part 4 of Schedule 1[8] sets out general provisions relating to conduct and compensation agreements. Part 5 of Schedule 1[9] then sets out a negotiation process. Part 5 commences with the following words:

> "*Note*—
> Generally, an exploration tenement holder can not enter private land to carry out an advanced activity unless the holder complies with this part. See sections 10 and 11."

[12] Part 6 of Schedule 1[10] then goes on to set out the process for deciding compensation through the Land Court. The originating application in this matter was made pursuant to s.22(3) of Schedule 1. Section 22 is in the following terms:

> "**22 Land Court may decide if negotiation process unsuccessful**
>
> (1) This section applies if an election notice is given and—
>
> (a) a party asked a relevant officer to call a conference and the relevant officer does not finish it within the period required under section 21 (the ***required period***); or
>
> (b) a party called for an ADR and the person facilitating the ADR does not finish it within the period required under section 21 (also the ***required period***).
>
> (2) This section also applies if an election notice is given and—
>
> (a) only 1 party attended the conference requested or ADR called for; or
>
> (b) both parties attended the conference or ADR and, at the end of the required period, there is no conduct and compensation agreement between the parties.
>
> (3) An eligible party may apply to the Land Court for it to decide the exploration tenement holder's—
>
> (a) compensation liability to the claimant; or
>
> (b) future compensation liability to the claimant for an authorised activity for the exploration tenement holder proposed to be carried out by or for the holder.
>
> (4) However, the Land Court may decide the liability or future liability only to the extent it is not subject to a conduct and compensation agreement.
>
> (5) In hearing the application, the Land Court must as much as practicable ensure the hearing happens together with, or as closely as possible to, the hearing of any relevant environmental compensation application.
>
> (6) In this section—
>
> ***eligible party*** means a party who attended the conference or ADR.
>
> ***relevant environmental compensation application*** means an application to the Land Court for compensation that is or may be payable by the exploration tenement holder to the eligible claimant under the Environmental Protection Act."

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[8] Ss 14 and 15.
[9] Ss 16 - 21.
[10] Ss 22 - 24.

[13] In determining the compensation liability, s.13 of Schedule 1 is critically important. It provides as follows:

> "**13 General liability to compensate eligible claimants**
>
> (1) The holder of each exploration tenement is liable to compensate each owner or occupier of private land or public land in the tenement's area (an ***eligible claimant***) for any compensatable effect the eligible claimant suffers caused by relevant authorised activities.
>
> (2) An exploration tenement holder's liability under subsection (1) to an eligible claimant is the holder's ***compensation liability*** to the claimant.
>
> (3) This section is subject to section 11.
>
> (4) In this section—
>
> ***compensatable effect*** means all or any of the following—
>
> (a) all or any of the following relating to the eligible claimant's land—
>
> (i) deprivation of possession of its surface;
>
> (ii) diminution of its value;
>
> (iii) diminution of the use made or that may be made of the land or any improvement on it;
>
> (iv) severance of any part of the land from other parts of the land or from other land that the eligible claimant owns;
>
> (v) any cost, damage or loss arising from the carrying out of activities under the exploration tenement on the land;
>
> (b) accounting, legal or valuation costs the claimant necessarily and reasonably incurs to negotiate or prepare a conduct and compensation agreement, other than the costs of a person facilitating an ADR;
>
> *Examples of negotiation—*
>
> an ADR or conference
>
> (c) consequential damages the eligible claimant incurs because of a matter mentioned in paragraph (a) or (b).
>
> ***relevant authorised activities*** means authorised activities for the exploration tenement carried out by the holder or a person authorised by the holder."

The Hearing

[14] The hearing of this matter was conducted over two days in Mackay, with a site inspection undertaken on the first day.

[15] The applicants called evidence from two people. The first was Mr Summers who is the manager of geological services with the applicants. His evidence was essentially technical in nature, detailing the activities that the applicants proposed to undertake on the respondents' property in accordance with the entry notices given. Mr Summers was not subject to any cross-examination.

[16] The applicants also relied upon the evidence of an expert valuer, Mr Lyons. Mr Lyons is the branch manager for Taylor Byrne in Central Queensland, and is also a director of Taylor Byrne. Mr Lyons produced a valuation report[11] and a statement of evidence.[12]

[17] The respondents called evidence from a registered valuer, Mr Jinks. Mr Jinks is the principal of PJ Jinks & Associates.

