

# **Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 2) [2010] NSWLEC 1 (6 January 2010)**

Last Updated: 7 January 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 2) [\[2010\] NSWLEC 1](#)

PARTIES: APPLICANT Caroona Coal Action Group Inc

FIRST RESPONDENT Coal Mines Australia Pty Limited

SECOND RESPONDENT Minister for Mineral Resources

FILE NUMBER(S): 80003 of 2009

CATCHWORDS: JUDICIAL REVIEW :- exploration licences - renewal of licence - subjective statutory pre-condition to renewal - decision-maker must be satisfied that special circumstances exist justifying renewal over certain area - whether challenger established that decision-maker not so satisfied - statutory limit of 5 years on period of renewal - renewal to be construed so as not to exceed statutory power - whether legislative intention that renewal in breach of statutory limit should be invalid - whether privative clause precludes challenge to renewal for breach of statutory limit - partial transfer of licence - whether document or instrument of transfer between transferor and transferee required under statute to effect transfer - statute provides that new authority over part transferred is taken to have been granted for period ending on date of old authority - document setting out terms of new authority purported to provide for later date of expiry - whether any legal consequence - expiry date fixed by operation of statutory provision not terms of new authority - licence to be construed so as not to exceed statutory power - whether legislative intention that renewal in breach of statutory provision should

not be invalid - whether privative clause precludes challenge to partial transfer in breach of statutory provision

LEGISLATION CITED: Coal Mining Act 1973 (NSW) (repealed 1992)[Interpretation Act 1987](#) (NSW) [ss 3, 21, 32](#)[Mining Act 1992](#) (NSW) [ss 19, 27, 114, 115, 117, 120, 121, 122, 123, 137, 159, 237, 296, 370, Part 3, Part 7](#) Division 2 , Schedule 6[Mining Amendment Act 2008](#) (NSW)

CASES CITED: Angelakos v Secretary, Department of Employment and Workplace Relations [\[2007\] FCA 25](#); [\(2007\) 44 AAR 436](#)Attorney-General of NSW v World Best Holdings Ltd [\[2005\] NSWCA 261](#); [\(2005\) 63 NSWLR 557](#) Austral Monsoon Industries Pty Ltd v Pittwater Council [\[2009\] NSWCA 154](#); [\(2009\) 166 LGERA 436](#)Currey v Sutherland Shire Council [\(1998\) 100 LGERA 365](#)Franklins Limited v Penrith City Council and Campbell's Cash and Carry Pty Ltd [\[1999\] NSWCA 134](#)Groth v Secretary, Department of Social Security [\[1995\] FCA 1708](#); [\(1995\) 40 ALD 541](#) Harrington v Lowe [\[1996\] HCA 8](#); [\(1996\) 190 CLR 311](#)Lesnewski v Mosman Municipal Council [\[2005\] NSWCA 99](#); [\(2007\) 138 LGERA 207](#) MLC Properties v Camden Council [\(1997\) 96 LGERA 52](#)Peters v Attorney General for NSW [\(1988\) 16 NSWLR 24](#)Project Blue Sky Inc v Australian Broadcasting Authority [\[1998\] HCA 28](#); [\(1998\) 194 CLR 355](#)R v Hickman; Ex parte Fox [\[1945\] HCA 53](#); [\(1945\) 70 CLR 598](#)R v NG [\[2002\] VSCA 108](#); [\(2002\) 5 VR 257](#)Sportodds Systems Pty Ltd v New South Wales [\[2003\] FCAFC 237](#); [\(2003\) 133 FCR 63](#)Victoria v The Commonwealth [\[1996\] HCA 56](#); [\(1996\) 187 CLR 416](#)Woolworths Ltd v Pallas Newco [\[2004\] NSWCA 422](#); [\(2004\) 61 NSWLR 707](#); [\(2004\) 136 LGERA 288](#) X v ACC [\[2004\] FCA 1475](#); [\(2004\) 139 FCR 413](#)

CORAM: Preston CJ

DATES OF HEARING: 26 October 2009, 27 October 2009

JUDGMENT DATE: 6 January 2010

LEGAL REPRESENTATIVES

APPLICANTMr B R McClintock SC and Ms J S Gleeson

SOLICITORSEnvironmental Defender's Office

FIRST RESPONDENT Mr T F Bathurst QC and Mr R C Beasley

SOLICITORS Minter Ellison

SECOND RESPONDENT Mr R Beech-Jones SC and Ms C C Spruce

SOLICITORS Crown Solicitor's Office

JUDGMENT:

**THE LAND AND**

**ENVIRONMENT COURT**

**OF NEW SOUTH WALES**

**PRESTON CJ**

**6 JANUARY 2010**

**80003 OF 2009**

**CAROONA COAL ACTION GROUP INC V COAL MINES  
AUSTRALIA PTY LIMITED AND MINISTER FOR MINERAL  
RESOURCES (NO 2)**

**JUDGMENT**

**1 HIS HONOUR:**

**Exploration licences are challenged**

The applicant is an incorporated association formed to contest exploration and mining on land in the Caroon district on the Liverpool Plains in NSW. The members of the applicant are landholders in the Caroon district whose properties are within the area of an exploration licence (“EL6505”) granted by the Minister for Mineral Resources (“the Minister”) to Coal Mines Australia Pty Ltd (“CMA”), a subsidiary of BHP Billiton Plc, as well as members of the wider community.

2 EL6505 covers an area of approximately 334 km<sup>2</sup> on the Liverpool Plains, north-west of the Hunter Valley (“the Carooona coal exploration area”). The area covered by EL6505 was formerly part of the area covered by Coal Authorisation No 216 (“A216”) issued in 1980 under the former *Coal Mining Act* 1973 and successively renewed.

3 In these proceedings, brought pursuant to s 296 of the *Mining Act* 1992 (“the [Mining Act](#)”), the applicant challenges the validity of EL6505 and A216, and seeks declarations that EL6505 is void and that the purported partial transfer and purported registration of the partial transfer of A216 are void; an order that CMA be restrained from prospecting for coal and oil shale in the Carooona coal exploration area; and costs.

