IN THE MINING WARDEN'S COURT
HOLDEN AT SYDNEY
ON 5TH DECEMBER, 1989
BEFORE J.L. McMAHON,
CHIEF MINING WARDEN.

AUSTRALIAN IRON & STEEL PTY. LIMITED
v
PLAYFORD INVESTMENTS PTY. LIMITED

This has been the hearing of an application for assessment of compensation made on behalf of Australian Iron & Steel Pty. Limited (AIS) which holds a title granted under the New South Wales Coal Mining Act which has been described as Authorisation No. 312. That title covers an area of 29.67 square kilometres and enables AIS to carry out borehole drilling, geological and geophysical surveying and testing. It was granted from 10th August, 1983 and now stands renewed until 10th August, 1993. Evidence before the Court indicates that AIS has conducted surveying and testing in certain lands in the Counties of Camden and Cumberland but have been unable to get access to land which falls within the area covered by the Authorisation owned by Playford Investments Pty. Limited (Mr. Playford) which owns an area of about 60 hectares, the property being known as "Willabong" near Appin, New South Wales. Assessment of compensation is necessary by virtue of Section 97(4) which prohibits the commencement of prospecting operations until an agreement is reached between the parties or an assessment, as herein sought, has been done.

At the hearing Mr. Peedom, Solicitor, appeared for AIS while Mr. Playford appeared on his own behalf as a Director of Playford Investments Pty. Limited.

The problem has been that Mr. Playford having been approached by representatives from AIS on earlier occasions has expressed concern about the welfare of his property and in particular the effect that the proposed operations of AIS will have on the horses which are run on the property.

The horses have been described by Mr. Playford as thoroughbreds and there is no evidence before the Court to suggest that this is not the case. In effect, he runs or spells brood mares, colts, fillies and geldings on the property in addition to at least one stallion. Those animals are either owned by himself but on occasions he leases out or makes available portions of his property for either agistment purposes or spelling of racehorses. For all intents and purposes he and his wife operate the property on their own although from time to time he gets additional help but he has expressed concern about the quality of available help saying that he must have confidence in any proposed employee before engaging him owing to the sensitive nature of the work and the value of the animals run on his land.

In this regard he has produced as Exhibit R12 a list supplied by a firm called Kieran Moore, Quality Bloodstock Pty. Ltd., which gave a summary as at 1st August, 1989 of the value of animals on his property. While there may be some expected variation in the valuations, suffice is to say that a mathematical total of the figures on Exhibit R12 indicates that as at that date the total value of horses on his land was $1,278,000.

The evidence of behalf of AIS comprised of Mr. Gregory Poole, a Coal Geologist employed by the company, Mr. Michael Armstrong, the Principal Coal Geologist with the New South Wales Department of Minerals and Energy,

and Mr. Phillip Walker, an experienced owner and trainer of racehorses from Gerringong, New South Wales.

Mr. Poole outlined the programme of surveying and testing to be carried out by AIS on Mr. Playford's property stating that neighbouring properites have been subjected to this activity without adverse effect to the properties. He produced as Exhibit 5 an aerial photograph taken on 23rd September, 1988 and had drawn on it the gridlines which had been placed on the properties indicating how they stand in relation to the property of Mr. Playford, which was also depicted, and showing how it was necessary for the purposes of the company's exploration programme to complete the surveying and testing over Mr. Playford's property. The surveying and testing took the form of line clearing with a mower, the insertion of markers, the operation of an auger drill, the insertion of a small charge of explosives, a recording in a vehicle of the effects of those explosives as they are detonated and a tidying up and rehabilitation of the area. As far as the drilling was concerned, Mr. Poole stated that it may make some noise and some dust could be created but should the landowner request, the dust produced could be passed through a water chamber and thereby reduced to a slurry. In addition there could be some deposits of the soil left around the surface of the hole but AIS was willing to remove that, should the landowner wish it. The discharge of the small deposit of gelignite would take place at a depth of approximately 1 metre in the ground and it would be impossible to hear these discharges. Mr. Poole indicated that on adjoining properties this discharge occurred in a hole made by a crowbar but as that could be heard the present plans as to Mr. Playford's property were that by insertion of the gelignite at a deeper level the discharge would not be heard. Mr. Poole produced in evidence a series of

