IN THE WARDEN'S COURT
AT MUSWELLBROOK,
IN THE STATE OF NEW SOUTH WALES
ON WEDNESDAY, 30TH JULY, 2008
J A BAILEY, CHIEF MINING WARDEN

CASE NO:	PARTIES	CAUSE OF ACTION
2008/16	Moolarben Coal Mines Pty. Ltd Moolarben Resources Pty. Ltd Australian Moolarben Coal Pty. Limited v Ulan Coal Mines Limited	Assessment Of Compensation Mining Lease No: 1605
2008/18	Moolarben Coal Mines Pty. Ltd Sojitz Moolarben Resources Pty.Ltd Kores Australian Moolarben Coal Pty. Limited v Ulan Coal Mines Limited	Assessment Of Compensation Mining Lease No: 1606

APPEARANCES AT HEARING:

Ms Sandra Duggan of Counsel, with Mr C. Withers of Counsel, instructed by Mr David White, of Sparke Helmore, appear for the Applicant.

Mr James Neal of Counsel, instructed by Mr Patrick Holland of MinterEllison, appears for the Respondent.

HEARING DATES: 7- 11 July, 2008 at Gulgong

REASONS FOR DECISION.

Handed down at Muswellbrook Court House, Muswellbrook 30th July, 2008.

DECISION

There are two matters before the court, both being heard together. Each is an application for assessment of compensation under the provisions of Section 265 Mining Act 1992. The first being in respect of Mining Lease 1605 (ML1605) and the other being in respect of Mining Lease 1606(ML1606).

Moolarben Coal Mines Pty Limited, Sojitz Moolarben Resources Pty Ltd and Kores Australia Moolarben Coal Pty Limited [hereinafter referred to as Moolarben], were granted mining leases 1605 and 1606 on 20 December 2007. A significant part of the lease area of those leases (approximately 957.3 hectares) is over land owned by the Respondent Ulan Mines Limited [hereinafter referred to as Ulan]. As attempts to reach agreement over compensation were not fruitful, the applications were placed before this court for a determination of "compensable loss".

THE INQUIRY

Evidence was received from the parties at the Gulgong Court House on 7th to 11th July 2008. The applicant was represented by Ms. S. Duggan of counsel, with Mr. C. Withers of counsel. The respondent was represented by Mr. H.J. Neal of counsel. All of the evidence comprised opinions expressed by witnesses, experts in their field, as to the compensable loss to Ulan.

APPLICABLE LEGISLATION:

Part 13 of the Mining Act 1992 is relevant to these proceedings, in particular the following sections and Regulation:

Mining Act 1992

Part 13 Compensation

Division 1 Prospecting and mining

262 Definition

In this Division:

"***compensable loss***" means loss caused, or likely to be caused, by:

(a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or

(b) deprivation of the possession or of the use of the surface of land or any part of the surface, or

(c) severance of land from other land of the landholder, or

(d) surface rights of way and easements, or

(e) destruction or loss of, or injury to, disturbance of or interference with, stock, or

(f) damage consequential on any matter referred to in paragraph (a)–(e),

but does not include loss that is compensable under the *Mine Subsidence Compensation Act 1961*.

265 Compensation arising under mining lease

(1) On the granting of a mining lease, a landholder of any land (whether or not subject to the lease) becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the lease.

(2) The holder of a mining lease may agree with a landholder as to the amount of compensation payable, but an agreement reached is not valid unless it is in writing, signed by or on behalf of the parties to the agreement.

(3) If a valid agreement is not entered into under this section within such period as may be prescribed by the regulations, the holder of a mining lease, or a landholder of land, may apply to a warden to assess the amount of compensation payable, and a warden is to assess the compensation payable.

(4) The holder of a mining lease is not authorised to exercise any rights under the lease on the surface of any part of the mining area unless the amount of any compensation payable to a landholder under subsection (1) in respect of that part of the mining area is the subject of a valid agreement or of an assessment made by a warden.

Division 3 Procedure for assessing compensation

271 Definitions

In this Division:

"***authorisation***" means an exploration licence, assessment lease, mining lease, mineral claim, opal prospecting licence or environmental assessment permit.

"***compensable loss***", in relation to the assessment of compensation payable under Division 1 or 2, has the same meaning as it has in that Division.

272 Assessment of compensation

(1) The assessment of compensation payable under this Part:

(a) must be made in the manner prescribed by the regulations, and

(b) must not be made until notice in the approved form:

(i) has been published in a newspaper circulating generally in the State and in one or more newspapers circulating in the locality in which the land concerned is situated, or

(ii) has been served on each person who appears to a warden to be interested in the assessment, and

(c) must not exceed in amount the market value (for other than mining purposes) of the land and the buildings, structures and works situated on the land.

(2) Any compensation agreed on or determined under Subdivision M or P of Division 3 or Division 5 of Part 2 of the Commonwealth Native Title Act for essentially the same act as an act in respect of which compensation is to be assessed under this Part must be taken into account in the assessment of compensation for the act under this Part.

276 Additional assessment

(1) If, after an assessment of compensation has been made, it is proved to the satisfaction of a warden:

(a) that the whole of the amount paid into court under this Part has been duly paid out, and

(b) that further compensable loss has been caused, or is likely to be caused, in respect of the land to which the assessment relates, or to other land,

the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.