4 The grounds of the applicant’s challenges to the validity of EL6505 and A216 were amended over the course of the proceedings. In the applicant’s amended points of claim filed in court on 26 October 2009, the grounds of challenge fall into three categories:

(a) *Invalid grant of exploration licence*: EL6505 purports to be a grant of an exploration licence but essential preliminaries to the grant of an exploration licence under [Part 3](#) of the [Mining Act](#) were not complied with, namely:

(i) EL6505 was granted over land subject to another exploration licence, being A216, contrary to s 19(1) of the *Mining Act* (paragraphs 10-14 of the amended points of claim);

(ii) EL6505 was granted without any application or tender being made under Division 1 of Part 3 and the Minister considering any application or tender under Division 3 of Part 3 of the *Mining Act* (paragraphs 15 and 16 of the amended points of claim);

(iii) EL6505 was granted without the Minister taking into account the relevant matters in s 237 of the *Mining Act* (paragraphs 17 and 18 of the amended points of claim; and

(iv) EL6505 was granted for a term exceeding 5 years from the date on which it was granted, contrary to s 27(b) of the *Mining Act* (paragraph 37 of the amended points of claim);

(b) *Invalid renewal of authority:* In the alternative, if EL6505 is a partial transfer of A216 under [Part 7](#) of the [Mining Act](#), A216 was invalid and was not able to partially transferred because:

(i) A216 had been renewed in 1998 and again in 2006 in breach of [s 114\(6\)](#) of the [Mining Act](#), in that the Minister did not satisfy himself that special circumstances existed that justified the renewal of the licence over a larger number of units than half of the number of units over which the licence was in force when the application for renewal was made (paragraphs 8-9A of the amended points of claim); and

(ii) A216 was purportedly renewed in 2006 for a period in excess of 5 years, in breach of [s 114\(3\)](#) of the [Mining Act](#) (paragraphs 20, 24 and 25 of the amended points of claim); and

(c) *Invalid partial transfer of authority:* In the further alternative, if EL6505 is a partial transfer of A216 under [Part 7](#) of the [Mining Act](#), the partial transfer was invalid because:

(i) there was no document of transfer in accordance with [s 123\(2\)](#) of the [Mining Act](#) and EL6505 is not such a document (paragraphs 29-32 of the amended points of claim); and

(ii) EL6505 provides for a date of expiry after the date of expiry of A216, in breach of [s 123\(1\)\(b\)](#) of the [Mining Act](#) (paragraphs 35 and 36 of the amended points of claim).

5 The first category of challenge fell away at the hearing of these proceedings. The Minister and CMA did not contend that EL6505 was the grant of an exploration licence under [Part 3](#) of the [Mining Act](#). Rather, their case was that EL6505 was the product of a transfer of part of A216 under [Part 7](#) of the [Mining Act](#) and that the validity of EL6505 stands or falls on that basis. Accordingly, there is no utility in addressing the applicant's first category of challenge.

### **Summary of decision**

6 I have determined that the applicant has not made out any of the grounds of challenge to the validity of either EL6505 or A216 and, accordingly, the

proceedings should be dismissed. Costs should be reserved for later argument.

7 In light of the publicity and interest in the proceedings, it should be noted that my decision only involves a resolution of the applicant's claims that the authorities challenged were granted in breach of certain statutory requirements, and were thereby invalid, and does not involve any consideration of whether the Minister ought to have granted the authorities. The Court has no jurisdiction to determine, and the applicant's proceedings do not raise, the merits of allowing exploration and mining on agricultural land in the Caroon district or elsewhere.

8 I acknowledge the assistance of Commissioner Pearson in the proceedings.

### **The original grant and early renewals of A216**

9 On 29 April 1980, the Under Secretary for Mineral Resources, on behalf of the Department of Mineral Resources ("the Department") applied for an authorisation to prospect for coal in the Gunnedah Basin under the then in force *Coal Mining Act 1973*. On 9 May 1980, A216 was granted to the Under Secretary on behalf of the Department to prospect for coal in the Gunnedah Basin including the Caroon coal exploration area. A216 was for a term of two years from 9 May 1980. The area of A216 as originally granted was 19,750 km<sup>2</sup>.

10 On 21 May 1982, A216 was renewed for a further term until 24 April 1986. On 13 August 1986, A216 was renewed for a further term until 24 April 1990.

11 In March 1987, the Department reviewed the areas covered by A216. As a result of the review, non-coal bearing areas, or areas where coal is at depths greater than 500m, or unminable due to structural problems, seam thickness or poor quality, were relinquished from 18 September 1987. Parts of the area of A216 were also allocated as other authorisations and as a coal lease. As a result of these part cancellations, by February 1990, the area of A216 had been reduced from the original area of 19,750 km<sup>2</sup> to 9,607 km<sup>2</sup>.

12 On 19 July 1990, A216 was renewed for a further term until 24 April 1993. The area of A216 had been reduced to 8,556 km<sup>2</sup>.

13 On 21 August 1992, the *Coal Mining Act* 1973 was repealed and replaced by the Mining Act. By virtue of cl 4(1) of Schedule 6 to the Mining Act, A216, as an authorisation granted under the *Coal Mining Act* 1973 and in force immediately before the commencement of the Mining Act on 21 August 1992, was taken to be an exploration licence granted under the Mining Act. An exploration licence is “an authority” as defined in the Dictionary to the Mining Act.

14 On 24 April 1993, A216 was renewed for a further term until 24 April 1998. Only three portions of the original area, including the Carroona exploration area, were renewed due to their potential for coal resources development. The total area renewed was about 3,329 km<sup>2</sup>.

### **The renewal of A216 in 1998**

15 On 20 March 1998, the Director-General on behalf of the Department, and on the advice of the Department’s Principal Geologist, applied for A216 to be renewed for a further term of five years. The area of A216 sought to be renewed was 3,252.64 km<sup>2</sup>.

16 The Ministerial Briefing on the renewal of authorities, including A216, noted that A216 was granted to the Department on 9 May 1990 and renewed for successive periods until 24 April 1998 and that the area of A216 was 3,252.64 km<sup>2</sup> to the north-west of the town of Gunnedah. The Ministerial Briefing stated that valid applications for the renewal of each of the authorities, which included A216, for a period of five years had been lodged by the Director-General on behalf of the Department. The Ministerial Briefing noted that individual geological reports for each authority were attached to the Ministerial Briefing and then continued:

“As outlined in the individual reports, each authority requires further geological investigation. In all cases the Department holds the authorities in order to explore for and protect the State’s coal resources prior to their allocation to private interests. Therefore the requirements of Section 114(6) of the Mining Act 1992 (requiring justification for retaining more than half of the area that was in force when the applications were made)

have been satisfied.

The Geological Survey have requested that these titles be renewed.”

17 The Ministerial Briefing concluded with three recommendations, the first that “[i]n accordance with the provisions of [Section 114](#) of the [Mining Act 1992](#)”, the Minister renew A216 for a five year period until 24 April 2003, the second that the Instruments of Renewal be signed and the third that in accordance with the provisions of [s 115\(1\)](#) of the [Mining Act](#), the Minister cause notice of the renewal to be served on the holder.

18 The Instrument for Renewal for A216 enclosed with the Ministerial Briefing stated that A216 “is renewed for a further term until 24 April 2003” and “is renewed over the land described hereunder and shown on the Exploration Area attached hereto.” The attached document entitled “Exploration Area” stated that the “exploration area embraces an area of about 325264 hectares as shown on the diagram hereunder ...”. 325,264 hectares is 3,252.64 km<sup>2</sup>.

19 The Ministerial Briefing was signed by the Department’s Titles Officer, Manager Titles Branch and Director Resource Planning and Development as well as the Director-General.