compensation agreements signed with other landowners - Exhibit 9 - with a schedule at the front showing the extent of compensation which those persons which I accept generally would have been at arms length with AIS. A perusal of Exhibit 9 shows that the $250 per line kilometre figure presented as a proposition to Mr. Playford had been accepted by several of the other landowners affected by the authorisation. It is significant however that it would appear that none of these other landowners conducts a similar operation to that carried on by Mr. Playford - Mr. Playford indicating that the closest similar operation to his own was some 35 kilometres away.

Mr. Poole's evidence was that excluding the possibility of mechanical breakdown of equipment and bad weather that the whole operation on Mr. Playford's property would take two to three weeks but if for instance bad weather were encountered similar to what had occurred in the early part of 1989, it could be at least one month before the operators could get onto the property. In this regard I recognise and accept that AIS in paying attention to the welfare of the property owner in addition to its own interests, would be reluctant to effect movement of vehicles across water sodden land which would do far greater damage than movement on relatively dry land.

Mr. Armstong's evidence was that he was familiar with the form of survey intended by AIS and on behalf of the Department of Minerals and Energy had conducted similar operations including some in the southern coalfields area. He had negotiated with landowners elsewhere and a figure of around $80 per week had been generally accepted with the qualification that the Department also bears the costs of rehabilitation. He felt that while horses

which were naturally curious animals, would show some interest in the drilling rig, these activities could be conducted on property where these animals were, in addition to cattle, without adverse impact on them.

Mr. Walker had been operating a racehorse training and grazing property for some two years. He had only been able to inspect Mr. Playford's property from an adjacent roadway as access to it had been denied by Mr. Playford. He had also looked at maps of the area. He felt that if the horses were in an open paddock there would be no problem created by the drilling operations nearby but if they were in a smaller paddock it may be that they should be taken from it if the operations were to be conducted closeby. He said that if a horse had "nowhere to go" it could be frightened by the operations but if they were kept in a big paddock they would wander away from the noise and other activity. He was familiar with the proposed drilling operations and said that while there was some dust created by them that was no more severe than that caused by an ordinary vehicle passing over a farm road. Any dust falling on pastures would last only as long as the next reasonable shower of rain.

Mr. Playford said in evidence on his behalf that on a recent occasion - he said 29th October, 1989 - six yearling fillies were being fed and he was supervising them. An empty bag which he produced as Exhibit R10 and which incidently was not denied by AIS was its property - had blown against a fence adjacent to the fillies. They had immediately been startled and had run away towards a narrow opening arriving at the one time and tried all to get through the gap together. Some adjacent black thorn bush had been brushed by some of them and subsequently it was discovered that she had an injury to an eye which according to Exhibit R11 - a veterinary

certificate - was a severe corneal ulcer caused by "external trauma". Mr. Playford said that the filly was valued at $20,000 and the veterinary costs could be $3,000. He said that this indicated the value of the animals and the costs which could be incurred should one become injured. He emphasised that a horse which was blind in one eye was useless for racing and indeed had little or not value for general equestrian use including for a pony club, asking the question of Mr. Peedom, who was cross examining him, "Would you put your daughter on a horse which was blind in one eye?" He gave other instances in evidence of simple matters which could cause considerable damage to horses and stated that he felt that he would be held liable if any of the horses which were owned by other persons held on his property were injured because of the operations of AIS. He gave as Exhibit R13 a list of the income from horses from his property from 1st January to 31st October, 1989, showing $63,753 and stating that he could, with assistance, take on other horses but because he was simply working on his own that was all he could manage, that being the extent of his capacity. He said that if AIS entered upon his land he would be forced to move the animals to a safer venue and that would cost in the vicinity of $25,500 over a sixty day period, producing as Exhibit R15 agistment figures to support that claim.