[18] Mr Jinks relied on affidavit evidence[13] and a valuation report.[14]

[19] The respondents also relied upon affidavit evidence of Mr Houen.[15]

[20] The applicants were represented throughout the hearing by Ms H Bowskill of Counsel, instructed by McCullough Robertson, Lawyers. The respondents relied upon the services of an agent, Mr Houen, of Landholder Services.

The heart of the dispute

[21] The principal issue in dispute between the parties is what compensation, if any, is payable by the applicants to the respondents under the head of compensation "diminution of its value".[16]

[22] With respect to this head of compensation, Mr Lyons had this to say in his valuation report:[17]

> "**7.2.2 Diminution of Value**
>
> The low level of intensity and short duration proposed in the drilling program by Macarthur Coal Limited will not cause any permanent loss in the value of the property in my opinion.
>
> There is no evidence in the market place for rural properties in Central Queensland that would give any indication that there is a discount for such short term activities.
>
> Furthermore it is not accepted valuation practice to make such discounts in our normal day to day assessment of property values. Therefore there is considered to be no loss under this head of compensation."

[23] Mr Jinks has a different view as to the diminution of the value of the respondents' property. In his valuation report, he relevantly states as follows:[18]

> "**The main concern is (ii) diminution of its value.**
>
> The fact that there is an EPC over all or part of the land is in itself not a great concern, as a large area of Qld has explorations permits of one type or another registered on the land.
>
> The concern is when an EPC is held, and exploration drilling commences in an area close to and of a similar country type to existing coal mining activities, the possibility of all or part of the land being required in the future for a Mining Lease increases considerably.

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[11] Exhibit 4.
[12] Exhibit 5.
[13] Exhibit 8.
[14] Exhibit 7.
[15] Exhibit 9.
[16] See Schedule 1, s.13(4)(a)(ii).
[17] See Exhibit 4, page 19 para 7.2.2.
[18] See Exhibit 7, pages 3 and 4.

As a result of these activities, it is considered that the current market value of the land falls because of 'Risk'.

DEFINITION OF MARKET VALUE.

The long standing definition is as Isaacs J pointed out in Spencer v Commonwealth, at 441:

'We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.'

RISK.

It is my view that the risk is two fold, (a) whether or not the land may be required for mining, and (b) whether all or part of the land only will be required.

Where a risk exists it reasonable to further assume that there is a loss of value of the land.

DEGREE OF RISK.

This is the most difficult point to assess. Because of the normal terms of compensation for the conversion of an EPC to a Mining Lease, it is reasonable to assume that if all the land is required, the owner will get back the full value, but with the risk of not knowing when this happen.

The risk of having part of the land required for a Mining Lease, is two fold, firstly not knowing when any action will be taken, and secondly how much of the property will remain.

Of course, it can be argued, that exploration drilling occurs all of the time with- out resulting in the application for a mining lease, but in these particular circumstances regarding the existing coal mining activities within the overall district, it is reasonable to assume that there is a very real risk, and this risk would be reflected in the reduction of the value of the land because of the exploration activity. **As per compensable effect, (a)(ii) diminution of its value.**

ASSESSMENT OF THE RISK.

Having regard to all of the circumstances, unsupported by evidence, simply because these exploration compensation considerations did not apply to exploration activities in the past, the assessment of this risk comes down to a considered opinion, and as Isaac J said in Spencer v Commonwealth, '…as then appearing to persons best capable of forming an opinion..'.

LOSS OF VALUE ADOPTED.

It is a considered opinion that the loss of value under the circumstances peculiar to this property that the loss of value, as a result of these proposed activities would be $50,000."

[24] Two key points arise from the valuation evidence above of Mr Lyons and Mr Jinks. Mr Lyons does not make any allowance for diminution of value because in his view there is "***no evidence in the market place for rural properties in Central Queensland that would give any indication that there is a discount for such short term activities***". For his part, Mr Jinks acknowledges that his view is "***unsupported by evidence***".

[25] It is in my experience an unusual circumstance for two experienced valuers to both draw important, opposite, conclusions based on either a lack of evidence or no evidence. Of course, Mr Lyons is making a positive assertion that sales show no evidence to support

the respondents' claim. There was not, however, an analysis of sales of properties without EPCs present vs those with EPCs.