20 On 24 June 1998, the Minister signed and dated the Ministerial Briefing and, by crossing out the printed words “not approved” and leaving the printed words “approved” and “noted”, the Minister noted the contents of the Ministerial Briefing and approved its recommendations. On the same day, the Director-General and the Minister each signed the Instrument of Renewal of A216 and dated it 24 June 1998. A216 was thereby renewed for a further term until 24 April 2003 over an area of 3,252.64 km<sup>2</sup>.

21 On 17 July 1998, notification of the renewal of A216 was published in the NSW Government Gazette No 108.

### **The renewal of A216 in 2006**

22 On 3 February 2003, a Departmental Minute from Geological Survey reviewed A216 and recommended its renewal. The Minute was signed by the Department’s Geologist, Principal Geologist and Acting Assistant

Director. The Minute recorded that the area of A216 had been renewed and reduced in size for successive periods until 24 April 2003. The Minute recorded that the current area of A216 was approximately “294” km<sup>2</sup> within the Gunnedah Basin and is separated into four areas. Three of the areas were located to the north-west of the township of Gunnedah and one to the south. The area of A216 stated in the Minute of “294” km<sup>2</sup> may be a typographical error because subsequently, in the renewal of A216, the area of A216 is stated to be “2,940” km<sup>2</sup>.

23 The Minute noted that the Department had undertaken a program of exploration during the then current five year period (1998-2003) and stated that the results of the program “provided a greater understanding of the geology, structure, coal geology and coal quality of the Caroonah area and provided the basis for the creation of a detailed geological model”. The Minute noted that “[t]here has been recent interest in the Gunnedah Coalfield by companies looking to gain a resource allocation in this area to ensure short to medium term supply for coal”.

24 The Minute noted that in the next five years, Coal and Petroleum Geology proposed to undertake an update of the computer database, computer 3D modelling, field mapping and further exploration as needed to meet the Department and Government’s requirements. The Minute concluded that:

“It is recommended that A216 be renewed for a period of five (5) years for the full area (294 kms<sup>2</sup>). Renewal of the Authorisation is required to continue coal exploration and resource identification of the area.

The Department holds the Authorisation in order to explore for, identify and protect the State’s coal resources prior to their allocation to the mining industry.”

25 The Geological Survey Minute was the basis of and was attached to a Departmental submission to the Director-General recommending that the Director-General on behalf of the Department apply for renewal of A216. The Director-General submission stated, similarly to the Geological Survey Minute:

“There has been recent interest in the Gunnedah Coalfield by companies

looking to gain a resource allocation in this area to ensure short to medium term supply of coal. Geological Survey therefore request that Authorisation A216 be renewed for a 5 year period (Tab B). This will allow for further investigation and assessment of the coal resources in this area.”

26 On 17 March 2003, the Director-General approved the recommendation and signed and dated it. On 21 March 2003, the Director-General on behalf of the Department applied for renewal of A216 for a further term of 5 years. The area of A216 sought to be renewed was “294” km<sup>2</sup>. This would seem to continue the typographical error made by Geological Survey and the correct area, according to the later renewal documents, should be 2,940 km<sup>2</sup>.

27 On 17 April 2003, notice was given of the receipt of the application for renewal of A216 in the NSW Government Gazette No 74.

28 The application for renewal of A216 was held in abeyance pending the Minister undertaking a process of inviting expressions of interest for the award of an exploration licence over the Caroona coal exploration area.

29 On 1 August 2005, the Minister issued the Caroona Expression of Interest Information document inviting companies to lodge an expression of interest (“EOI”). In the Introduction, the document stated, in part:

“The Minister for Mineral Resources in New South Wales, Australia, invites Expressions of Interest for the awarding of an exploration licence in respect of the Caroona coal exploration area pursuant to the [Mining Act 1992](#) ... The Expression of Interest is for an area of approximately 350 sq km which is expected to contain large underground resources of export quality thermal coal.

The area comprises part of Authorisation 216 (Figure 2), which is currently held by the Department of Primary Industries. The successful applicant will be awarded coal exploration rights over the area for an initial period of 5 years, pursuant to the [Mining Act 1992](#).

A number of companies have approached the Government, seeking access to coal resources in the area. The Minister for Mineral Resources has

decided to call for Expressions of Interest for the awarding of an exploration licence over the area.

Interested parties are required to submit an Expression of Interest to the Department of Primary Industries with details of an exploration and development program.

...

The Minister will select a company/companies or consortium to whom exploration rights over the area will be awarded for an initial period of five years. The continued tenure of the exploration licence during the initial period and any subsequent renewal period will be subject to compliance with agreed commitments and title conditions. The Minister is not bound to accept any of the proposals.”

30 Four companies submitted an EOI, including BHP Billiton in December 2005. BHP Billiton’s EOI was through its wholly owned subsidiary CMA.

31 On 20 January 2006, the Department’s Minerals Development section made a Ministerial Submission to the Minister recommending that the Minister announce CMA as the successful EOI applicant for the exploration licence over the Caroona coal exploration area. The Ministerial Submission referred to A216 and the process by which the recommended successful EOI applicant should be awarded an exploration licence over the Caroona coal exploration area:

“The subject Caroona coal exploration area comprises part of Authorisation 216 under the [Mining Act 1992](#), which is currently held by the Department of Primary Industries. Renewal of this exploration title is pending. It is proposed that the successful EOI applicant be awarded the exploration licence over the subject Caroona coal area by way of part transfer of Authorisation 216.

Awarding of the exploration licence could occur 4-6 weeks after the announcement of the successful EOI.”

32 On 25 January 2006, the Director-General signed and submitted a

Ministerial Briefing to the Minister on the issue of renewal of A216. The terms of the briefing note are important and warrant setting out in full:

## **“Renewal of an Exploration Licence**

### **Issue:**

Renewal of Authorisation No 216 (Act 1973) held by the Director-General, NSW Department of Primary Industries on behalf of the Crown.

### **Background:**

Authorisation No 216 (A216) was granted to the Director-General, Department of Mineral Resources (now DPI) on 9 May 1980, and was renewed for subsequent periods until 24 April 2003.

The original area of A216 covered some 8556 square kilometres in the Narrabri and Gunnedah regions. Various allocations to mining companies since grant have reduced the area to about 2940 square kilometres.

A valid application for the renewal of A216 was received on 21 March 2003. The renewal process was, however, held in abeyance pending the calling for expressions of interest in the Caroon area, which forms part of A216. This was done so that the title could be renewed for five years at the same time as the announcement of a successful tenderer, and part of A216 could then be transferred to the successful entity for the maximum five year term.

A copy of [section 114](#) of the [Mining Act 1992](#), referred to in this briefing, is described on the Additional Information 1.

### **Comment:**

DPI holds authorisations and exploration licences in order to explore, identify and protect the State’s coal resources prior to allocation to the mining industry. Recently there has been increased interest in the Gunnedah Coalfields by companies looking to gain coal resource allocations in this area.

