

LANDHOLDERS HAVE INCREASED POWER TO WITHHOLD CONSENT FROM MINING COMPANIES FOR ACCESS AND EXPLORATION RIGHTS

20 May 2016 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings - By **Olivia Kelly** and **John Taberner**

IN BRIEF

The Land and Environment Court has significantly expanded the scope of improvements to land that can constitute a 'significant improvement' under the *Mining Act 1992 (NSW)* (**Mining Act**).

Miners and explorers will now require written consent from landholders to access areas of land subject to a broader range of improvements than previously thought before they can obtain an access agreement or mining lease.

Additionally, current access agreements, determined under the compulsory arbitration processes contained in the Mining Act, may be invalid to the extent they purport to authorise access to land for the purposes of prospecting, where that land has located upon it improvements which fall within the expanded scope of 'significant improvements' identified by the Land and Environment Court (**Court**).

WHAT HAS HAPPENED?

The Land and Environment Court recently decided *Martin v Hume Coal Pty Ltd*.¹ The decision significantly expands the scope of what has previously been held to be a 'significant improvement' for the purposes of the Mining Act. This is important because, under the Mining Act, the owner of land on which there is any 'significant improvement' has an absolute discretion to withhold its consent to:

- the carrying out of exploration activities by the holder of an exploration licence or an assessment lease on that land, and
- the grant of a mining lease over the surface of any land on which a 'significant improvement' has been identified in a claim made in accordance with clause 23A of Schedule 1 of the Mining Act.

Any dispute as to whether or not anything is a 'significant improvement' is to be determined by the Court.

WHO NEEDS TO KNOW?

All NSW coal or mineral explorers or miners.

KEY ELEMENTS OF THE DECISION

The Court made its decision on an appeal from the Commissioner for Mining (**Mining Commissioner**). Four landowners in the Southern Highlands sought a declaration that Hume Coal, the holder of an exploration licence under the Mining Act, was not permitted to carry out exploration activities on certain areas of land on which the landowners considered there to be 'significant improvements'. The Mining Commissioner initially found in favour of Hume Coal. However, the Court overturned the decision of the Mining Commissioner and found in favour of the Landowners.

The Court found that certain roads and driveways, pastures with improved paddocks, equestrian courses, cattle laneways and irrigation piping and fences on their lands were 'significant improvements'. As a result, the landowner's written consent was required to authorise exploration activities in these areas and it was not open to Hume Coal to seek an access arrangement over these areas without first obtaining this consent.

THINGS TO DO NOW

The Court's decision makes it clear that:

- the scope of what can constitute a 'significant improvement' is much broader than was previously understood, and
- explorers will need to obtain the landowner's written consent prior to carrying out any exploration activities (including travelling over the land for exploration purposes) on land on which there are any 'significant improvements'.

Negotiated access arrangements should not be affected as these typically include a broad consent by the landholder to the carrying out of any activities on land which may constitute a 'significant improvement'.

However, the decision has the potential to affect the validity of access arrangements determined (as opposed to negotiated and agreed access arrangements) under the compulsory arbitration processes contained in the Mining Act (**Determined Access Arrangements**), to the extent that such access arrangements purport to enable exploration activities to be carried out on land on which there is any 'significant improvement' such as formed roads and driveways, paddocks with improved pastures or agricultural land.

Miners should identify and avoid any 'significant improvements' in carrying out further exploration activities under any such Determined Access Arrangements.

The decision is also likely to have significant implications for explorers applying for mining leases as a mining lease may not be granted over the surface of any land on which a 'significant improvement' has been identified in a claim made in accordance with clause 23A of Schedule 1 of the Mining Act.

BACKGROUND TO THE DECISION

Hume Coal is the holder of Exploration Licence A349 which authorises exploration for coal in certain parts of the Southern Highlands in NSW. Mr Martin and four others (**Applicants**) owned land within the area of Exploration Licence A349. The Applicants sought a declaration from the Mining Commissioner that Hume Coal was not permitted to exercise rights under Exploration Licence A349 on certain areas of land on which the landowners considered there to be 'significant improvements'.

The Mining Commissioner refused the declaration. The Applicants appealed the decision of the Commissioner of Mining under section 56A of the *Land and Environment Court Act 1979 (NSW)* on the grounds that she had misconstrued the relevant provisions of the Mining Act and their application.

The Applicants submitted that formed roads and driveways, paddocks with improved pastures and lucerne, an equestrian cross-country event course, cattle laneways, irrigation piping and fences fell within the meaning of 'significant improvement' and that Hume Coal was therefore precluded from carrying out exploration activities on those areas of their property without the written consent of the landowners.