[26] Assistance in resolving the dilemma caused by this evidence is to be found in a close examination of the actual words of s.13, Schedule 1.

Meaning of "diminution of its value" as contained within s.13 of Schedule 1

[27] A number of aspects of the construction of s.13 of Schedule 1 are clear. To begin with, it is immediately apparent that the provisions are quite different to those which apply relating to the payment of compensation for the grant of a mining lease under s.281 of the MRA.[19] While compensation pursuant to s.281 of the MRA relates to the **grant** of a mining lease, under s.13(1), Schedule 1, a landholder is compensated "**for any compensatable effect the eligible claimant suffers caused by relevant authorised activities**". In simple terms, under Schedule 1 the landholder is compensated for the actual damage that the explorer does to the landholder's property in actually carrying out the exploration activities.

[28] In my view, the heads of compensation in Schedule 1, s.13(4) must be read in light of this distinction. In this regard, the observations of Thomas J, with whom Andrews CJ and de Jersey J agreed, in *R v The Land Court; ex parte Kennecott Explorations (Australia) Ltd*[20] are quite pertinent. His Honour said:[21]

> "… 'diminution of the value of the lands of the owner or occupier or any improvements thereon' may be very different according to whether the diminution is that caused by the taking of the coal mining tenement, or the taking of the surface area only, or the taking up and working of the mining tenement. In short, when one looks at the words 'diminution of the value' in s 129(4)(A)(b) one immediately has to ask 'diminution of the value by reason of what acts or events?'.
>
> In some other compulsory acquisition and compensation provisions, there is an express statement of the acts or events in respect of which the assessment is to compensate the owner. For example in compulsory acquisitions under the *Acquisition of Land Act 1967* it is the taking of the land which is the causative factor, and in general terms the measure of compensation is the loss which the owner sustains by reason of his land being taken (subject of course to the express statutory directions in relation to assessment of compensation). The answer in the present case is suggested by the terms of s 128. The reference to 'compensation', although negatively expressed, is to compensation 'for the right to take up and occupy or work a mining tenement'…"

[29] The question then falls to be asked: what are the acts or events which give rise to a claim for diminution of value in the case at hand?

[30] The direct evidence in this regard is clear and uncontested. It is set out in some detail in Mr Summers' evidence, and is conveniently summarised by Mr Lyons at page 4 of Exhibit 4 as follows:

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19 See, by way of example, *Barrett v Weir & Gregcarbil Pty Ltd* [2009] QLC 182; *Markert v Struber & Anor* [2010] QLC 60 and *Slater & Anor v Appleton & Anor* [2012] QLC 0007.

20 [1989] 1 Qd R 335.

21 At 338-9.

"… Planned exploration works for the 2011 calendar year include the following:

- 4 drill pads
- Approximately 3 kilometres of main tracks and 3 kilometres of minor tracks

The total area disturbed would equate to approximately 3.4 hectares based on a standard drill pad of 1,000m² and road widths of 5 metres. It is anticipated that the total drill program on Lenton Downs will be 12 days or 1 week and 5 days.

The exploration activity is considered to have a nominal impact on the property, considering the relatively small area disturbed and limited period of activity."

[31] I note that the respondents' property has an area of approximately 15,000 ha.[22] Accordingly, the proposed activities will have a direct impact on only a very small part of the property as a whole.

[32] In her written submissions, Ms Bowskill for the applicants had this to say:[23]

"39. The focus of s 13(1) is clearly upon the 'relevant authorised activities' - the liability of an exploration permit holder being to compensate owners or occupiers of land for any compensatable effect caused by relevant authorised activities.

40. The phrase 'caused by' in s 13(1) encompasses the ordinary notion of causation in the context of legal responsibility. Causation is essentially a question of fact, the determination of which involves common sense, and in respect of which the 'but for' test has an important role to play (*March v Stramare (E&MH Pty Ltd)* (1991) 171 CLR 506 at 515-516 per Mason CJ and at 522-523 per Deane J)."