The department has undertaken extensive exploration of A216 since 1980.

Coal Advice has recommended renewal of A216 for 5 years. This will allow for further investigation and assessment of the coal resource.

Once the renewal of A216 is approved the Caroonna area can be Part Transferred to the successful tenderer.

All statutory requirements have been met.

### **Recommendations:**

1. In accordance with [section 114\(1\)\(a\)](#) of the [Mining Act 1992](#), the Minister renew Authorisation 216 (Act 1973) effective from 1 March 2006, for a period of five (5) years, subject to the terms and conditions as set out in the attached Instrument of Renewal document.
2. The Director-General NSW DPI, on behalf of the Crown, and the Minister sign the Instrument of Renewal document and return it to the Maitland Minerals Titles office for registration.”

33 The “Additional Information 1” referred to was an extract of the full text of [s 114](#) of the [Mining Act](#), including subsections (3) and (6).

34 On 17 February 2006, the Minister wrote to BHP Billiton advising that he had selected CMA as the successful EOI applicant for the awarding of the exploration licence over the Caroonna coal exploration area for a period of up to five years and inviting CMA to apply for the exploration licence for that area.

35 On 22 February 2006, the Minister initialled and dated the Ministerial Briefing that had been signed and dated by the Director-General on 25 January 2006 recommending renewal of A216. On the same day, the Minister signed and dated the Instrument of Renewal of A216 that had been enclosed with the Ministerial Briefing. The Instrument of Renewal stated that the licence was renewed for a further term until “28 February 2011”. The area of A216 was stated to be “2940” km<sup>2</sup>.

36 On 3 March 2006, notice of the renewal of A216 was published in the NSW Government Gazette No 30. The area of A216 was stated to be “2940” km<sup>2</sup>. The renewal was stated to be “effective on and from 22 February 2006” for a further term until “28 February 2011”.

## **The partial transfer of A216**

37 On 7 March 2006, BHP Billiton emailed the Department concerning the proposed conditions for the Carooona exploration licence. On 8 March 2006, the Department replied with a modified version of proposed conditions for the exploration licence.

38 On 17 March 2006, the Director of CMA wrote a letter to the Director-General headed “Part Transfer of Authorisation 216”. The letter stated:

“Coal Mines Australia Limited, a wholly owned subsidiary of BHP Billiton, accepts the proposed part transfer of Authorisation No. 216 to it as the successful Expression of Interest applicant for the Carooona coal exploration area as defined in the Carooona Expression of Interest Information document.”

39 On 31 March 2006, the Department’s Minerals Development section made a submission to the Director-General recommending the Director-General approve and submit Form 12 (application for approval of the transfer of an authority) and Form 13 (application for registration of the transfer of an authority) to enable the part transfer of A216 of the Carooona coal exploration area to CMA to proceed. In the Background section, the Director-General submission stated:

“Coal Mines Australia Limited, a member of the BHP Billiton Group, was the successful Expression of Interest applicant for the Carooona Coal Exploration Area. The Premier announced on 17 February 2006 that the company would be awarded an Exploration Licence for five years. This will be achieved administratively by Part Transfer of Authorisation 216 which is held by the Director-General, NSW Department of Primary Industries on behalf of the Crown.

This process requires:

Form 12 Application for Approval of the Transfer of an Authority (attached), and Form 13 Application for Registration of the Transfer of an Authority (attached) to be completed and signed by the holder of the authority (the Director-General).

Once signed, forms will be forwarded to Coal & Petroleum Titles, Maitland for completion of administrative requirements and registration of Part Transfer.”

40 On 5 April 2006, the Director-General (per Peta Johannessen) wrote a letter to CMA with the heading “Part Transfer of Authorisation 216 (Act 1973) from Director-General NSW Department of Primary Industries on behalf of the Crown to Coal Mines Australia Limited Caroon Project Exploration Licence No 6505 (Act 1992)”. The letter stated in part:

“I refer to the application for part transfer of this authority.

Enclosed is a copy of the proposed new authority to be offered to your company. As you aware, it is proposed that the original of this document is to be signed by a relevant officer of your company in the presence of Ian MacDonald, Minister for Mineral Resources. Could you please check this copy and advise as soon as possible if your company is prepared to accept this offer, or if there is anything that requires attention.”

41 The proposed new authority enclosed with the letter was entitled “Exploration Licence” and was in the form of a deed between the Minister and CMA.

42 On 6 April 2006, a Departmental email from Mr Garth Holmes, Manager, Minerals Development noted that the final exploration licence document with conditions was to be ready “for the handover ceremony and signing by the Minister (presently scheduled for Wednesday 12 April ~ 9.30am at Gunnedah).”

43 On 6 and 7 April 2006, various changes were made to the deed that was the exploration licence.

44 On 10 April 2006, the Director-General signed and lodged with the Director-General a completed Form 12: Application for Approval of the Transfer of an Authority and a completed Form 13: Application for Registration of the Transfer of an Authority. The forms were recorded as being received at 9.30am on 10 April 2006.

45 On 11 April 2006, Ms Peta Johannessen, of the Northern Titles section

of the Department, made a submission to both the Director-General and the Minister concerning approval and registration of the part transfer of A216. The terms of the submission are important and warrant setting out in full:

## **“APPROVAL AND REGISTRATION OF PART TRANSFER OF AN AUTHORITY**

### **ISSUE:**

Application for approval and registration of the part transfer of Authorisation 216 (Act 1973) from Director-General NSW Department of Primary Industries on Behalf of the Crown to Coal Mines Australia Limited, a member of the BHP Billiton Group.

### **BACKGROUND:**

Exploration Licence 6505 (part transferred from Authorisation 216) is situated approximately 28 kilometres west north west of Quirindi and covers an area of 344 square kilometres.

Coal Mines Australia Limited, a member of the BHP Billiton Group, was the successful Expression of Interest applicant for the Caroon Coal Exploration Area. The Premier announced on 17 February 2006 that the company would be awarded an Exploration Licence for five years.

### **PRESENT POSITION:**

All requirements have been met.

The Manager, Coal and Petroleum Titles has delegation to approve and register the part transfer of an exploration licence.

### **RECOMMENDATIONS:**

1. Pursuant to the provisions of [Section 121\(1\)\(a\)](#) and [123\(1\)\(b\)](#) of the [Mining Act 1992](#), the Minister approve the transfer of that part of Authorisation 216 (Act 1973) from Director-General NSW Department of Primary Industries on Behalf of the Crown to Coal Mines Australia Limited, a member of the BHP Billiton Group, and

determine the new lease include the conditions set out in the attached document.

2. The new exploration document is signed at the tagged location.
3. Pursuant to [Section 122\(3\)](#) of the [Mining Act 1992](#), the Director-General register Coal Mines Australia Limited (ACN 062 855 270) as the holder of Exploration Licence No. 6505 (Act 1992).”

