IN THE WARDEN'S COURT SYDNEY
ON 3RD SEPTEMBER 1992
BEFORE J L McMAHON
CHIEF MINING WARDEN

APPLICATION BY MR R SLACK-SMITH FOR DETERMINATIONS UNDER SECTION 27(3)(d)

BENCH:

At the Warden's Court, Walgett on 25th February 1992 I heard evidence submitted in relation to a decision under Section 27(5) of the Mining Act. Section 27 of the Act provides as follows:

"(1) A person wishing to apply for the registration of a claim shall, before lodging his application under section 28 -

(a) mark out, in the manner prescribed, the area of land over which he wishes the claim to be registered; and

(b) serve on any occupier of that land an instrument in writing stating that he intends to apply for the registration of a claim over that land.

(2) An area of land marked out pursuant to subsection (1) shall -

(a) be situated in a single division;

(b) be square in shape, except in such circumstances as may be prescribed; and

(c) not be greater than the prescribed size.

(3) A person shall not, pursuant to subsection (1)(a) mark out land -

(a) unless the land is Crown lands;

(b) that is bona fide in use as a garden or an orchard, or situated within fifty metres of any such land, without the consent of the occupier of the land so in use;

(c) that is situated within two hundred metres of a dwelling-house that is the principal residence of its occupier, without the consent of that occupier;

(d) that is situated within 50 metres of any improvement (being a substantial building, dam, reservoir, tank, drain, contour bank or graded bank or water disposal area, for soil conservation purposes, or any other valuable improvement) other than an improvement constructed or effected for mining purposes and not bona fide used for other purposes, without the consent of the occupier of the land on which there is such an improvement; or

(e) that is situated within 200 metres of any woolshed or shearing shed which is in use as such, without the consent of the occupier of the land on which there are such improvements.

(4) A consent under subsection (3) shall be given by instrument in writing and shall be irrevocable.

(5) A dispute as to whether or not any land is land to which subsection (3)(b), (c) or (d) applies shall be referred for decision to the warden, and his decision shall be final."

The evidence showed that the land the subject of the dispute is Crown lands, there was no suggestion that a garden or orchard was involved nor any suggestion that the principal residence of the occupier, a woolshed or shearing shed was involved. The problem arose under paragraph (d) in that the question to be decided was whether or not roads and tracks traversing the lands come within the meaning of "any improvement" as provided by Section 27(3)(d).

Applying the section to the land of Mr Slack-Smith, he is the holder of a Western Lands Lease for grazing purposes of a rural property called "Muttabun" in the Walgett district and had been in that position for some 10 years. His main activity was the grazing of sheep but occasionally he also grazed cattle. These animals were taken to and from the property by means of a 3 or 4 decker transport vehicle and roads to and within the property were utilised to give all necessary attention to the animals. The fact is also that as Crown lands the property is available for persons to make application for the registration of claims on it. Prospecting and mining have already taken place across the property in places as depicted by exhibits 2, 3 and 4 quite extensively. These are photographs which show the extent of mining immediately adjacent to well formed roads in the area.

Mr Slack-Smith deposed that when he purchased the property he took into account the fact that the property had tracks and roads on it, some of which had been widened and graded and his purchase price was appropriately increased by the vendor to take into account the existence of those means of access. Additionally, Miss Anne Martel, a valuer, gave evidence that the use and good management of a property depends, among other things, upon the existence of roads and tracks and that properties cannot be run without them. The standard of the road or track depends largely on the soil type. Generally, as to the cost of diversion of a road, she said that a figure of $500 per kilometre would not be unreasonable.

Mr Dooley, President of the Lightning Ridge Miners Association, gave evidence along the lines of being understanding and sympathetic to the situation of Mr Slack-Smith but raised the question that roads made by the miners should not be the subject of any protection under Section 27. He felt that there was no need for a buffer zone to apply to all grazier-used roads and tracks but agreed that if one had to be put in place the 6 metre zone from the centre of each road would be appropriate. He felt that with the passage of time and a new condition being placed upon the registration of claims that roads and tracks be not interferred with in new fields, that the need for the Warden to give a decision on the status of this means of access would apply only to the older claims. In addition, those roads which the miners themselves had built would become the subject of self regulation, that is to say that the miners would not be mining or prospecting in such a position that the roads would be adversely affected, or a danger created.

Mr Ronald Dillon, the Regional Mining Officer, felt that it would be hard to get the miners to understand that there should be a buffer zone protecting roads and tracks but felt that these conditions were slowly gaining recognition. He made reference to a new Condition No 13 attached to the registration of claims in new fields requiring that the miner not impede or obstruct any road without the permission of the Regional Mining Engineer or the Regional Mining Officer who was empowered to remove any obstruction.