[33] The respondents' position is best summarised in paragraphs 6 - 10 of Mr Houen's written submissions as follows:

"6. The compensation provisions of Schedule 1 of the Mineral Resources Act and those of section 532 of the Petroleum and Gas (Production and Safety) Act 2004 are effectively identical. In the P&G Act authorised activities are the only cause of compensation - that is, no compensation is provided for the grant of a petroleum lease or any other P&G Act tenement. These uniform provisions of the two Acts each clearly specify that the compensation liability arises from the relevant authorised activities.

7. There is no reason to look to the provisions of the MR Act section 281, which address compensation for the grant of a mining lease, as a guide for interpreting the MR Act Schedule 1 compensation provisions which address compensation for authorised activities.

8. Mr. Jinks' evidence is that there are circumstances applying to this property and this determination which distinguish it as one where authorised exploration activities will cause loss of property value. There is no evidence that comparable circumstances applied in the historical examples postulated by Mr. Lyons, the valuer for the applicants.[3]

9. These circumstances, which would cause a prudent purchaser to perceive a risk created by the activities in this particular instance, include -

   a. this proposed drilling follows on from the applicants' earlier drilling nearby on the same property, heightening a perception that viable coal deposits exist;
   b. the relevant part of Lenton Downs is similar land to that on nearby properties where numerous existing and developing coal mines are located;
   c. a number of the adjoining or nearby properties have been acquired by mining companies;
   d. a new coal rail line a short distance to the west further heightens the likelihood of mining should the land be proved prospective;

[22] See Exhibit 4, page 3 paragraph 1.5.
[23] At paragraphs 39 and 40.

e. a coal mining boom of unprecedented proportions is in progress;[4]
f. there is a new and widely-publicised aversion in the rural property market to the risk of mining;[5]
g. a new statutory framework has recently begun, where both the compensation provisions and the land access rules for exploration have been significantly upgraded as part of the State Government's response to widespread concern amongst landowners.[6]

As mentioned above, Mr. Jinks' evidence is that in the circumstances the authorised activities will cause a loss of value of the property.[7]

10. The respondents' evidence also exhibits promotional material from Macarthur Coal illustrating that the relevant land is part of that company's North/West Burton project which it names as one of its 'future potential projects'.[8]

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3 Statement of Evidence, P.J. Lyons, 2 February 2012, Annexure 'PL-2'
4 Affidavit, P.J. Jinks, 3 January 2012, para 5
5 Affidavit, P.J. Jinks, 3 January 2012, para 5
6 Affidavit, P.J. Jinks, 3 January 2012, para 7
7 Affidavit, P.J. Jinks, 3 January 2012, para. 9-11 inclusive
Affidavit, P.J. Jinks, 3 January 2012, para 14
8 Affidavit. G.T. Houen, 18 January 2012 "

[34] When Ms Bowskill's submissions, both orally and written, are considered in their entirety, in my view it is a fair summary to say that, whilst the applicants acknowledge the existence of a reference to diminution in value of the land in s.13 of Schedule 1, in a practical sense they find it difficult to contemplate any circumstances which would result in a monetary award for diminution in value being made with respect to advanced exploration activities actually undertaken under an EPC.[24]

[35] In my view, s.13 is not to be read as narrowly as the applicants would have the Court believe. There can be no doubt that Parliament clearly inserted diminution of value of the land as a head of compensation under s.13, Schedule 1. It did so for a purpose. In my view, it is easy to conceive of circumstances where the activities undertaken under an EPC may lead to a diminution in value of the land. One example springs readily to mind. I am of course speaking hypothetically, but if during the course of drilling activities an explorer inadvertently caused a fracture in an aquifer which was the major source of water supply for the subject property, and as a result of that fracture the capacity of that aquifer to hold water was severely diminished, then I would have no doubt that such hypothetical exploration activities would cause an actual diminution in the value of the subject land compensatable under s.13 of Schedule 1.[25] In such circumstances, I would expect that valuation evidence as to the diminution of value of the land as a result of the loss of the aquifer would be quite easily identifiable through sales evidence of comparable properties with and without access to a like aquifer.

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24 See, for instance T 1-66-67.
25 In these hypothetical circumstances, the compensation would arise under s.23 of Schedule 1.

[36] The question then falls to be answered: does the evidence in this matter support any award for diminution in value of the respondents' land?