46 On 12 April 2006, the Department’s Manager, Coal and Petroleum Titles, by delegation from and on behalf of the Minister and the Director-General, circled the word “approved” on the submission and initialled and dated it 12 April 2006. The delegate’s approval had a twofold operation: first, as the Minister’s delegate, it operated as the Minister’s approval of the transfer of part of A216 under [s 121\(1\)\(a\)](#) of the [Mining Act](#) and secondly, as the Director-General’s delegate, it operated to register the transferee, CMA, as the holder of EL6505 under [s 122\(3\)](#) of the [Mining Act](#).

47 The submission also has a handwritten asterisk placed at the end of recommendation 2 and a footnote for the asterisk stating “Document signed by Minister at handover ceremony in Sydney”.

48 On 12 April 2006, the exploration licence EL6505 was executed by CMA and the Minister. According to the asterisk and note on the submission, the Minister executed the licence at the handover ceremony in Sydney. The exploration licence executed was in the form of the deed between the Minister and CMA setting out the terms of the authority which had been previously discussed and agreed.

49 On 5 May 2006, notice of the transfer of part of A216 was published in the NSW Government Gazette No 61. The notice stated that A216 had been transferred in part to CMA and the transfer was registered on 12 April 2006. The notice then stated:

“Pursuant to [Section 123](#) of the [Mining Act 1992](#):

(1) Authorisation No. 216 has been cancelled as to the area transferred;  
and

(2) Exploration Licence No. 6505 has been granted to COAL MINES AUSTRALIA LIMITED over the area transferred for a period until 28

February 2011.”

The notice dated that the area part transferred was an area of about 344 km<sup>2</sup>.

### **The challenge to the renewal of A216**

50 The applicant’s challenge to A216 has as its purpose the undermining of the foundation of EL6505. EL6505 purports to be a transfer of A216. However, if A216 were to have been renewed in breach of [s 114](#) of the [Mining Act](#), and were to be declared invalid, there would be no original authority to be transferred, in whole or part, and hence no new authority could be taken to have been granted.

51 The applicant claims that the renewal of A216 involve two breaches of [s 114](#) of the [Mining Act](#): one of [s 114\(6\)](#), at the time of both the 1998 renewal and the 1996 renewal, and the other of [s 114\(3\)](#) at the time of the 2006 renewal.

### **The [s 114\(6\)](#) claim**

52 [Section 114\(6\)](#) of the [Mining Act](#) provides:

“The number of units over which an exploration licence may be renewed is not to exceed half the number of units over which the licence was in force when the application for the renewal was made unless the Minister is satisfied that special circumstances exist that justify the renewal of the licence over a larger number of units.”

53 The concept of a “unit” is defined in the Dictionary to the [Mining Act](#) to mean “a unit into which a block is divided as referred to in [section 370](#) or, if the Minister so directs in a particular case, part of such a unit.” [Section 370](#) of the [Mining Act](#) provides that, for the purposes of the [Mining Act](#), the surface of the Earth is taken to be divided into graticular sections of 5 minutes of longitude and 5 minutes of latitude ([s 370\(1\)](#)). Each graticular section is divided into 25 units: [s 370\(2\)](#).

54 Put more simply in terms of area of land, [s 114\(6\)](#) provides, in effect, that the area of land over which an exploration licence may be renewed is

not to exceed half the area of land over which the licence was in force when the application for the renewal was made unless the Minister is satisfied that special circumstances exist that justify the renewal of a licence over a larger area of land.

55 The applicant submits that there is no evidence that the Minister satisfied himself prior to the renewal of A216 on 24 June 1998, or the subsequent renewal of A216 on 22 February 2006, that there existed special circumstances that justified the renewal of A216 over an area that exceeded half the area over which A216 had previously been in force. Consequently, there was no validly existing authority available to be partially transferred.

56 The applicant submits that the expression “special circumstances” used in [s 114\(6\)](#) of the [Mining Act](#) requires something to distinguish a case from the ordinary or usual case: *Groth v Secretary, Department of Social Security* [\[1995\] FCA 1708](#); [\(1995\) 40 ALD 541](#) at 545 and *Angelakos v Secretary, Department of Employment and Workplace Relations* [\[2007\] FCA 25](#); [\(2007\) 44 AAR 436](#) at [\[27\]](#)- [\[36\]](#). The applicant submits that there is nothing to indicate that the Minister, either in 1998 or 2006, turned his mind to what might constitute “special circumstances” for the purposes of [s 114\(6\)](#).

57 CMA submitted that the Ministerial briefing prepared for the Minister in 1998 and again in 2006 included matters capable of constituting “special circumstances” within the meaning of [s 114\(6\)](#) of the [Mining Act](#); that both brought the terms of [s 114](#) to the Minister’s attention; and that both were signed or initialled by the Minister. In relation to the 1998 renewal, there was a specific reference to the requirements of [s 114\(6\)](#) in the Ministerial Briefing which the Minister accepted. In relation to the 2006 renewal, a copy of [s 114](#) was attached to the Ministerial Briefing; that Briefing included the statement that “all statutory requirements have been met” and the Minister signed it. CMA submits that the onus is on the applicant to show that the Minister did not form the required opinion of satisfaction under [s 114\(6\)](#). CMA submits that the applicant has not discharged this onus.

58 The Minister also submits that it is for the applicant to prove that the Minister did not consider [s 114\(6\)](#) and the applicant has not done so. In

relation to the 1998 renewal, the Ministerial Briefing signed by the Minister included the statement that the requirements of [s 114\(6\)](#) had been satisfied. In relation to the 2006 renewal, there was a recommendation for renewal for the full area in accordance with the application for renewal. The text of [s 114\(6\)](#) was before the Minister, being part of the extract of [s 114](#) that was attached to the Ministerial Briefing, and the Minister's attention was drawn to circumstances that would distinguish the case from the ordinary or usual case, namely that A216 was held by the Director-General on behalf of the Crown in order to explore, identify and protect the State's coal resources prior to their allocation to the mining industry. To the extent that there is evidence, it indicates that the matter was considered and precludes the drawing of an inference that it was not.

59 The existence of the Minister's mental state of satisfaction under [s 114\(6\)](#) of the [Mining Act](#) that special circumstances exist that justify the renewal of the licence over a larger number of units, is a precondition or an essential preliminary to the exercise of the power to renew an authority over a number of units exceeding half the number of units over which the licence was in force when the application for the renewal was made. Unless the Minister forms that mental state of satisfaction, the prohibition on renewal of the exploration licence over a number of units in excess of half the number of units over which the licence was in force when the application for renewal was made, remains: see discussion on the analogous preconditions in *Currey v Sutherland Shire Council* (1998) 100 [LGERA 365](#) at 372, 374 and *Franklins Limited v Penrith City Council and Campbell's Cash and Carry Pty Ltd* [1999] [NSWCA 134](#) at [18], [28].