Mr Browne, Solicitor on behalf of Mr Slack-Smith highlighted the value of roads and tracks to the property owner and the fact that they are essential for the proper management of a grazing property. He felt that restriction of drilling near roads and tracks could go some distance towards avoiding the occurrence of a serious accident. As long as the existence of a buffer zone did not interfere with his client's use of the property then he would have no objection to the creation of a buffer zone. Likewise, Mr Dooley on behalf of the Miners Association felt that a buffer zone would be satisfactory.

In interpreting Section 27(3)(d) which talks about "any improvement" there is further qualification in the subsection to this expression in that substantial building, dam, reservoir, contour bank or graded bank or water disposal area for soil conservation purposes are mentioned, "or any other valuable improvement". It might be argued that "any other valuable improvement" should be read ejusdem generis with the other improvements as listed which, of course, are valuable. However I do not think that the legislation intended this to be the case and I believe that other improvements such as fences and roads should be covered by the Section. For instance, from the evidence of Mr Slack-Smith and Miss Martel, the existence of internal roads on the property adds value to it and it seems to me clear that roads used by a grazier could be declared

to come within the category of "any other valuable improvement" within the meaning of the section. Therefore, strictly speaking, land should not be marked out over which there is a road which is bona fide used by the grazier for the use and management of his land for purposes other than mining. However the land is generally of flat and undulating terrain in the Lightning Ridge Mining Division and because of this topography and often because of the existence of exploratory holes or mine shafts or vegetation, there are also roads and tracks of varying standards which run at random across grazing properties. It would be, in my opinion, inappropriate for me to decide as to "Muttabun" that all of such tracks are valuable improvements within the meaning of Section 27(3)(d) especially in the light of the exclusion of the words "improvement constructed or effected for mining purposes" and I specifically decide that they are not all valuable improvements.

A road or track may be constructed by means of building up, grading or by general usage and whether or not a particular road or track or other feature comes within the category of being a valuable improvement will depend on evidence as to its nature and use. Therefore should it be anticipated that such a question might arise, it would be highly prudent for any person seeking to say that a road, track or indeed a dam, reservoir, contour bank or water disposal area was or was not in existence at a particular time to take a series of photographs of the area at the relevant time to prove its status then and there and its nature. Failure to do so might well result in a factual conflict. It might well be necessary in all cases for a visual inspection to be made by a Warden.

That comment, of course, does not solve the immediate and complex problem here. As I have said, a visual inspection might well be the only way to determine the status of roads and in this regard I have had Mr Dillon and the Mining Registrar, Mr Hunt, carry out an inspection of the roads on "Muttabun". Their

report is attached as an annexure. I decide under Section 27(5) that roads and tracks categorised as 3, 4 and 5 are valuable improvements but roads and tracks in categories 1 and 2 are not.

In conjunction with that matter I have now had referred to me by the Registrar two other disputes. These have arisen since I heard evidencon 25th February and have caused the delay in this matter. The first relates to a letter written by Mr Slack-Smith requesting that "all stock watering dams and drains to those dams" should be declared to be valuable assets. I assume for the purposes of the Act that Mr Slack-Smith is attempting to have me decide that these features on his land are improvements within Section 27(3)(d). In addition to that, in a further letter, Mr Slack-Smith sought that a claim registered by a Mr Huber numbered 29506 be declared to be over a valuable improvement, that is a drain for a stock watering dam. This claim was said to be at Kevins Rush.

Notification was sent to the parties by the Registrar, who in addition advertised the fact that I would be holding an Inquiry on 22nd July 1992 into these questions. When the Inquiries were opened Mr Browne, Solicitor appeared for Mr Slack-Smith, Mr Dooley appeared as President of the Lightning Ridge Miners Association, Mr M J Huber appeared as the registered holder of Claim 29506 and Mr Hunt, the Mining Registrar appeared on his own behalf. Mr Hunt firstly gave evidence of the presence of a recently constructed drain to a dam which if or when it overflowed, spilled its contents into a larger dam. The problem was made more complex by the fact that puddling operations, that is processing of mined opal dirt takes place on one of the dams, whereas both of them are available also for the purposes of watering livestock. Mr Slack-Smith deposed that as the grazier and owner of "Muttabun" on 8th April 1992 he had engaged an earthmoving contractor and certain drains were put in to the landscape to

facilitate the draining of water to the dams. This was particularly to allow for stock which he ran on his property to gain drinking water. In relation to Mr Huber's claim there had been a dispute between himself and Mr Huber and the drain had been constructed across the area the subject of the claim. The construction of the drains took place on 17th April 1992 and the claims were registered on the 23rd of the same month, some six days later. However it is apparent that Mr Huber had pegged out the claim some days before the date of the actual registration.