(2) If it is proved to the satisfaction of a warden:

(a) that an access arrangement does not make provision for or with respect to compensation, and

(b) that compensable loss has been caused, or is likely to be caused, in respect of the land to which the arrangement relates,

the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.

(3) If it is proved to the satisfaction of a warden:

(a) that the whole of the amount assessed by or in accordance with an access arrangement determined by an arbitrator as referred to in section 140 (b) has been paid in accordance with the arrangement, and

(b) that further compensable loss has been caused, or is likely to be caused, in respect of the land to which the assessment relates or to other land,

the warden must, on the application of any of the parties concerned, assess that loss and order that the amount so assessed be paid by the holder of the authorisation to which the assessment relates, within the time and to the persons specified in the order.

(4) A warden's decision on such an application has effect as an assessment of compensation under this Division.

(5) In making an assessment of compensation, a warden must have regard to any agreement between the parties concerned as to the compensation payable.

Mining Regulations 2003

43 Assessment of compensation

For the purposes of section 272 (1) (a) of the Act, the prescribed manner of assessing compensation is by making an assessment that has regard to the following factors:

(a) the nature, quality, area and particular characteristics of the land concerned,

(b) the proximity of the land to any building, structure, road, track or other facility,

(c) the purpose for which the land is normally used.

THE DISPUTED SUMS:

At the commencement of proceedings the claim, from the applicant's point of view, is that this court should determine the compensation payable to Ulan as:

(a) the market value based on the lands highest and best use as an agricultural enterprise (as determined by Moolarben's expert)[i.e. $30,000 per annum].

(b) such sum not to exceed the market value of the land (for agriculture purposes) as determined by Moolarben's expert [i.e. $615,000].

From the Respondent's point of view, it was submitted that this court should determine the compensation as:

(1) For damage, severance and consequential loss, based upon Ulan's expert, the sum of $9,695,791.[1]

OR

(2) In the alternative:

(a) Damage to Improvements [$692,865.41]

(b) Agistment [$783,362 plus cpi increase] (includes $50,000 for severance)

(c) Salinity Offset Program [$520,000]

(d) Land Tax [$674,059]

Totalling in the alternative: $2,670,286.41.

[1] The majority of this sum is the cost to Ulan for the loss of this land as a "buffer zone" for noise and dust from its current mining activities surrounding the subject land.

ISSUES TO BE DETERMINED:

There are three steps to be determined in respect of the applications before the Court:

1. **Market Value** of the subject land – this then sets the "ceiling" for the quantum assessed[2]
2. What constitutes "**compensable loss**" in respect of the respondent's land[3]
3. Placing a **monetary value** on those matters determined to represent "compensable loss".

Concerning **market value,** the dispute between the parties is whether the market value is arrived at on the basis of:

- *Spencer Principle* or
- the land has a "special value" and also
- whether "aggregation" is a valid way in arriving at a *comparable sale*

In respect of **compensable loss,** no dispute arose as to

1. the use of the land for agistment purposes,
2. the severance of the land and
3. the destruction of improvements

A dispute arose as to whether the following matters were considered to come within the ambit of "compensable loss", as in "loss caused or likely to be caused":

4. liability for land tax
5. loss of land for an environmental buffer zone
6. costs associated with a Salination Offset Program

There was generally disagreement between the parties as to the **monetary value** of both the matters referred to in 1 – 6 above and also to the market value, although in final submissions there are concessions as to monetary values.

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[2] Section 272(1)(c) Mining Act 1992
[3] Section 262 Mining Act 1992

CURRENT MARKET VALUE

Two witnesses gave evidence concerning the market value of the subject land. Mr John Austin was called on behalf of Moolarben and Mr Timothy Irwin on behalf of Ulan; both are registered valuers. Mr Phillip English also gave evidence, inter alia, on the aspect of a buffer zone.

Land as a Buffer Zone

Mr Irwin assessed the current market value as being $9.7m, due for a need for Ulan to use that land as a buffer zone for noise and dust. Mr. Austin did not agree that it was a recognised method of the meaning of market value.

Mr Irwin says land that is not within a mining lease area (the subject land is not within the mining lease area of Ulan's mine) "and is utilised as a "buffer" to a project that emits unacceptable levels of dust, ..."[4] may be considered in light of other land purchased by Moolarben in the area to be of a higher value for such buffer purposes.

In addition to Mr Irwin's opinion about a buffer zone, Mr English also in his affidavit[5] referred to the land acting "as an environmental buffer with respect to impacts of UCML's operations at the Ulan mine." He goes on to specify other benefits of the land to include, inter alia, reducing soil erosion; reducing nutrient runoff, increasing native vegetation cover, maintaining biodiversity.[6]

Mr English further opined that the Moolarben mine will be located in the vicinity of residences and other sensitive receivers such as schools, primarily in the village of Ulan. He said that there is a real prospect that such sensitive receivers will experience a higher degree of noise and dust levels. He says "to the extent that the use of these

[4] See exhibit 15, pg 5, 4.1(a)
[5] Exhibit 11
[6] id, paragraph 67

lands by MCM causes UCML to incur additional costs to mitigate cumulative impacts, these costs are a direct consequence of MCM's use of UCML's lands."[7]

In written submissions by the applicant concerning this issue, the court was referred to Exhibit 5, p132-133, which refers to the Director General, Department of Planning, after considering experts opinions supplied by both Moolarben and Ulan at the Independent Hearing and Assessment Panel, making the following statement under the heading **Cumulative Impacts:**

> *The Department is satisfied Moolarben has satisfactorily considered and assessed the cumulative impacts of the project on surface and groundwater, noise and dust, flora and fauna, and traffic impacts. Notwithstanding, the Department has recommended a range of considerations to ensure the amenity of the environment and community would be protected from increased mining in the area.*
>
> *The Department concludes that there is no significant reason relating to cumulative impacts of mining to withhold approval of the project.*

Mr English conceded in giving evidence that he had no basis for assuming the Director General was incorrect.