60 The question then becomes: has the applicant established that the Minister failed to form the requisite mental state of satisfaction for either the 1998 renewal or 2006 renewal of A216? In my opinion, the applicant has not so established.

61 In relation to the 1998 renewal, on 24 June 1998, the Minister noted the contents and approved the recommendations of the Ministerial Briefing recommending the renewal of A216 over an area of the same size (that is to say the same number of units) as the area over which A216 was in force when the application for renewal was made. The Minister was informed by the Ministerial briefing that:

- (a) A216 was in force until 24 April 1998;
- (b) a valid application for the renewal of A216 for a period of five years had been lodged;
- (c) when the application for renewal was made, A216 covered an area of 3,252.64 km<sup>2</sup>;
- (d) an individual geological report for A216, a copy of which report was attached to the Ministerial Briefing, outlined that the area of A216 requires further geological investigation;
- (e) the Department holds A216 in order to explore for and protect the State's coal resources prior to their allocation to private interests;
- (f) Geological Survey have requested A216 be renewed;
- (g) the Ministerial Briefing recommended the Minister "in accordance with the provisions of [Section 114](#) of the [Mining Act 1992](#)" renew A216 and sign the attached Instrument of Renewal which stated the area of A216 to be renewed was about "325264 ha" which is 3,252.64 km<sup>2</sup>;
- (h) [Section 114\(6\)](#) of the [Mining Act](#) requires justification for retaining more than half of the area that was in force when the applications for renewal were made;
- (i) by reason of the above matters stated in the Ministerial Briefing, "[t]herefore the requirements of Section 114(6) of the Mining Act 1992 (requiring justification retaining more than half of the area that was in force when the applications were made) have been satisfied."

62 The Minister recorded on the Ministerial Briefing that he noted and approved it and he signed the Instrument of Renewal.

63 In these circumstances, the inference should be drawn that the Minister was satisfied under [s 114\(6\)](#) of the [Mining Act](#) that special circumstances existed that justified the renewal of A216 over the same area that was in force when the application for the renewal was made.

64 In relation to the 2006 renewal, it is important to recall that the Minister

was aware that the renewal of A216 was taking place at the same time, and in part in order to facilitate, the transfer of part of A216 to the successful EOI applicant, CMA. The Minister's knowledge at the time of the 2006 renewal was based not only on the information supplied in Ministerial Briefings for the renewal of A216 but also for the transfer of part of A216.

65 Hence, the Minister was aware from the Caroonia Expression of Interest Information document, issued on 1 August 2005, that the Caroonia coal exploration area, in respect of which the Minister had invited expressions of interest, comprised part of A216 and had an area of approximately 350 km<sup>2</sup>. The Minister was informed by the Ministerial Submission of 20 January 2006 that the Caroonia coal exploration area comprises part of A216, that renewal of this exploration title was pending, and that it was proposed that the successful EOI applicant would be awarded the exploration licence over the Caroonia coal exploration area by way of part transfer of A216. Five days after that Ministerial submission, the Director-General signed on 25 January 2006 another Ministerial Briefing dealing specifically with the renewal of A216. This Ministerial Briefing was enclosed under a document stating "brief and talking points". This suggests that the Minister may also have been briefed orally. The Minister was informed by this written Ministerial Briefing that:

- (a) A216 was in force until 24 April 2003;
- (b) a valid application for renewal of A216 was received on 21 March 2003;
- (c) the area of A216 has been reduced since the original grant to an area of about 2,940 km<sup>2</sup>;
- (d) the process of renewal of A216 was held in abeyance pending the calling for Expressions of Interest in the Caroonia coal exploration area which forms part of A216. This was done so that the authority could be renewed for five years at the announcement of a successful tenderer and part of A216 could be transferred to the successful entity for the maximum five year term;
- (e) the Department holds authorisations and exploration licences in order to explore, identify and protect the State's coal resources prior to

allocation to the mining industry;

(f) there has been increased interest in the Gunnedah Coalfields by companies looking to gain coal resource allocations in the area;

(g) the Department has undertaken an extensive exploration of A216 since 1980;

(h) Coal Advice has recommended renewal of A216 for five years. This will allow for further investigation and assessment of the coal resource;

(i) once the renewal of A216 is approved the Caroonna coal exploration area can be part transferred to the successful tenderer;

(j) the recommendation of the Ministerial Briefing was that the Minister renew A216 subject to the terms and conditions as set out in the attached Instrument of Renewal which stated the area of A216 to be about “2940” km<sup>2</sup>;

(k) [Section 114](#) of the [Mining Act](#) is a relevant statutory provision for the renewal of A216 and a copy of [s 114](#) is described in Additional Information 1. The full text of [s 114](#) was quoted in Additional Information 1, including the full text of subsection (6); and

(l) “all statutory requirements have been met”.

66 On 17 February 2006, the Minister informed CMA that he had selected it as the successful EOI applicant for the awarding of the exploration licence over the Caroonna coal exploration area for a period of up to five years and invited it to apply for an exploration licence over that area.

67 On 22 February 2006, the Minister initialled the written Ministerial Briefing and dated it the same day he signed and dated the Instrument of Renewal of A216.

68 In these circumstances, the inference should be drawn that the Minister was satisfied under [s 114\(6\)](#) of the [Mining Act](#) that special circumstances existed that justified the renewal of the licence over the same area that was in force when the application for renewal was made. The special circumstances stated in the Ministerial Briefing which the Minister

approved, related to being able to transfer part of A216 to CMA as the successful EOI applicant and retain the balance of A216 for the Department to explore, identify and protect coal resources prior to their allocation to the mining industry. The Minister's attention was specifically drawn to [s 114](#) of the [Mining Act](#) and its terms were quoted in the attachment. Although unlike the 1998 renewal there was not a specific reference to subsection (6), it was sufficient that the Minister's attention was drawn to: the relevance of [s 114](#); the full terms of the section including subsection (6); the area over which A216 was to be renewed was the same size as the area over which A216 was in force when the application for renewal was made; and particular information about A216, which the Minister could consider constituted special circumstances for the purpose of [s 114\(6\)](#) of the [Mining Act](#).

69 The onus rests on the applicant as the challenger of the Minister's decision to renew A216 to establish that the Minister did not form the required mental state of satisfaction under [s 114\(6\)](#). The applicant can discharge this onus by reference to the documentary material evidencing the decision-making process if that material is sufficient to allow the Court to draw the inference that the Minister did not form the required mental state of satisfaction. However, having regard to all of the documentary evidence, I do not consider that it would be proper to draw the inference that the Minister did not form the mental state of satisfaction required by [s 114\(6\)](#) of the [Mining Act](#). Having regard to all of the documentary evidence, I also do not consider that the applicant has established that the inference should be drawn that the Minister was misled by the statement in the Ministerial Briefing that "all statutory requirements have been met". Viewed in context, I do not consider that this statement meant that the Minister need not turn his mind to the requirement of [s 114\(6\)](#).