REGULATORY REQUIREMENTS

Section 31 of the Mining Act prohibits an exploration licence holder from exercising 'any of the rights conferred by the licence over the surface of land' on land, on which or within certain distance of which, are dwelling-houses, a garden or *any significant improvement* to the land. The term '*significant improvement*' is defined in the Dictionary to the Mining Act as "*any substantial building, dam reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure*".

DECISION OF THE COMMISSIONER

In *Martin & Ors v Hume Coal Pty Ltd*² the Mining Commissioner held that none of the contested land, works or structures were captured by the scope of 'any significant improvement'. The Mining Commissioner also found that a right of vehicle access over land was not a right conferred under an exploration licence, and she therefore did not consider whether roads and driveways were significant improvements to the land. In considering the scope of 'any significant improvement' the Mining Commissioner decided that pastures and lucerne, the equestrian cross-country event course and irrigation pipes under cattle laneways were not significant improvements. The Mining Commissioner also found that section 31 of the Mining Act did not apply to fences which were erected after the date on which Hume Coal gave notice under section 142 of the Mining Act and, therefore, did not decide whether fences erected prior to the notice were 'significant improvements'.

THE COURT'S FINDINGS

A) THE RIGHTS CONFERRED BY THE LICENCE:

Before the Mining Commissioner, Hume Coal had argued, and the Mining Commissioner had accepted, that the right to prospect conferred by an exploration licence does not include any right of access over relevant land and that therefore section 31 of the Mining Act does not prevent access to that land even if there are 'significant improvements' on the land. The Court rejected this argument. It accepted instead the Applicants' submissions that the right to prospect conferred by the exploration licence must by implication include a right of access over the land, including by vehicles. The effect of this is that the restriction in section 31 of the Mining Act covers not just the carrying out of physical exploration activities such as core holes, but also travelling over land to areas on which it is proposed to carry out physical exploration activities.

B) SIGNIFICANT IMPROVEMENTS:

Before the Mining Commissioner, Hume Coal had argued, and the Mining Commissioner had accepted, that improved pastures and lucerne were not 'significant improvements'. The Court rejected this argument. The Court also held that the Mining Commissioner had erred in considering whether the concept of 'improved pastures' fell within the definition of a 'significant improvement', rather than making factual findings about the particular paddocks in question.

The Court also rejected the Mining Commissioner's finding that an equestrian cross-country event-course was not a 'significant improvement'. The Court accepted the Applicants' submissions that the Mining Commissioner had failed to ask whether the substantial work involved in creating and preparing the equestrian course for events was a work or structure that was 'substantial' or 'valuable'. The Court also held that the Mining Commissioner had failed to consider the potential uses of the equestrian course in determining whether it was 'valuable'.

In relation to the cattle laneways and irrigation pipes the Court found that the Mining Commissioner had erred in finding that they were not significant improvements. The Court held that the correct question was whether the water reticulation system, of which the piping was a component, was a significant improvement and as a whole was substantial and valuable.

The Court held that the Commissioner erred in failing to consider whether fences were a 'significant improvement'. If the fences were 'substantial and valuable' structures, Hume Coal would not be permitted to cut those fences without the Applicants' consent.

The Court also remitted the decision of whether roads or driveways fall within the definition of 'significant improvement' to the Commissioner.

The Court confirmed that 'any significant improvement' extends to paddocks with improved pastures and lucerne, equestrian event course, cattle laneways and irrigation pipes and may also extend to formed roads, driveways and fences. The Court also confirmed that a 'significant improvement' is to be determined at the date on which the rights under the relevant exploration licence are exercised.

The Court's interpretation of the 'significant improvement' provisions in the Mining Act is likely to further restrict the ability of explorers to both:

- carry out exploration activities under their exploration licences, and
- obtain mining leases over the surface of land,

without first obtaining the written consent of all landowners. This has important public policy implications for access to resources and may require amendments to be made to the Mining Act.

ENDNOTES

1. [Martin v Hume Coal Pty Ltd \[2016\] NSWLEC 51](#).
2. [Martin & Ors v Hume Coal Pty Ltd \[2015\] NSWLEC 1461](#).

MORE INFORMATION

For information regarding possible implications for your business, contact [Peter Briggs](#) or [John Taberner](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PETER BRIGGS
PARTNER, SYDNEY

+61 2 9225 5155
Peter.Briggs@hsf.com



JOHN TABERNER
CONSULTANT,
SYDNEY

+61 2 9225 5427
john.taberner@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021