There is certainly a strong case submitted by Moolarben that Ulan is unlikely to suffer any losses arising out of the loss of use of the lands as "environmental buffer lands".

Notwithstanding the issue raised by Mr English, I return now to the differing opinions between Mr Irwin and Mr. Austin. Mr Austin is of the opinion that the approach of Mr Irwin is that he is assessing the land for a "special purpose" and falls outside the recognised international definition of the term "market value".

"Market Value" is not defined in the *Mining Act 1992*. However, in *Spencer v Commonwealth (1907) 5 CLR 418* Griffith CJ said at 434:

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[7] id, paragraph 71

> *In my judgment the test of value of land is to be determined .. by enquiring . "what would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?"...*

It was further noted by Isaacs J at 441:

> *To arrive at the value of the land at that date, we have, as I conceive, to suppose it's sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. 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 convenience 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 whatever reason so ever in the amount which one would otherwise be willing to fix as the value of the property.*

Moolarben submits:

> Land may have a "special value" to the owner *above* the market value of the land to a willing but not anxious purchaser. In *Boland v Yates Property Corp Pty Ltd* (1999) Callinan J described "special value" (at 269) (emphasis added):
>
> > *The special value of land is its value to the owner over and above its market value. It arises in circumstances in which there is a conjunction of some special factor relating to the land and a capacity on the part of the owner exclusively or perhaps almost exclusively to exploit it.... There will in practice be few cases in which a property does have a special value for a particular owner. Obviously neither sentiment nor a long attachment to it will suffice. The special quality must be a quality that has an economic significance to the owner.*

> Special value bears a similar definition on s 57 of the *Land Acquisition (Just Terms Compensation) Act* 1991 as "the financial value of any advantage, in addition to market value, which is incidental to the person's use of the land" (emphasis added).

Ms Duggan cross-examined Mr Irwin as to his understanding of "mining purposes" (as referred to in S272(1)(c) Mining Act 1992). He indicated that although he sought guidance as to the meaning of "mining purposes", he was informed to "follow the Act". He conceded that if his interpretation of "mining purposes" is incorrect, then he would need to reconsider his opinion of evaluating the land as a "buffer zone". Mr Irwin indicated that it was his assumption that Ulan would not be able to use any of its land for any other purpose, including use as a Salination Offset Plan, other than a buffer zone. He admitted that his opinion in respect of this was a guess and that he did not look at any other material to support his guess.

I agree with Mr Austin that the expression by Mr Irwin that the subject land being utilised as a "buffer zone" is to be taken into account in assessing the "market value" is not a "market value" in accordance with the provisions of the *Mining Act 1992*[8]. I not only consider that as a "buffer zone" the land is being valued for a "special value" as described in *Boland's* case, but in utilising it as a "buffer zone", Ulan is utilising it as a buffer zone solely because it has a mining enterprise nearby. It is not the purpose "for which the land is normally used"[9]. There is no evidence to suggest it was used as a buffer prior to Ulan being granted mining leases and no doubt when mining is concluded in the Ulan area it will not be used as a buffer zone then.

I shall disregard Mr Irwin's valuation that includes the use of the land as a buffer zone

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[8] Section 272(1)(c)
9 reg 43P

Land used as Rural Land:

Evaluations as rural land varied from $1.75 million by Mr Irwin[10] to $615,000 by Mr Austin[11]

Both experts had extensive experience in valuating land within this and other States of the country. Mr Irwin originates from the area subject to the compensation claim, Mr. Austin from the south coast of New South Wales. The respondent submitted that the local experience and knowledge of Mr Irwin should be accepted above someone who has had no or very little experience in valuing within the area. Clearly the two witnesses were as far apart in evaluation as they possibly could be. I find it difficult to accept that two professional valuers, with extensive experience, would be so far apart in their opinion, solely because of the familiarisation one may have with the area. Their differences must be sheeted home to other factors.

Each one was cross-examined extensively as to the reasons for their opinion.

It would appear little was done, by Mr Irwin, to make adjustments to compensate for proportions of cleared as against uncleared land. For example, Mr. Irwin's sale No. 22[12] – there was 1/3 of the land in that sale which was not cleared; whereas the Ulan land had 2/3 of the land which was not cleared. Both experts agree that cleared land is more valuable for rural purposes than uncleared land.

Mr Irwin conceded that in the circumstances of his examples, he should have adjusted down his valuation "marginally". He was asked by Ms Duggan:

Q. At the moment, "marginal" is at best a guess?

A. Yes

Mr Irwin relied on more recent sales of land within the area, which were sales to Moolarben. The issue is whether those sales were at "market value". On page 6 of the joint report, at 4.2 it is stated:

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[10] Exhibit 9 p29
[11] Exhibit 4 p26
[12] Exhibit 9 p 21.

Mr Irwin and Mr Austin have both adopted a similar approach to value having regard to the accepted market value principle.