[37] In my view, Mr Jinks has done an admirable job in establishing a causal link between exploration activities; the mining in the general area; and a risk that, if the exploration activities find a workable level of coal, there is a real risk of additional mining activity being undertaken on the respondents' land. In my view, however, the nature of the risk as set out by Mr Jinks is beyond the scope of that envisaged by s.13 of Schedule 1. Try as he did, in my view, Mr Jinks was unable to link any diminution in value to the actual exploration activities to be undertaken on the land. His concept of diminution of value, in the particular circumstances of this case, more readily arises, in my view, in light of the heavy mining activities already being undertaken on and around the subject property, as well as the significant Government infrastructure (including the recently opened "missing link" coal freight line) in the locality, and therefore outside the scope of Schedule 1.

[38] Strictly on the evidence before me in this matter, I am not satisfied that the respondents have successfully made out a claim for diminution in value of the subject land in any amount whatsoever.

Balance of compensation payable under s.13, Schedule 1

[39] There is general agreement between the parties as to the other heads of claim under s.13 of Schedule 1. I will deal with each head of claim separately.

Deprivation of possession of the surface land

[40] Under this head, the respondents claim the sum of $380.[26] The applicants acknowledge this entitlement to compensation, and say that the amount of $380 is reasonable.[27]

Diminution of the use of the land

[41] In his report,[28] Mr Lyons has this to say regarding diminution of the use of the land:

> "**7.2.3 Diminution of the Use of the Land**
>
> The increase of traffic on the station roads will cause minor quantities of additional dust on pastures adjoining the roadways. Given the short duration of movement on the tracks, the use of slashing in lieu of grading whenever possible and the low level of traffic movement I expect that this area may lose 50% of its productive capacity for 6 months.
>
> The generally accepted standard in this regard is an allowance over a buffer which is twice the width of the roadway to each side at half rate.
>
> In this case the roadways are approximately 5 metres wide. As such the assessment of land affected is as follows:
>
> Road width:- 5 metres
> Area affected:- 10 metres to each side allowed at 50% usage of grazing productivity

[26] See Exhibit 7, page 5.
[27] See applicants' submissions, paragraph 48.
[28] Exhibit 4, pages 19-20.

Therefore the area affected is 12 hectares at 50% usage for 6 months or at a carrying capacity of 1 beast to 3.6 hectares, the loss of grazing of 1.7 head for 6 months.

Dust issues may also be created from the drill pads. In this case I have allowed partial loss of productivity of twice the area of the drill pads to allow for dust on surrounding pasture for 6 months. This is also allowed at half rate.

The calculation of the productivity lost on this basis is calculated as follows:-

4 Drill Holes x 2,000 square metres per pad = 0.8 hectares.

This will result in the loss of grazing productivity for 0.1 head for 6 months.

In total I have adopted loss of grazing for 2 head with rounding up for the buffers to the tracks and drill pads.

Therefore using the same parameters as discussed in Section 7.2.1 my assessment of loss under this item is as follows:-.

2 head x 183 days @ 0.6kg/head/day @ $1.80/kg = $395

My observations are that there will be no impact from noise, dust and the like to the farm infrastructure.

Further the low level of intensity proposed in the drilling program by Macarthur Coal Limited will not interfere with the operations of the property in my opinion. There should be no need to destock paddocks or cease use of certain parts of the property in ordinary circumstances.

Therefore there is no further loss under this head of compensation."

[42] On the other hand, Mr Jinks has this to say on the same subject:[29]

"**Diminution of the use of the land. (Dust).**

100 Ha adopting offer figures, but extending loss to

A minimum of 8 weeks. = $1,152."

[43] With respect to this head of compensation, in my view it is appropriate to adopt a conservative approach. There have been numerous cases before the Land Court and the former Land and Resources Tribunal where the impact of dust as a result of mining or exploration activities has been considered.[30]

[44] There is no doubt that the amount of dust that may be caused as a result of the exploration activities will be heavily dependant upon the prevailing weather conditions in the time leading up to the exploration activities being conducted (for example, if there has been a lengthy period without rain, there will necessarily be more dust than if there has been rain just before the exploration activities are undertaken). The climatic conditions at the time

29 Exhibit 7, page 5.

30 See for example *Xstrata Coal Queensland Pty Ltd & Ors v Friends of the Earth Brisbane Co-op Ltd & Ors & Department of Environment and Resources Management* [2012] QLC 0013; *New Oakleigh Coal Pty Ltd v Hardy & Ors & EPA* [2003] QLRT 24; *Shaw PWJ v Heritage Holdings Pty Ltd* [1992] 14 QLCR 139; *Wilgarning Holdings Pty Ltd v NewAge Metals Pty Ltd* (unreported) 16 June 1995; *Geoffrey Lawrence Salmon v Dean Lindsay & Lisa Maree Armstrong* [2002] QLRT 54; *Bakhash & Ors v Monize* [2003] QLRT 134.

of the exploration activities will also be highly relevant. If there is significant wind blowing, the dust will travel further. If there is little or no wind, the dust will settle in a much more confined area.