Mr. Peedom in cross examination of Mr. Playford in effect put to him that AIS would pay the wages of an assistant to Mr. Playford over the period during which AIS would be on the property, such a person would assist in the supervision of the activities of the contractors of AIS and would also, if necessary, assist Mr. Playford in the movement of horses around the property so as to minimise and indeed to exclude any adverse effect upon them of the drilling activities. It ought to be understood that the

authorisation as shown by Exhibit 6, an orthophotomap, shows the proposed gridlines as far as they cross Mr. Playford's property, the lowest line on the grid being line H running through a rise in the land which is shown on the map and on other photographic exhibits. That southernmost line is said to be at its closest point within 100 metres of any spelling yards in which horses could be held and generally lines to the northwest of line H would not appear to traverse any area where spelling yards are located. While not agreeing with the proposition that Mr. Peedom advanced that the horses could be moved to a more convenient location it was pointed out by Mr. Peedom to Mr. Playford in cross examination that he had already conceded that the property had the capacity to carry more stock but that was limited by reason of Mr. Playford managing it on his own.

The above details set out the matters generally which were argued before the Court. On the one hand AIS offering $250 per week plus the cost of the charges of an assistant over the short period during which the operations will take place and on the other Mr. Playford claiming that the proposed activities would adversely affect his property and saying by reason of the perils which were being created that at least $25,500 would be needed to cover the expenses of movement of all animals from his land over the relevant period.

The Coal Mining Act by Section 98 provides that the criteria governing the assessment of compensation shall be:

(1) Where compensation is by this Act directed to be assessed by the warden the assessment -

(a) shall be made in the manner prescribed;

(a1) shall not be made until after either -

(i) if there are ten or more persons who appear to the warden to be interested in the assessment - notice in the approved form is published in a newspaper circulating generally in the State and in a newspaper, or more than one newspaper, circulating in the locality in which the land concerned is situated; or

(ii) in any case - notice in the approved form is served on each person who appears to the warden to be interested in the assessment;

(b) shall, except where the assessment is to be made for the purposes of section 93A(14) or 97(5), be of the loss caused or likely to be caused by -

(i) damage to the surface of land, and damage to the crops, trees, grasses or other vegetation on land, or damage to buildings and improvements thereon, being damage which has been caused by or which may arise from prospecting or mining oerations;

(ii) the deprivation of the possession or of the use of the surface of land or any part of the surface;

(iii) severance of land from other land of the owner or occupier of that land;

(iv) surface rights-of-way and easements;

(v) destruction or loss of, or injury to, or disturbance of, or interference with, stock on land; and

(vi) all consequential damage;

(c) shall, where the assessment is to be made for the purposes of section 97(5), be -

(i) of the loss caused by the occupation or interference with the use of the excluded land referred to in that subsection and of the damage to that land, or to any crops, buildings and improvements thereon caused by the registered holder of the coal lease; and

(ii) of the value of any coal or minerals damaged or removed from that land, reduced by the amount of any royalty paid under this Act, in respect of that coal or those minerals;

(c1) shall, where the assessment is made for the purposes of section 93A(14), be of the loss caused by -

(i) the interference with the use of the land;

(ii) the damage to the land, to any crops, trees, grasses or other vegetation on the land or to any buildings and improvements thereon, being damaged caused by the holder of the permit; and

(iii) all consequential damage; and

(d) shall not exceed in amount the market value for other than mining purposes of the land and the improvements thereon;

(2) For the purposes of subsection (1)(c)(ii) coal or minerals shall be deemed to have been damaged if, as a result of any operations carried on by the registered holder of a coal lease on any excluded land referred to in section 97(5), the subsequent recovery of that coal or those minerals is rendered more difficult or more expensive.

(3) Subject to subsection (4), the total amount of compensation so assessed shall be paid by the registered holder of an authorisation or a concession or the holder of a permit under section 93A, as the case may be, into the warden's court, and shall, from time to time, on loss or damage being caused from any reason mentioned in subsection (1), be paid out of court on the application of any person entitled thereto.

(4) If an order is made under section 141 of the Mining Act, 1973, the amount of compensation so assessed shall be paid in accordance with that order.