> *"The estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arms length transaction after proper marketing where in the parties had each acted knowledgably, prudently and without compulsion".*

Mr Irwin was asked about marketing of land purchased by mining companies. When asked if his sales, numbered 9 and 10 were put on the market, he replied: "Not to my knowledge".

The following interaction took place:

> *Ms Duggan: Q: In often times, a mining company will go out and knock on the door and say: "we would like to buy your land, how much will you sell it to me for?"*
>
> *Mr. Irwin: A: Yes, that's the case.*
>
> *Q: And the sale will take place without there being marketing? A: Yes.*

And later:

> *Q: So what you have Mr Irwin is a purchaser who wouldn't have been willing to buy but for the mine, correct? A: To protect his mine.*
>
> *Q: And the mining company is prepared to pay a sum more than the land is worth for its usual purpose to secure that land rather than have the private person sitting there and interfering with its operation? A: Correct*
>
> *Q: So would it be fair to say that the mining company has some anxiety in relation to purchasing the land, it has pressure that normal people in the market don't have, to buy? A: Some mining companies do, yes.*
>
> *Q: You cannot say today, that the sale of that land was for a market value, based upon the definition you read on page 6 of the joint report? A:For a rural purpose, no.*
>
> *Q: I didn't ask you for a rural purpose - for the land? A: No.*

Under cross examination by Mr Neal, Mr Austin conceded that in his report he did not indicate that he had taken into account cleared and uncleared properties, however, he said that he did take that into account. Questions were asked as to those properties outlined in Mr Irwin's report and why he (Mr Austin) had not used those properties to form his assessment of value. Mr Austin indicated that in some instances the properties listed there were either sales to the mining company "which I did not consider to be for 'market value'" or were "lifestyle" sales, which he considered generally to be not comparable.

Although, Mr Austin did consider one sale to Ulan, [his sale number (d) which was also sale 24 in Mr Irwin's report] in which he says: *Discussions with the Vendor reveal that the purchase price agreed to was on the basis of its rural value and not on its value for mining purposes.*

Both experts referred to some properties as being of a smaller nature and purchased for "lifestyle" purposes. Both agreed that generally these were not always suitable as a viable rural property but suited the individual purchaser.

When being questioned Mr Austin indicated that when looking at the smaller "lifestyle" properties he had to make appropriate adjustments. Concerning sales 21 and 26 in Mr Irwin's report, Mr Austin said he did not speak to either the vendor or purchaser in either case, however, he used one of them as his comparative sale but had to "make huge adjustments"

When questioned about the "Carlisle" property, which is property No 22 in Mr Irwin's report, (which has a land value of $1,768 per ha) he was asked what figure he deducted from the $1768 to assist him to come to his opinion. Mr Austin said:
"I looked at a number of properties and made an experienced decision".
When pressed as to what deductions, he replied that the Carlisle property has a house on it, the property is also well fenced and watered. He indicated that there is no house on the Ulan property, it has poor fences and poor water – in considering those matters he "arrived at a figure". He said that the Carlisle property is "not a large viable rural holding".

He was asked by Mr Neal:

Q: You heavily disregarded Mr Irwin's "lifestyle" properties?

A: Yes..... I was asked to value Ulan land as a market value for rural use...in doing that I considered but discounted the "lifestyle" properties.

Aggregation

An important issue in these proceedings is the fact that there is very little for the valuers to compare in respect of properties sold in recent years that are of the same size and quality of the land which is currently subject to ML 1605 and 1606. Both valuers agree that it was necessary to look at smaller holdings and make adjustments. Although in that regard, Mr. Irwin did not make any adjustment in his report, but conceded in cross examination that there was a need to make a "marginal" adjustment.

It is not without dispute that estimating a valuation of the property for rural purposes, Mr Irwin used recent sales of smaller properties and "aggregated" them to create the size of the Ulan land subject to ML 1605 and 1606.

Mr. Irwin was strong in saying that he could take a sale of small property and aggregate it to be a market value for a larger property. Mr. Austin was strongly of the opposite view – the following question was put by Mr Neal:

Q: You have to agree that Mr Irwin's figure is right?

A: No, he aggregated, I think he is wrong.

In re-examination by Ms Duggan, Mr. Austin was asked why he thought the aggregation principle was wrong. He replied:

What we are asked to value is the subject property at market

Value, by the Spencer case, the willing buyer.....you are asked about that property based upon comparable sales evidence. We are not asked to say what the Ulan property would be to replace it, that is the value to the owner, not a market value.

He was then asked about the "adjoining owner effect" and why that is ignored. He indicated when people aggregate in those circumstances, they generally pay a higher price for the adjoining land and therefore it is always ignored as being a comparable sale.

I have some reservations as to the appropriateness of aggregation in general commercial transactions; if one buys in bulk it is generally cheaper than buying smaller lots. However, the issue here is whether Mr Irwin or Mr Austin is correct when it comes to aggregation of property values. There is no evidence produced to show that aggregation is appropriate. It is merely the opinion of Mr Irwin for the purpose of arriving at a valuation of the subject property that he says aggregation should occur. If one peruses the list of sales nominated by the two witnesses, it is seen that in general, the smaller the holding the greater the price per hectare. See, for example, exhibit 8 page 7; sale 25 was 305 hectares. It was the largest lot compared to sales 9 and 21 on that page, yet it has the least percentage increase of the three properties.

The evidence did not satisfy me that it is appropriate to aggregate smaller lots to obtain a market value for the land subject to this case.

