The effect of the Tribunal decision is that the formula to be applied by the Board will include an increased level of tonnage of saleable coal but because the base discount rate has increased in the meantime, it could result in a lower amount of compensation being determined.

CONSTRUCTION OF CROWN GRANT RESERVATION OF "ALL MINERALS"

MINISTER FOR MINERAL RESOURCES v BRANTAG PTY LTD

(New South Wales Court of Appeal, Proceedings No. CA40255/95, 20 November 1997)

crown grants - construction - what reservation of "all minerals" includes

Facts

In *Minister for Mineral Resources* v. *Brantag Pty Ltd*, the Court considered whether a reservation of all minerals in New South Wales Crown Grants issued in 1877 and 1879 included the mineral sands of rutile, zircon and ilmenite. In the course of deciding that all minerals included those mineral sands, the Court considered the principles of construction there are relevant in construing minerals reservations in Crown Grants.

The relevant Crown Grants were made subject to a reservation to the Crown of "all minerals which the said land contains with full power and authority... to enter upon the said land and to search for, mine, dig and remove the said minerals with a full right of ingress, egress and regress for the purposes aforesaid" (the *all minerals reservation*). There was also an exception and reservation to the Crown of "all sand, clay, stone, gravel and indigenous timber and all other materials the natural produce of the said land which may be required at any time or times thereafter by the Government... for the construction and repair of any public ways, bridges or canals or for naval purposes or railroads..." (*the construction materials reservation*).

The definition of "minerals" in the NSW Crown lands legislation was not relevant in this case because the Crown Grants were made prior to the commencement of that legislation.

Decision

The following points were made by the Court.

I. The meaning of the reservation of minerals in the Crown Grant had to be determined having regard to the time at which the instrument was executed and the facts and circumstances then existing and if there is any ambiguity, the ambiguity should be resolved in favour of the Crown.

II. In construing an expression such as "minerals" in a conveyance or statutory reservation of minerals, the ultimate search is for the expressed intention of the parties. The issue was a question of fact, namely what did that expression mean in the vernacular of the mining world, the commercial world and the landowners at the time when the instrument was made.

III. The all minerals reservation is an exception in the sense of a description of that which is kept back from what was otherwise granted and when a mineral is reserved it is reserved to the Crown whether extracted or not and whether or not it is found secreted in a substance which is not a reserved mineral.

IV. Evidence based on various dictionaries which were published at the time indicated that rutile, zircon and ilmenite were minerals at the time of the Crown Grant. The fact that the possibility of extracting them from the black sands of the East Coast of Australia may not have been considered until the 20th century was not relevant to this issue.

V. The trial judge relied on the case of *Waring* v. *Foden* as standing for the proposition that the word "minerals" when found in a reservation out of a grant of land means substances, exceptional in use, in value and in character and does not mean the ordinary soil of the district which if removed would practically swallow up the grant. President Mason distinguished that proposition from the present case on the basis that it derived from the special statutory context of the House of Lords cases dealing with the Railways Clauses Act of 1845 and was not a case involving a Crown Grant with a reservation of all minerals stipulated by statute. Also, he stated that the cases dealing with the concept of the ordinary soil of the district were distinguishable on their facts from the present situation where the mineral is itself extracted from the ordinary soil and does not represent the whole or a substantial part of it.

VI. The trial judge construed the all minerals reservation in light of the construction materials reservation based on the expressio unius maxim and concluded that the word minerals in the earlier reservation did not include sand. President Mason rejected this argument stating that such a construction ignored the force of the statutory requirement that the relevant grants had to be made with the reservation of any minerals and that statutory requirement precluded the reading down of the all minerals reservation in that way. Also, if there was any ambiguity on this issue, that ambiguity had to be resolved in favour of the Crown.

NORTHERN TERRITORY*

CLARIFYING THE POWERS OF THE SELF-GOVERNING NORTHERN TERRITORY WITH RESPECT TO MINING: THE NEWCREST MINING AND MARGARULA DECISIONS

The courts have recently provided clarification of the powers and authority of the separate Northern Territory body politic since the grant of Self-government on 1 July 1978 over Commonwealth-owned minerals in the Northern Territory. This clarification has come in two recent cases which deal, respectively, with Commonwealth mining tenements granted prior to Self-government and continued after Self-government, and secondly with Northern Territory mining tenements granted after Self-government over Commonwealth-owned minerals. The two cases are:

1. *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 71 ALJR 1346 (High Court); and

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