70 Apart from relying on the documentary evidence, there are other judicial mechanisms that the applicant could have invoked to establish that the Minister did not form the required mental state of satisfaction. Interrogatories could have been directed to the Minister with a view to eliciting the relevant evidence. Other powers of the Court could be called in aid in order to establish the relevant facts, including seeking a direction under [Part 4 r 4.3](#) of the [Land and Environment Court Rules 2007](#) that the Minister furnish a written statement setting out the Minister's reasons for

the decision. These judicial mechanisms were noted in *Austral Monsoon Industries Pty Ltd v Pittwater Council* [2009] NSWCA 154; (2009) 166 LGERA 436 at [99] and [100]. The applicant did not invoke these judicial mechanisms. The applicant has, therefore, been unable to displace the inference that should properly be drawn from the documentary evidence that the Minister did form the mental state of satisfaction required under [s 114\(6\)](#) of the [Mining Act](#).

71 For these reasons, I reject the applicant's challenge that A216 was renewed in either 1998 or 2006 in breach of [s 114\(6\)](#) of the [Mining Act](#).

### **The [s 114\(3\)](#) claim**

72 [Section 114\(3\)](#) of the [Mining Act](#) provides:

“(3) The period for which an authority is renewed may not on any one occasion exceed:

- (a) 5 years in the case of an exploration licence or assessment lease, or
- (b) 21 years (or such longer period as the Minister may, with the concurrence of the Premier, determine) in the case of a mining lease.”

73 A216 was renewed on 24 June 1998 for a further term until 24 April 2003. Application for renewal of A216 was made on 21 March 2003, before the expiry of the further term of A216. By dint of [s 117\(1\)](#) of the [Mining Act](#), A216 continued to have effect until the application for renewal was finally dealt with. The application for renewal of A216 was approved by the Minister on 22 February 2006. However, the recommendation in the Ministerial Briefing stated that the Minister should renew A216 “effective from 1 March 2006 for a period of five (5) years”, not from the date of approval. The recommendation continued that the Minister should renew A216 “subject to the terms and conditions as set out in the attached Instrument of Renewal document.” The attached Instrument of Renewal stated that A216 is “renewed for a further term until 28 February 2011”. It can be seen that if the renewal had been made effective from 1 March 2006 as recommended, then the period for which A216 was renewed, being until 28 February 2011, would not have exceeded five years and there would have been no breach of [s 114\(3\)](#) of

the [Mining Act](#).

74 However, although the Minister signed and dated the Ministerial Briefing note with this recommendation, when he signed the Instrument of Renewal, instead of inserting the recommended date of 1 March 2006, the Minister inserted by handwriting the date of 22 February 2006. The date of expiry of the further term of A216 was, however, left by the Minister to be 28 February 2006 as already printed on the Instrument of Renewal. The notification of the renewal of A216 published in the Government Gazette used these two dates: the renewal was effective on and from 22 February 2006 and the further term was until 28 February 2011.

75 As a consequence, A216 has been purportedly renewed for a period exceeding five years. If the renewal were to be effective on and from 22 February 2006, the period should not have exceeded 22 February 2011 but instead it extended to 28 February 2011.

76 The applicant claims, as a result of this error, A216 was in breach of [s 114\(3\)](#) of the [Mining Act](#) and is therefore invalid.

77 CMA and the Minister submit that, to the extent that the Instrument of Renewal purported to exceed the maximum period of five years by six days, it should be read down so as not to exceed the power granted by the [Mining Act](#). Such reading down should be done by operation of [s 32\(1\)](#) of the [Interpretation Act 1987](#) or by the common law rules of severance (see *Harrington v Lowe* [\[1996\] HCA 8](#); [\(1996\) 190 CLR 311](#) at 328).

78 Alternatively, if it is not legitimate to read down the Instrument of Renewal so as to be within power, the CMA and the Minister submit that, applying the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* [\[1998\] HCA 28](#); [\(1998\) 194 CLR 355](#), any defect in the period of the Authority would not be such as to lead to the invalidity of A216.

79 Finally, CMA and the Minister submit that the renewal of A216 in 2006 may not be challenged by the applicant by reason of the privative clause in [s 137\(1\)](#) of the [Mining Act](#). Notice of the renewal of A216 had been published in the Government Gazette on 3 March 2006. The applicant did not commence these proceedings challenging the renewal of A216 until 7 July 2009, well after the three months period after the date on

which notice of the renewal was published in the Gazette.

80 I agree with the submissions of CMA and the Minister that A216 should be construed as operating to the full extent of, but so as not to exceed, the power conferred by [s 114\(3\)](#) of the [Mining Act](#). This means that the period for which A216 should be construed as having been renewed is up to but not exceeding five years, that is to say, until 22 February 2011 rather than 28 February 2011.

81 This construction of A216 is required by s 32 of the *Interpretation Act* 1987 (“[Interpretation Act](#)”) which provides:

“(1) An instrument shall be construed as operating to the full extent of, but so as not to exceed, the power conferred by the Act under which it is made.

(2) If any provision of an instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the power conferred by the Act under which it is made:

(a) it shall be a valid provision to the extent to which it is not in excess of that power, and

(b) the remainder of the instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.

(3) This section applies to an instrument in addition to, and without limiting the effect of, any provision of the instrument or of the Act under which it is made.”

82 “Instrument” is defined in [s 3\(1\)](#) of the [Interpretation Act](#) to mean “an instrument (including a statutory rule or an environmental planning instrument) made under an Act, and includes an instrument made under any such instrument.”

83 A reference to an instrument being “made” under an Act is defined in [s 21\(1\)](#) of the [Interpretation Act](#) to include an instrument being issued or granted under an Act.

84 An authority granted, renewed or transferred under the [Mining Act](#) falls within the concept of an “instrument” for the purposes of the [Interpretation Act](#). It is a written legal document whereby rights and responsibilities are created and is designed to carry into effect the [Mining Act](#): see *R v NG* [2002] VSCA 108; (2002) 5 VR 257 at [48], [52] and [56]; *X v ACC* [2004] FCA 1475; (2004) 139 FCR 413 at [27]- [29] and cases therein cited and *MLC Properties v Camden Council* (1997) 96 LGERA 52 at 58-59. Accordingly, an authority granted, renewed or transferred under the [Mining Act](#) is to be read and construed to the extent that it can be as a valid instrument: *Peters v Attorney General for NSW* (1988) 16 NSWLR 24 at 41.