Criteria in determining value

It is clear from the evidence of both of these gentlemen that there are no set criteria or formulae in adjusting the sale price of one property to assist in determining the market value of another property. In Mr Austin's case, he makes a "experienced decision" and in the case of Mr Irwin, although I have no recollection of him being questioned directly on this point, he indicated elsewhere as to other matters, he would either "guess" or determine an opinion "only on my experience".

So it is left to individual valuers to have consideration to differences between properties, such matters will include, the amount of timber as compared to cleared area, availability and quality of water, type of roads to property, whether it fronts a river, structures and buildings on properties, quality and quantity of fencing, as well as particular location and size of properties, quality of soil etc etc. All of these have to be considered and then an opinion formed by "experience" or possibly a guess.

Caution must be exercised because some purchasers may have paid a higher price because of an individual "special purpose" pertaining to the land purchased. It is certainly an inaccurate assessment when no, or very few, identical comparable sales within the immediate vicinity are available.

When Mr Irwin was questioned by Ms Duggan in respect of sale 22, page 21 of exhibit 9, he admitted that one third of that particular parcel of land was not cleared. Considering that the uncleared portion of the Ulan land was two thirds, he conceded that the land in sale 22 was of superior quality. The following interaction took place:
Ms Duggan: Q: Although the land was superior (to the Ulan land) you made no alteration?
Mr. Irwin: A: No.
Q: You did not mark it down?
A: No

In his final submissions, Mr Neal urged the court that if it was not satisfied with either of the expert's opinion, there was sufficient material in the exhibits to allow the court to make its own determination as to the market value of the Ulan land. He referred to Mr Irwin's affidavit that is exhibit 8. On page 6 of that document, he values Ulan land, as at 20 July 2004 as $350 per hectare for timbered lands and cleared lands at $1,150 per hectare. He submitted that was close to Mr Austin's (current) break-up, however, some 4 years have now passed and both Mr Irwin and Mr Austin agreed there has been an upturn in the market.

To the best of my ability in utilising the July 2004 figures of Mr Irwin, 985.7 hectares of Ulan land, of which 2/3 are wooded and 1/3 cleared, gives a value of $608,847. However, Mr Irwin now places a value of $1.75m for rural purposes. This is about a 287% increase on the value he put on it in 2004. In his affidavit of 10 August 2007,[13] Mr Irwin's comparative value subsequent to 2004 shows there is certainly an increase. Those increases are listed on pages 9 and 10 of exhibit 8 and repeated on page 29 of exhibit 9. Utilising those figures, sale 9 is an increase of 36%, sale 21an increase of 160% and sale 25 an increase of 10%.

[13] See exhibit 8, page 7.

None of those sales come anywhere within the range of 287% nominated by Mr Irwin for the Ulan land. Perhaps further evidence that aggregation is not appropriate.

I cannot accept, in the circumstances, that the opinion of Mr Irwin as to the value being $1.75million for rural purposes is an accurate opinion.

From the questioning of the two valuers before the court, I am satisfied that Mr Austin has clearly paid more attention to critical matters in considering "comparable sales" than has Mr Irwin. Consequently, I am of the opinion that a more accurate assessment has been made by Mr Austin when he used his "experience" to make a decision as to adjust down certain sale prices to make such sale a truer "comparative sale" for the purpose of putting a market value upon the Ulan land which is the subject of ML 1605 and 1606. In saying that, consideration should be given as to whether Mr Austin's opinion is accurate or whether there has been an undervaluation.

In taking up the suggestion of Mr Neal's submission, I endeavoured to see if Mr Austin's valuation ought to be increased.

To that end I should consider the twenty six land sales itemised by Mr Irwin on page 21 of exhibit 9 as well as the ten sales itemised by Mr Austin in his report, exhibit 4. Excluding sales to mining companies and other reasons, I am left with sales 21-26 in Mr Irwin's report and sales (a), (c) and (d) in Mr Austin's report. Caution should be exercised in respect of Mr Irwin's sale 23, his title search on 1 July 2008 showed that it had not been transferred.

Mr Irwin's sale 21 is the only one the approximate size of Ulan's land. The other properties Mr Irwin referred to are a lot smaller and were aggregated by him. I do not consider, nor does Mr Austin, that aggregation is appropriate, without considerable adjustment.

Mr Irwin gave evidence of speaking to the vendor of sale 21 – it was sold because of the problems the landowner was having with wildlife attacking his stock. Also it was further from Mudgee than the Ulan land. He did not consider, in those circumstances,

that it was comparative enough to be a good example. However, Mr Austin used the same land as his example (a). He considered that it was sufficiently comparable, with appropriate adjustments. That land, which was a sale from Griffiths to Birt, is further from Mudgee than Ulan, has 9 kilometres frontage to Goulburn River and about 79% of it is cleared. With a sale price of approximately $820 per hectare FCW, Mr Austin had to adjust down his estimate for the Ulan land.

In considering the Griffiths to Birt sale, I am of the opinion, having regard to all the material placed before the court, that with down adjustments it could be utilised as a comparative sale.

Sale (c) of Mr Austin's has a cleared area marginally less than the percentage of the Ulan land; but being a "lifestyle" property, ought to be adjusted down. It has a price of approximately $700 per hectare FCW. Likewise, Mr Austin's sale (d) has a cleared area larger than the Ulan land and that should also be adjusted down. It has a price of $950 per hectare FCW.