(5) Where, after the expiration of six months, and before the expiration of twelve months, from the date on which an authorisation, a concession or a permit, ceases to have effect, the whole or any part of an amount paid into court in pursuance of subsection (3) or (4) has not been paid out and has not been ordered to be paid out, the person who paid the amount into court may apply to the warden for payment out to him of the amount of any part thereof, and the warden may order the payment to be made.

(6) Where, after the expiration of twelve months from the date on which an authorisation, a concession or a permit ceases to have effect, any amount paid into court in accordance with subsection (3) or (4) has not been paid out, the warden may cause the amount or any part of the amount to be paid into the Treasury and carried to the Consolidated Fund.

There is evidence from Mr. Poole about the limited nature of loss caused or likely to be caused and indeed evidence from the company through him, in effect excluding the various matters under Section 98(b)(i) to (iv). As to paragraph (v) of Section 98(i)(b) "loss caused or likely to be caused"

to stock on land, there is evidence from Mr. Playford as to the injury to the filly, apparently from operations nearby, but no evidence of course of any loss or injury arising out of operations on his own land, as obviously, they have not commenced. Can I say that I must assume his contention to be correct that loss will be likely to be caused? To attempt to do so, in my opinion, is an exercise in trying to foretell the future. How can I say that a horse or horses will be injured, and if I could, how can I say what will be the extent of and the cost of the loss? Section 100 of the Act speaks about additional compensation, but only to damage to the land, and to this extent the Act is deficient; and it might well be that Mr. Playford would have to have re-course to the civil courts, were a horse to be destroyed, lost or injured. As far as disturbance or interference with them is concerned I believe that I can make an assessment on the evidence and I propose to do that. On the other hand although he did not seek to claim this to be the case, Mr. Playford's figures of $25,500 would appear to come under paragraph (1)(b)(vi) "all consequential damage".

I have done considerable legal research as to the meaning of this phrase, without success, and I am therefore left to my own interpretation. In my opinion for damage to be consequential it ought to follow upon an activity complained of either immediately or at some later time but should be taken to be a logical and reasonable result of the activity and not so remote either in time or in event that it cannot be logically and reasonably associated with the act which caused the damage. It must arise out of the usual course of events and not from an un-natural or abnormal result of the mining activity, nor should it be concluded as being totally consequential damage if there are one or more other factors which were

co-operating causes. Likewise, if a person reacted to a situation it might well be that while that person reasonably and properly in his own view took that course that might well not necessarily be viewed by an objective observer to be such a logical, usual or reasonable reaction to come within the category of being consequential.

In this particular matter, Mr. Playford has said in effect that his horses will be moved from the property but looking at the factual situation bearing in mind the limited extent of intrusion on the property, the limited activity by AIS within the property, the remoteness in distance from the animals of the proposed exploration activities and the fact that the animals can be moved elsewhere on the property to avoid exposure to the activities of AIS, it could not be said that the incurrence of $25,500 is "consequential" damage arising out of the activities of AIS in this matter. At the present time the moving of the horses has not been done and I am not satisfied on the evidence that payment for it is for a loss "likely to be caused" so as to come under the definition of "all consequential damage".

I am of the view that the figure accepted at arms length by other landowners who have been affected by these operations of $250 per week is acceptable criteria, bearing in mind that there should be added to that a figure of $800 per week to cover the charges and associated costs of a person or persons to enter the lands of Mr. Playford of Mr. Playford's own selection to supervise the activities of AIS and to assist in the movement of animals around the property, to attempt to avoid or to minimise disturbance or interference.

I would add that should Mr. Playford seek to have the material brought to the surface by the drilling activities as are depicted on photograph "M" in the bundle of photographs tendered as Exhibit R16 then AIS should remove this material so as to restore the land to the condition which it stood prior to the operations. Otherwise the conditions contained in points 1 to 7 in the penultimate paragraph of the letter of 18th April, 1989 to Mr. Playford, Exhibit 4, should apply in addition to the usual conditions about which Mr. Poole gave evidence.

I assess compensation herein at $1,050 payable by AIS direct to Mr. Playford in respect of each week or part of each week during which the operations take place. I direct that a sum payable on the above assessment be forwarded direct to Mr. Playford within fourteen days of cessation of operations.

On the question of costs I direct that the parties pay their own expenses.