retrospective Valuer General valuations for Muswellbrook Shire coal properties and the fact that questionable assumptions would be required in translating recent valuations to historical valuations.

The valuations used to calculate pecuniary loss compensation for loss of rates income are fair and reasonable alternatives to the Valuer General's valuation where as in this case such valuations do not exist.

Muswellbrook Shire Council would have regained the opportunity to levy rates on coal properties restored to the previous owners under the *Coal Ownership (Restitution) Act* 1990 between the period of restoration and the later re-acquisition under the Coal Acquisition (Re-Acquisition Arrangements) Order 1997. As such, the Board is not required to pay compensation for any rates that were levied on privately owned coal during the period of restored ownership.

There is no need to apply ramping up of valuation of a property five years prior to being included in a mining lease as the re-acquisition valuations determined by the Board for purposes of calculating compensation to previous coal owners takes account of the expected time of mining.

COMPENSATION FOR LOSS OF OPPORTUNITY TO RATE COAL[*]

In the matter of an appeal by Muswellbrook Shire Council against a determination of the NSW Coal Compensation Board

(NSW Coal Compensation Review Tribunal CCRT 2001/11 (1 November 2001))

This Appeal related to a claim for compensation for pecuniary loss by the Council pursuant to Clause 12 of the Coal Acquisition (Compensation) Arrangements 1985 arising from the loss of opportunity to rate coal in the Althorpe Coal Area.

The issues of this Appeal were:

(a) what was the value of the coal for rating purposes;

(b) what was the correct rate to be used to calculate the loss; and

(c) to which rating years is the rate to be applied having regard to the provisions of the *Coal Ownership (Restitution) Act* 1990, the *Coal Ownership (Restitution) Regulation* 1995 and Section 5A of the *Coal Acquisition Act* 1981 (as amended) and the *Local Government Act* 1919 and 1993.

[*] Skye Watson, Summer Clerk, Allens Arthur Robinson.

Decision

The appeal was successful and the matter remitted to the Board for reconsideration.

The Tribunal referred to its decision given on 13 August 2001 in respect of the first issue.

There are two categories of valuations involved:

(a) assessment of the value of surface-land and coal combined with parcels of land and coal usually categorised for rating purposes as either:

  (i) farmland;

  (ii) residential;

  (iii) mining; or otherwise as

  (iv) business.

(b) assessment of the value of coal only with the rating as business unless or until it becomes clear to the rating authority that it is to be included in a mine.

Valuation of surface-land and coal combined

Assessment cannot be performed separately. Coal in a combined title cannot be treated separately from the assessment of the surface-land and coal. The test to determine the applicable rate is to establish the dominant purpose for which the land and coal is used, despite the cessation of rate pegging.

Coal in the combined title or dormant coal will not be treated as having a separate purpose from that of the land where it is included in the same assessment, unless or until it is a part of a mine.

Valuation of coal only

Assessment of the value of coal only may be rated separately from any land on which it lies. Until the dominant use of the coal is for a coal mine it is not appropriate to apply the mining rate.

A local council should not apply the "coal mining rights" rate available under s 529 *Local Government Act* 1993, as this is not a description of a "kind of mining" referred to in s 529(2)(c) *Local Government Act* 1993. Further, even if there is legislative support for the sub-categorisation of the mining rate into "coal mining rights", it is not just and equitable compensation as it would require the Board to apply the mining rate to coal which was not being used for the dominant purpose of mining.

It is just and equitable to apply the coal mining rights rate rather than the business rate when sufficient investigation has occurred to establish that mining is likely to proceed.

Due to rate pegging there are only two rating categories available between 1 January 1982 and 1 July 1994, being "rural" or "general", and as such the only rate that can be applied between these dates to a coal only assessment is the "general" rate.

Coal which is the subject of a single assessment, not being "farmland", "residential" or the dominant use of which is not for a coal mine, must be categorised as "business" and rated accordingly.

BINDING AGREEMENT — ROYALTY VARIATION — GUARANTEE[*]

Pacific Power & Elcom Collieries Pty Ltd v Cumnock No 1 Colliery Pty Ltd, John Hodge, Helen Janice Dalton & Thomas James Johnson

(Supreme Court of New South Wales, Commercial List [2001] NSWSC 1100, 30 November 2001)

Pacific Power the First Plaintiff (formerly Electricity Commission of NSW) owned the Liddell State Coal Mine (the Mine) through its subsidiary, Elcom Collieries Pty Limited, the Second Plaintiff (Elcom). The mine was purchased in 1991 by Cumnock No 1 Colliery Pty Limited (previously Stocklyn Pty Limited) (*Cumnock*). Cumnock entered into a royalty agreement with Elcom agreeing that it would pay royalties on coal from the mine. The mine contained a number of coal seams with two major seams known as the Liddell seam and the Barrett seam.

Sale of the Mine

During the sale process of the mine in 1991 Cumnock submitted a bid for a single cash payment of five million dollars, ten percent on signing the Sale Share Agreement and balance to be paid upon completion in addition to royalties on the Liddell seam (5-8 percent base price depending on the coal supply option) and Barrett seam (30c per tonne) for the life of the reserves. Clause 13 of the Sale Agreement entitled "Royalty Reservation" stated that the relevant royalties were to be payable on terms and conditions as the parties agreed from time to time.

Royalty Deed

A royalty deed was executed on completion on 10 October 1991, which contained a covenant by Cumnock to pay Elcom monthly:

(a) 5 percent royalty price per tonne Liddell seam coal sold and delivered; and

(b) 30c per tonne Barrett seam coal sold and delivered.

The Deed also contained provisions for the Barrett seam royalty to be increased in the same proportion which the contract price per tonne (clause 2.4) and payment of interest for non payment of royalties (clause 2.5). Elcom could assign the Deed but the assignee was required to enter into

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[*] Lisa Ziegart, Lawyer, Allens Arthur Robinson.