Ultimately Mr Austin gave an opinion that the land has a current market value of $635 per hectare FCW. He breaks that up into $1150 per ha for cleared and $350 per ha for uncleared land, giving a total value of $607,445. As I mentioned earlier, that figure for cleared and uncleared is the same figure put forward by Mr Irwin in 2004.

At page 25 of exhibit 9, after indicating a current market value of $635, Mr Austin said: *"...this value having remained much the same over recent years, as a result of a stable market.*

It is this comment that I have difficulty reconciling. I have accepted on the evidence that there has been an increase in sale prices. I indicated above, that of the three samples given, the minimum increase was 10% over recent years.

Even if one increases Mr. Austin's figures for cleared and uncleared by the minimum 10%, then the following valuation arises:
340.5 hectares cleared @ $1265 per hectare = $430,732.50
616.8 hectares uncleared @ $385 per hectare = $237,468.00

Thus giving a value of the Ulan land as $668,200.50

Add to that the $5000 estimated value of stockyards nominated by Mr Austin, which gives a total of $673,200.50, say $675,000.

It would appear to me that a more appropriate valuation for the Ulan land, being valued as rural land would be no less than $675,000.00.

I am aware that in arriving at the relevant values, Mr Austin estimates the size of the land to be "approximately 957.3 hectares"[14], whereas Mr Irwin indicates a size of 985.7 hectares.[15] The difference is of no great concern, in the circumstances.

COMPENSABLE LOSS

Two witnesses, John Warwick Austin and Timothy Richard Irwin gave evidence as to their opinion as to the compensation that should be payable to Ulan. Their document headed "Joint Conference of Expert Witnesses in respect of Valuation Evidence"[16], indicated they agreed on the more mundane matters, such as title details, location, zoning etc.

There was no agreement on what I consider to be the important issues that had to be decided by the court:

In respect of S262(a), Irwin assesses loss at $600k,(replacement cost) Austin nil

In respect of S262(b), Irwin assesses loss at $2.99mil, Austin $268,550

In respect of S262(c), Irwin assesses loss at $5.423m, Austin $50k

In respect of S262(f), Irwin assesses loss at $674k (land tax usage) Austin nil

Overall: Irwin assesses loss of $9.69m, Austin loss of $318.5k

[14] Exhibit 4, p26
[15] Exhibit 9, p29
[16] marked exhibit 15 in proceedings

DAMAGE TO BUILDINGS, STRUCTURES OR WORKS

There was no challenge to the fact that Ulan was entitled to relief under this heading, pursuant to S262(a). The dispute that arises concerns quantum and to a smaller degree some items.

The annexure to exhibit 22 itemised, inter alia, those matters considered by the Supreme Court, in other proceedings, to be improvements under the Mining Act 1992. The only difference between the two witnesses concerning those items is the value. Mr. Paul Baguley nominated a total sum of $212,771.28 whereas Mr Neville McMichael nominated $194,608.94.

In submissions Mr Neal urged the court to be liberal. He said "*It is important to bear in mind that UCM is a dispossessed landowner. The relevant provisions are remedial and should be construed liberally, in favour of UCM:* He then referred to Pearce and Geddes, *Statutory Interpretation in Australia 5th edn paragraphs [9.3] and [9.4].* That text refers to a beneficial interpretation approach to ambiguity within the legislation. In response, Ms Duggan agreed with that submission, however, pointed out that there is no ambiguity in this legislation, only varying opinions as to quantum of values placed before the court by witnesses.

I agree with Ms Duggan in that respect, the legislation is quite clear and to my mind without ambiguity.

However, whilst bearing that in mind, the court is confronted by varying opinions as to values put before it by the witnesses. Should the court, in those circumstances, when there is no evidence to show that either witness is incorrect, accept the lowest value? I think not. Even in final submissions, although urging the court to accept the value placed upon matters by their respective witnesses, both Mr Neal and Ms Duggan indicated that their clients are "willing to split the difference" in respect to matters set out in exhibit 22. In making that concession, counsel is ensuring that their clients would be in a better position than if I accepted the evidence of their opposing witness.

An exact calculation of compensation for the next 21 years is almost impossible. It is for that very reason that Parliament has enacted section 276 in the Mining Act 1992. Pursuant to that section, a party may, at the conclusion of the term of an authority or prior thereto, apply for additional compensation.

To that end, I am of the opinion that if differing values are placed before the court and no evidence can distinguish the opinion as to those values, then as the landholder is dispossessed, the court should accept the higher value.

Accordingly, I propose to award the amount of compensation for those items, as indicated by Mr Baguley, as $212,771.28.

There remain the other items listed in the annexure to exhibit 22. Ms Duggan concedes to all matters listed above the words "Graded Road" and is willing, as is Mr Neal, to "split the difference" in the values nominated, if the court doesn't accept the value placed upon those items by the respective witnesses. For the reasons I have set out above, I propose to allow the figures placed upon those items by Mr Baguley. That being so, the compensation in respect of those items is: $34,378.00

Of the remaining items listed under "Graded Road", Mr Neal did not, on behalf of Ulan, press the two items listed as "Cleared Land Areas". What remains is the item "Additional Fencing". Both parties are at odds as to whether or not additional fencing should come within the ambit of compensable loss.

It was submitted on behalf of Moolarben that there is a requirement that the mine area be fenced and consequently, a fence will be in place when the mine site is rehabilitated. Mr Neal submitted that the existing fences will be destroyed during the mine process and Ulan is entitled to be compensated for that.

