It remains to be seen the extent to which the final report of the Commission diverges from these draft findings and recommendations. It will then be a question of whether the participating States and Territories agree to amend the Gas Access Regime as recommended in the final report. This is significant as this is but one component in the wider issue of the reform of the energy markets currently being considered by the Ministerial Council on Energy on behalf of the Council of Australian Governments.

NEW SOUTH WALES

JUST AND EQUITABLE COAL COMPENSATION*

NSW Coal Compensation Board v Nardell Colliery Pty Ltd and Coal Compensation Review Tribunal ([2004] NSWCA 35)

Just and equitable compensation – Super royalty and front end payments in compensation calculation – Coal Acquisition Act 1981 – Coal Acquisition (Re-Acquisition Arrangements) Order 1997

First Instance Decision

The decision of the trial judge, Sperling J, has been reported in this Journal.[1] That report should be read in conjunction with this note.

The trial judge concluded that super royalty and front end payments should be included in the compensation calculation and that a dividend implementation factor of 0.5 should be included in determining factor "r" in the compensation formula.

The Appeal Grounds

The Board appealed against the trial judge's decision on the ground that:

1. it was not just and equitable for the super royalty and front end payments to be included in the compensation calculation; and
2. having found a mismatch between the methodology used by the Tribunal to determine the base rate component of factor "e" and the methodology used by the Tribunal to determine factor "r" the trial judge should not have corrected factor r but rather should have permitted the Tribunal in its discretion to reconsider the methodology used to determine factor "e" as well as or in the alternative to reconsider the methodology used to determine factor "r".

Decision

The Court of Appeal confirmed that the trial judge's reasoning in respect of the super royalty and front end payment was correct and that it was just and equitable to include the super royalty and front end payment in the compensation calculation. Hodgson JA also looked at the compensation calculation on the basis of a *Malec*[2] approach by assessing the degrees of probabilities of various possible outcomes and came to the same conclusion.

In respect of the mismatching, the Court of Appeal confirmed the mismatch but found that the trial judge could not correct the error of mismatching in the way he did because that required him to

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* Tony J Wassaf, Partner, Allens Arthur Robinson (who acted for Nardell in these proceedings).

1 (2003) 22 ARELJ 125-127.

2 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.

descend into the merits of the matter and in the administrative law jurisdiction this is not permitted. Where there was an inconsistency either "r" was right but not "e" or "e" was right but not "r" or both were wrong. Which conclusion one should arrive at was the prerogative of the Board or the Tribunal on appeal but not the Court. The court quashed both the determination relating to factor "e" and "r". The court invited the parties to agree on orders by way of directions to the Tribunal that reflect the reasons of the court or alternatively to bring in alternative versions of the orders with supporting written submissions.

On costs, Nardell was ordered to pay the Board's costs of instituting the appeal and preparing the appeal books but otherwise each party was to bear its own costs of the appeal.

QUEENSLAND

APPLICATION TO LODGE CAVEAT*

Arthur v Department of Natural Resources and Mines Anor ([2003] QLRT 100 (Smith DP))

Mining lease – Serious question to be tried – Balance of convenience – No foundation in law – Costs

Background

The applicant sought to lodge second caveats, pursuant to s 304 of the *Mineral Resources Act* 1989 (the MRA), over a number of mining leases. Previously, interim caveats had been granted by the Tribunal.[1]

In the applicant's submission they were, pursuant to previous agreements, royalty holders whose consent was required before any transfer of the interest could be validly made. The current owners of the mine were placed into receivership and the receivers and managers had entered into a sale agreement with a third party without the consent of the applicants.

Serious Question

The applicant's original interest was set out in two deeds, dated 1968 and 1971, which set out their entitlements to royalties from the mining lease as well the consent clauses. The applicant submitted that its interests continued in their original form despite a different agreement being entered into in 1996.

The undertaking to pay damages set out in the earlier deeds continued in force but the consent clause was not included in the 1996 agreement. Smith DP held that the "chain" was therefore cut and that consequently there were no grounds to support the applicant's caveat.

Balance of Convenience

The applicant, in the course of the hearing, entered into an undertaking as to damages in support of their application. However, it was found that the applicant was not able to demonstrate sufficient financial resources to meet any potential costs arising from the consequences of the caveat being lodged. These were the likelihood that the current sale agreement to the third party would fall through, up to 300 jobs would be lost and that the creditors would not receive their full entitlements.

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* Richard Brockett, Research Officer to the Presiding Members, Queensland Land and Resources Tribunal. The full text of these cases can be accessed via the LRT's website: www.lrt.qld.gov.au.

1 [2003] QLRT 94.