Mr Andrew Slack-Smith, the son of Mr Ross Slack-Smith gave guidance to the bulldozer owner as to where the drain was to go; and the work was commenced on 13th April 1992. It was not put in, he said, to prevent registration of claims.

Mr Mark Holland, an earthmoving contractor, gave evidence of the construction of the particular drains which was carried out with a particular view to allow water to be conveyed to the stock watering dams. He was experienced in earthmoving and was careful to construct the drains so that the drainage would be maximised. Ms Martel gave similar evidence having viewed the drains on "Muttabun". She had discussed the construction of them with the Soil Conservation Service and construction of the drains for the dams was considered by her to be a necessary feature to improve the stock watering facilities of the property, bearing in mind that in the event of water being unavailable, stock have to travel a long distance otherwise to get it. She felt that the value of the property would be enhanced by construction of the drains.

Mr Dooley's evidence was to the effect that miners were having a big problem with owners who construct drains across their properties in the apparent hope of creating a 50 metre buffer zone to prevent the registration of claims within

the drain areas.

Finally Mr Huber gave evidence about how he acquired the claim. When he was at the Mining Registrar's office on 26th February 1992 he made enquiries as to where he could peg a claim and was informed that as from 21st March a new area would become available. On 20th March he surveyed for a Mr Allen Hall two Claims 29195 and 29196 at Kevins Rush. He found another area of ground which had on it what he considered to be an old possession notice, but no claim had been registered by Mr Slack-Smith, no pegs were in existence so he measured it up and put pegs in. He arrived at the Mining Registrar's office at 3.00 a.m. on 23rd April 1992, the first day that the area became available for claims to be registered and noted that Mr Slack-Smith had arrived at 4.30 a.m. He said that he had seen the drain in the vicinity on 21st April before he had registered the claim but he did not recognise its significance. When he had returned to his claim he had found his pegs had been removed but on advice from the Deputy Mining Registrar he had reinstated them. He sought that his Claim No 29506 be recognised as being a valid one.

Mr Slack-Smith said in evidence that an area of land which was subsequently covered by Claim 29506 had been pegged for him as a "compensation claim" by miners who had been working on the property. He had not been aware that it had been pegged until some time after the pegging but when he became aware he then tried to register the claim but in the meantime action had been taken by Mr Huber. The basis of a compensation claim, as I understand it, is, that where miners work on the land held by a grazier under a Western Lands Lease, in order to recompense him for the use of his land they set aside one claim for him. Mr Slack-Smith felt that the pegging had been done in good faith and that if other parties are allowed to peg and register claims over these compensation

claims he would have to be much more cautious how he viewed other people. He conceded in questioning by Mr Huber that in fact he had given permission for other people to peg claims near the particular drain. He denied however that the drain had been put in to make sure that Mr Huber did not acquire title to Claim 29506.

On the question of recently established drains, there is no doubt in my mind that it would be inappropriate for me to find that they are valuable improvements bona fide used for grazing purposes. The drains themselves appear to be constructed by means of a single or multiple bulldozer blade cuts and they would be relatively simple to create, and once created if given recognition would have the effect of sterilising at the discretion of the Western Lands lessee for a distance of 50 metres the land for the purposes of registration of claims. While I made comment earlier in this decision about what was intended as to roads and tracks by Section 27, similarly I now make comment about what was intended by the same Section as to drains. I do not think that it was intended that Section 27 should be interpreted so that drains of this type should have the effect of sterilising tracts of land along them. I specifically decide that such drains are not improvements entitling the creation of the 50 metre protection.

It follows that I hold that the drains of this type are not valuable improvements within the provisions of Section 27.

As to Mr Huber's situation I believe that there was a dispute between Mr Slack-Smith and Mr Huber in which Mr Huber by means of marking out and early arrival at the Registrar's office obtained the ascendancy. I make no comment upon the morals of the situation, merely the legality. The creation of a drain

was a fairly obvious action by Mr Slack-Smith to prevent Mr Huber exercising his rights as a registered claim holder. Mr Slack-Smith has allowed other claims to be registered within the 50 metres limit and I decide that Claim 29506 is not adversely affected by any drain in the area; and the registration of that claim is to stand.