The annexure to exhibit 22 already includes fencing that has been considered by the Supreme Court to be "improvements" under the Mining Act 1992. What this court is being asked to do is to compensate Ulan for "additional fencing" which has not been considered to be an improvement.

True it is the section 262 of the *Mining Act 1992* provides for compensation to be granted for damage to "buildings, structure or works" even if they are not "substantial and valuable". This is confirmed by Smart AJ[17] paragraph 379.

Although the fencing being discussed at the moment has not been entirely identified, from the questions asked of the witnesses it consists of both perimeter and internal fencing. As it was not included as an "improvement" by Smart AJ, then it is reasonable to assume that this fencing was not stock proof. It may be possible to assume that at the end of the mining a fence, that will be put up prior to mining taking place, will still be in place. One could also reasonably assume that such fence would be stock proof. Thus, for the perimeter fence, it would be replacing an inferior fence with one that could be utilised for stocking of cattle.

Rather than getting into an area of "unjust enrichment", this question is best resolved by the provisions of section 276 Mining Act 1992.

In other words, it will not be known until the conclusion of the rehabilitation of the mine site what fencing will then exist. At that point of time, it would be appropriate to consider whether or not there is a compensable loss in respect of fencing which has been excluded from the list of matters outlined by Smart AJ as substantial and valuable improvements.

Consequently, I do not propose to award any compensation at this point of time in respect of such fencing.

On 11th July, Mr Baguley in giving evidence indicated a sum of approx $116k to rehabilitate cleared land at the end of the lease. When questioned about this it became clear that the sum he indicated was the current rate for clearing the land, which has in fact already been done. He put this down as a loss of expenditure to Ulan. In fact that is not correct. At the end of the 21 years, the land will be handed back to Ulan and it will be in a cleared condition. There will be no need for Ulan to

[17] Ulan Coal Mines Limited v. Minister for Mineral Resources [2007] NSWSC 1299

do any further clearing. The only issue that may arise is whether the land is suitable to graze cattle at that point of time.

Although both Mr Baguley and Mr McMichael both said that they have not seen cattle grazing on rehabilitated mining land, I have personally observed it. I have also personally observed a situation where the mining company buried the valuable top soil and left inferior overburden as top soil, thus making it useless to the landholder.

The court cannot give compensation at this point of time on the basis that Moolarben in 21 years time may not rehabilitate the site in accordance with its obligations.

Salinity Offset Program

A lot of time was consumed over this particular issue. On the final day of the proceedings, undertakings were filed by Moolarben that it would, inter alia, meet all costs reasonably incurred by Ulan concerning it's obligations to have a Salinity Offset Program. In final submissions, Mr. Neal submitted that due to undertakings by Moolarben, the claim for Salinity Offset Program (SOP)[$520,000] will not be pressed "at this point of time". Although no determination has to be made by this court on that issue, it is important to briefly outline the issues concerning the subject, so that if the issue is aired at some time in the future, there will be no doubt as to what the issues were in this hearing.

Pursuant to mining leases granted to Ulan previously, an Environmental Protection Licence (EPL) 394 was granted to Ulan wherein the licensee was required to offset *"the residual salinity loads generated by UCML'S Bobadeen Irrigation Area over the life of the Bobadeen Irrigation Program. It must achieve an offset ratio of 1:1.5 when fully implemented".*[18] Ulan was using the land that is now the subject of ML 1605 and 1606 as part of an area it set aside for the SOP. Ulan submitted that it should be now compensated because it will need to find another suitable property for the purpose of its obligation under EPL 394.

[18] Page 4, exhibit 19 in proceedings.

Moolarben asserts that it now has an obligation under its EPL to fulfil the obligations that Ulan has under EPL 394 concerning a SOP. Consequently, Ulan has suffered no compensable loss in relation to its SOP [also referred to as a Salinity Offset Management Plan (SOMP)]. That obligation comes pursuant to Moolarben's Project Approval, granted by Hon. Frank Sartor, Minister for Planning.[19] It provides:

> ***Salinity Off Sets***
>
> - ***Bobadeen Irrigation Scheme (BIS) – Salinity Offset Management Plan (SOMP)***
>
> *In the event that the Moolarben Coal Project reduces the capacity for the removal of salt from the Salinity Offset Management Plan area operated by Ulan Mine in conjunction with the Bobadeen Irrigation Scheme under Environment Protection Licence 394, then Moolarben will, at its election, either:*
>
> - *Take from Ulan that volume of water that would otherwise have been used in the BIS; OR*
> - *Provide an area of land with equivalent salt removal capacity; AND*
> - *Any disputed issue will be determined by an appropriately qualified expert agreed between Moolarben and Ulan and in default appointed by the Director General of Planning.*

Phillip English, the environmental manager for Ulan, gave evidence of his understanding of the obligations of Ulan and Moolarben concerning the SOP. It was his responsibility to ensure that Ulan complies with its obligations under its EPL. To summarise part of his evidence, he would take any necessary action to have Ulan's EPL modified prior to Moolarben doing anything (concerning the SOP) that may put Ulan in non compliance of its obligations under its EPL. He admitted that if Moolarben was to provide other land in furtherance of the SOMP, Ulan would not have to spend further money in maintaining the land.