[45] Taking all of the evidence into account, as well as my observations at the site inspection, in my view it is appropriate to double the area of disturbance as allowed by Mr Lyons. Accordingly, I award the sum of $790 with respect to this head of compensation.

Other costs

[46] There is agreement between parties as to landowners' time of $1,050 and valuation fees of $1,000.[31] I consider these sums reasonable, and accordingly award the sum of $2,050 for other costs.

Additional amounts claimed

[47] Mr Houen has made an additional claim of $1,100 relating to Mr Jinks' attendance at the mediation conference conducted at the Land Court on 8 December 2011, as well as a further amount for Mr Jinks' costs in attending the hearing, including the inspection.

[48] Mr Houen relies upon s.13(4)(b) and (c) of Schedule 1 in support of these claims.

[49] In order to fully understand this aspect of Mr Houen's claim, it is necessary to turn to additional provisions of the MRA.

[50] ADR is defined in the dictionary as contained in Schedule 2 of the MRA as follows:

> "***ADR***, for schedule 1, see schedule 1, section 20(2)(b)."

[51] It is therefore necessary to next consider the provisions of s.20 of Schedule 1, which are as follows:

> "**20 Parties may seek conference or independent ADR**
>
> (1) This section applies if, at the end of the minimum negotiation period, the parties have not entered into a conduct and compensation agreement or deferral agreement.
>
> (2) Either party may by a notice (an ***election notice***)—
>
> (a) to the other party and a relevant officer—ask for a relevant officer to call a conference to negotiate a conduct and compensation agreement; or
>
> (b) to the other party—call upon them to agree to an alternative dispute resolution process (an ***ADR***) to negotiate a conduct and compensation agreement.
>
> (3) If the notice calls for an ADR, it must—
>
> (a) identify the ADR; and
>
> (b) state that the party giving the notice agrees to bear the costs of the person who will facilitate the ADR.
>
> (4) An ADR may be a process of any kind including, for example, arbitration, conciliation, mediation or negotiation.
>
> (5) However, the facilitator must be independent of either party."

[52] When the provisions of Schedule 1 are considered in their entirety, and in light of the specific definitions applying to ADR, I am in no doubt that the costs recoverable under this head include costs incurred by the landholders in engaging a valuer to assist in the

[31] See applicants' submissions, paragraph 52.

negotiation phase of Schedule 1. However, once the matter proceeds to Court, the scheme of negotiation as contemplated by Schedule 1 is at an end. Any costs incurred by either party are recoverable, if at all, pursuant to s.34 of the *Land Court Act 2000*, and not as a head of claim under s.13 of the Schedule 1.

Total award of compensation

[53] In light of my determination above, I award compensation to the respondents as follows:

Diminution of value	$Nil
Deprivation of possession of the surface of land	$380
Diminution of use of the land	$790
Other costs	$2,050
Mr Jinks' costs of attending Land Court mediation and hearing	$Nil
Total	**$3,220**

Orders pursuant to s.363 of the MRA

[54] Order 2 as sought by the applicants is non-controversial. It has not been opposed by the respondents.

Orders

1. Pursuant to section 22(3) of Schedule 1 MRA, the Court determines the applicants' future compensation liability to the respondents for an authorised activity to be carried out by the applicants, in relation to Lot 8, in the total sum of Three Thousand, Two Hundred and Twenty Dollars ($3,220).

2. Pursuant to section 363 MRA, the respondents permit the applicants access to Lot 8 in accordance with the terms of the Conduct and Compensation Agreement to be entered into between the applicants and the respondents, in the form of Exhibit 6, with the inclusion at Schedule 2 of the Court's determination of compensation.

PA SMITH
MEMBER OF THE LAND COURT