Justice Kirby's judgment observed that an examination of the PSLA's provisions demonstrated its clear objective to afford stable title and to ensure that the property rights of permitees were guaranteed against arbitrary or discretionary loss. Justice Kirby noted that if this were not the case, if there was *"a risk of arbitrary or discretionary loss stated or implied in the Act, it is unthinkable that permitees would assume the extremely heavy obligations, involving long term investments and commitment, associated with such permits"* (at 106). Thus, Justice Kirby concluded that any suggestion that the permits were defeasible rights which could be cancelled at will, without just terms, was completely incompatible with the nature of those rights and the valuable investments depending upon them.

Addressing the argument that the Commonwealth did not relevantly "acquire property", Justice Kirby concluded that the Commonwealth had received an "identifiable benefit or advantage" through the CPA clearing the slate of the vexing interests of permitees. Because those interests were proprietary in nature, their extinguishment to the benefit of the Commonwealth amounted to an acquisition. This enables the Commonwealth to achieve its external affairs goal and derive the taxation benefits provided for under the Treaty.

In the circumstances, Justice Kirby accepted that the acquisition of WMC's permit, pursuant to Part 8 of the CPA, did constitute an acquisition of property on otherwise than just terms, with the result that the Commonwealth was obliged to pay reasonable compensation.

NEW SOUTH WALES*

JUDICIAL REVIEW OF COAL COMPENSATION REVIEW TRIBUNAL DECISIONS

In (1997) 16 AMPLJ at p5, the Tribunal decision in *New Readhead Estate and Coal Company Ltd v Coal Compensation Board* was noted. The Coal Compensation Board has filed a summons seeking a declaration in the NSW Supreme Court (Administrative Law Division) that the Tribunal's decision was wrong. The Court dismissed the summons in a decision delivered on 8 December 1997 (proceedings number 30040/96). The Court confirmed that the Tribunal's reasoning was correct. In particular, the Court stated that the "coal the subject of the claim" in relation to "r" in the compensation formula in the Coal Acquisition (Compensation) Arrangements should not be significantly different from "saleable coal" in relation to "t" in that compensation formula.

COAL COMPENSATION REVIEW TRIBUNAL DECISIONS

The Trustees Rothbury Estate v Coal Compensation Board CRT 97/60.

In the appeal by the Trustees of the Rothbury Estate against the determination of the Coal Compensation Board, the Tribunal considered whether a wayleave provision included in a lease variation agreement was discharged by the operation of Section 5 of the *Coal Acquisition Act*. The lease variation agreement varied the provisions of a 1945 lease of coal by relaxing the obligations to continuously mine for coal, varying royalty and rent provisions and adding the wayleave provision. The wayleave provision provided for a

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payment of 5 cents per tonne on coal hauled from the colliery and which has been processed at the lessee's washery and coal processing plant, such coal not having been produced from the demised seams. The Trustees had claimed a pecuniary loss for the loss of the wayleave payments as the lessee had ceased making the wayleave payments because of the *Coal Acquisition Act.*

The Tribunal concluded that the intention of the parties, based on the recitals in the lease variation document the fact that the mining had ceased and it was not expected that mining would recommence before the expiry of the term of the lease of coal and previous correspondence between the parties, was that the wayleave provision was a stand alone agreement relating to the operation of a coal washing plant on the lease area and was not part of the lease of coal. The wayleave provision was therefore unaffected by the *Coal Acquisition Act* and continued in force.

***Griffin v Coal Compensation Board* CRT 97/51 and 52**

In the appeal by NL & JM Griffin against determinations of the Coal Compensation Board, the Tribunal considered whether the Board's calculation of compensation over an area covered by exploration licences in the Stratford North area was correct. Issues in dispute included coal geology issues, the commencement date for coal production, stripping ratios, the area based discount rate, production based discount rate and adjustment for development risk and the amount of mineable resources. After reviewing the relevant evidence, the Tribunal allowed the appeals and directed the Board to reassess the coal compensation determinations and in doing so to remodel the coal geology using the latest available information and, from that geological remodelling, to measure the coal resource using a specified limiting strip ratio and taking account of the Tribunal's comments on the regional seam dip evidence and to vary the production based discount rate.

***Trustees Hedley Estates v Coal Compensation Board* CRT 97/70 and 71**

A recent Tribunal decision has highlighted one of the risks involved in appealing a determination of the Coal Compensation Board.

In the appeal by the Trustees of the Estates of D B Hedley and S A Hedley against determinations of the Coal Compensation Board, an issue arose as to an appropriate discount rate to be applied to their claims. The Board had used a discount rate of 12.5% and the claimant considered that a rate of 11% was more appropriate. The claimant also argued that the quantity of saleable coal was higher than calculated by the Board having regard to currently available information.

The production based discount rate determined by the Board is based on a base discount rate which comprises the sum of the long term bond rate and a premium derived from calculations involving various financial market factors. In November 1997, the Board increased the premium from 2% to 3% thereby increasing the base discount rate applicable to the claims. The claim had been determined by the Board prior to that increase in discount rates. The Tribunal allowed the appeal and directed the Board to redetermine the claim having regard to new geological information and other up-to-date information relating to past coal production and planned future coal production in the claim area, being information that was not available at the time the claim was determined by the Board in June 1997. The Board noted that the discount rate to be used by the Board when redetermining the claim is the discount rate applicable at the time of redetermination by the Board and not at the time of the original determination.

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.