[19] Exhibit 5, page 67

Notwithstanding the apparent overwhelming evidence to negative the claim by Ulan for compensation regarding their SOMP, the undertaking mentioned above was filed in court (exhibit 23). A sealed copy of that has since been filed and has been attached to the exhibit.

Consequently, there is no need for the court to consider whether liability for costs associated with a Salination Offset Program come within the ambit of "compensable loss" under the provisions of the Mining Act 1992

The Purpose for which the Land is Used

This phrase, which is in Regulation 43(c) of the *Mining Regulation 2003*, is important in determining the assessment of compensation. Each party produced an expert to give an opinion as to the best way in which the "Ulan land" could be used.

Mr N McMichael on behalf of Moolarben expressed an opinion that a cattle enterprise on the land, comprising of breeding, trading, agistment and fattening would be the highest and best agricultural use of the property. He assessed the carrying capacity of the land at 4.5DSEs per hectare, or 1,500 DSEs for the 320 ha area of cleared land.

Mr. J Lane on behalf of Ulan, considered that Mr McMichael's opinion to be a "fair representation of the Ulan land with respect to its agricultural production, including its livestock carrying capacity"[20]

In the joint statement of those two witnesses[21] they agreed the average rate per week per beast for agistment purposes was $4 per week. Concerning the carrying capacity, they agreed it was 4.5DSE/ha, however with a proviso, "it is variable subject to season"

The witnesses disagreed as to the viability of the property for rotational grazing. Mr. McMichael suggested it could not be achieved successfully with the current large paddocks and poor fencing. Mr. Lane suggested it is possible with boundary fences suitable to contain the cattle. Although under questioning each would not change his

[20] See exhibit 12, pg 7
[21] Exhibit 13

opinion, for the purpose of determining compensation, I shall assume that rotational grazing is a viable proposition for this property.

Having regard to the evidence of Mr McMichael and Mr Lane, the legal representatives of both parties agree that compensation should be granted in the sum of $283,074 for agistment purposes. I am of the opinion that such as sum in all the circumstances is appropriate.

Accordingly, I will allow the sum of $283,074 PNV (present net value) for agistment.

Loss of Land for Environmental Buffer Zone

This issue was raised when consideration was being given to the current market value of the land. I have determined that the loss of the land as a buffer zone is not a valid consideration in respect of determining the current market value.

The issue is raised once more by the respondent, by way of affidavit of Phillip English, dated 4th July 2008.[22] This affidavit was made on the Friday prior to the commencement of the hearing of evidence at the Inquiry. I note that Mr Irwin expresses an opinion[23] that the "diminution in value of Buffer Zone" comes within Section 262(c) Mining Act 1992 and he places a value on that of $5,422,750.

From the questioning of Mr English, it would appear that Ulan provided an expert's report to the EPA concerning the accumulative effect of dust and noise. That report was not adopted in the recommendation of the Director General that there would be no adverse cumulative effect as to noise and dust with the introduction of the Moolarben mine. Mr English conceded in questioning before this court, that the subject land would still have the benefit of being a buffer zone, so far as Ulan mine is concerned, notwithstanding that it will be mined by Moolarben.

As I mentioned above, the utilisation of the land as a buffer zone was not a matter to consider when determining market value. I also find there is no evidence to satisfy me that Ulan will suffer any economical loss if it no longer controls the subject land

[22] Exhibit 11
[23] See exhibit 9, page 25

for the purpose of a buffer zone. Consequently, the question as to whether or not the loss of land as a buffer zone could come within the ambit of S262(c) does not have to be answered in this instance.

SEVERENCE OF THE LAND

There is no challenge that Ulan is entitled, under Section 262(c) to compensation due to severance of the land. Mr. Austin assesses that as $50,000[24]. Mr J Lane, expressed an opinion[25], on behalf of Ulan, that such sum "appears to be sufficient". There is no challenge to this amount. I should point out that Mr Irwin placed a figure of $5,422,750 for severance under S.262(c); on the basis of "diminution in value of buffer zone"[26]. I have determined above that there should be no compensation for loss of a buffer zone. Consequently, I propose to allow $50,000 to Ulan under Section 262 (c).

Land Tax

At the moment the Ulan land is rated by the local government as "rural" land. There was an opinion expressed during the proceedings that once mining commences, the land will be rated for mining purposes and then Ulan will be required to pay a substantially higher amount of rates annually. Thus a claim for $674,059. It transpired that the applicant gave an undertaking to meet any costs concerning that issue if it arises in future. The written undertaking was marked exhibit 24. Since the court hearing, a sealed and signed copy of that undertaking was filed. That sealed copy is attached as part of Exhibit 24.

Following those undertakings, Mr Neal in his final submissions indicated the claim for Land Tax would not be pressed "at this point of time". Consequently, there will be no determination as to whether such land tax would be a "compensable loss" in accordance with S.262 *Mining Act 1992.*

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[24] Exhibit 4, pg 18
[25] Exhibit 12, pg 16

[26] Exhibit 9, p25

Accordingly, having regard to all the evidence placed before the court, I propose to access compensation payable by Moolarben to Ulan as follows:

Damage to Buildings, Structure or Works	$212,771.28
	$ 34,378.00
Loss of use of land (agistment)(PNV)	$283,074.00
Severance of Land	$ 50,000.00

This sum does not exceed the current market value of the land, consequently, the full amount as stated above is to be awarded.

TOTAL COMPENSATION PAYABLE IS $580,223.28

At the request of the parties, the question of costs is reserved.