85 A court construing an instrument may be required to construe words and provisions in quite varied ways in order to give effect to the instruction in [s 32](#) of the [Interpretation Act](#). Indeed, as observed in *Sportodds Systems Pty Ltd v New South Wales* [2003] FCAFC 237; (2003) 133 FCR 63 at [21], the court “can make significant changes to the apparently plain meaning of the text when it is clear that the relevant Parliament intended that that should occur”. There are, however, limitations: “the court cannot ‘construe’ the relevant provision, whether by reading down or by expunging invalid provisions, where the effect of doing so is to create a provision which the Parliament did not intend”: *Sportodds Systems Pty Ltd v New South Wales* at [19].<sup>86</sup> In this case, A216 properly can be construed so as to confine the period for which A216 is renewed within the limits of power in [s 114\(3\)](#) of the [Mining Act](#), namely for five years until 22 February 2011 rather than until 28 February 2011. Such a construction would not cause the authority to “operate differently or produce a different result from that which was intended” (*Peters v Attorney-General for NSW* at 41) of effect a “change to the substantial purpose and effect” of A216 (*Harrington v Lowe* at 328). It would not create an authority which either the Parliament or the Minister did not intend to create. This is not a case where the Parliament or the Minister intended the renewed authority of A216 “to operate fully and completely accordingly to its terms, or not at all”: *Victoria v The Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502.

87 If for some reason [s 32](#) of the [Interpretation Act](#) was not applicable to the authority of A216, then application of the common law rules of

severance would lead to the same result: *Harrington v Lowe* at 328 and *R v NG* at [57]-[59].

88 I also agree with CMA and the Minister that the breach in this case of [s 114\(3\)](#) of the [Mining Act](#) is not the kind of breach of statutory provision that would result in invalidity of A216. Having regard to the language of [s 114](#) and [s 114\(3\)](#), and the scope and object of the [Mining Act](#), I do not discern that “it was a purpose of the legislation that an act done in breach of the provision should be invalid”: *Project Blue Sky Inc v Australian Broadcasting Authority* at [93]. As Spigelman CJ noted in *Attorney-General of NSW v World Best Holdings Ltd* [\[2005\] NSWCA 261; \(2005\) 63 NSWLR 557](#) at [\[107\]](#), the word “an” in this test “indicates that a court must look at what Parliament intended to be the consequences of the particular breach under consideration”.

89 In this case, the particular breach of [s 114\(3\)](#) arose from the Minister’s error in inserting in the Instrument of Renewal as the date on and from which A216 was to be renewed, 22 February 2006 rather than 1 March 2006 as had been recommended in the Ministerial Briefing he had approved, and then not changing the expiry date of the five year period from 28 February 2011 which had been already inserted in the Instrument of Renewal, to 22 February 2011. The consequence was that the period of A216 exceeded the maximum five year period by six days, in breach of [s 114\(3\)](#) of the [Mining Act](#). I do not consider that Parliament intended that such a breach should have the consequence that the whole authority should be rendered invalid.

90 Finally, I agree with CMA and the Minister that [s 137\(1\)](#) of the [Mining Act](#) is applicable to the particular breach of [s 114\(3\)](#) in the 2006 renewal of A216. The applicable form of [s 137\(1\)](#) which applies is the former and not the current [s 137\(1\)](#). [Section 137](#) in its current form was inserted into the Act by the [Mining Amendment Act 2008](#), which commenced on 1 August 2008. Clause 111 of Schedule 6 of the [Mining Act](#) provides:

“[Sections 137](#), [210B](#) and [234A](#), as substituted or inserted by the 2008 Act, apply to an authority, mineral claim or opal prospecting licence in force immediately before the section commenced but do not apply to any decision made before that commencement.”

91 The effect of cl 111 is that the new s 137 only applied to decisions made after it came into force (although those decisions can relate to authorities that were in force immediately prior to it being enacted). Consequently, in relation to the decisions made by the Minister in 1998 and 2006 to renew A216 and the decision made by the Minister in 2006 to approve the transfer of part of A216 to CMA, the former s 137 applies. The former s 137(1) provides:

“The grant, renewal or transfer of an authority may not be challenged in any legal proceedings commenced later than 3 months after the date on which notice of the grant, renewal or transfer of the authority is published in the Gazette”.

92 Notice of the renewal of A216 on 2 February 2006, was published in the Gazette on 3 March 2006. The applicant commenced these proceedings by summons filed on 7 July 2009, over three years and three months after notice was published.

93 The Minister’s renewal of A216 satisfied the threefold principle in *R v Hickman; Ex parte Fox* [1945] HCA 53; (1945) 70 CLR 598 at 615 as being a bona fide attempt to exercise the power under s 114 of the [Mining Act](#), relating to the subject matter of the [Mining Act](#), and being reasonably capable of reference to the power given to the Minister. Furthermore, I do not construe the requirement in s 114(3) of the [Mining Act](#) “as being of such significance in the legislative scheme that it constitutes a limitation or requirement that is variously expressed in the authorities as ‘essential’, ‘indispensable’, ‘imperative’ or ‘inviolable’”: *Lesnewski v Mosman Municipal Council* [2005] NSWCA 99; (2007) 138 LGERA 207 at [76] and see also *Woolworths Ltd v Pallas Newco* [2004] NSWCA 422; (2004) 61 NSWLR 707; (2004) 136 LGERA 288 at [81], [84].

94 Accordingly, by operation of s 137(1) of the [Mining Act](#), the renewal of A216 in 2006 may not be challenged in these proceedings on the ground of breach of s 114(3) of the [Mining Act](#).

95 For each of these reasons, I reject the applicant’s challenge that A216 was renewed in 2006 in breach of s 114(3) of the [Mining Act](#).

### **The challenge to the partial transfer of A216**

96 The applicant claims that EL6505 is not a valid transfer of part of A216, because, first, there was no document or instrument of transfer effecting the transfer of part of A216 from the Director-General on behalf of the Crown as transferor and CMA as the transferee and, secondly, the period of EL6505 expires on a date after the date of expiry of A216, in breach of [s 123\(1\)\(b\)](#) of the [Mining Act](#).

### **The document of transfer claim**

97 The applicant claims that in order to transfer an authority under the [Mining Act](#), in whole or part, there needs to be a document or instrument of transfer effecting the transfer from the transferor to the transferee. The applicant submits that there is no such document or instrument of transfer evidencing the transfer of part of A216 from the Director-General to CMA and EL6505 itself is not such a document or instrument.

98 Rather, the applicant submits, EL6505 is in form and content a grant of an exploration licence. The applicant refers to the following matters in EL6505: EL6505 is in the form of a deed; the parties are the Minister and CMA rather than the Director-General as transferor and CMA as transferee; in Recital (b) of the deed the Minister states that he “DOES HEREBY demise and licence to the licence holder” the lands covered by EL6505; Recital (a) of the deed states “in conformity with the Act application was made for an exploration licence” over the lands covered by EL6505; and the habendum which entitles CMA to hold the lands on certain conditions.

99 As a consequence of there not being any document or instrument of transfer, the applicant submits, there never was any transfer of part of A216 and hence there could not have been a registration of the transfer. The purported registration of the transfer of part of A216 was void.

100 CMA and the Minister submit that the applicant has misconstrued the statutory scheme regulating the transfer of authorities under the [Mining Act](#). Contrary to the applicant’s claim, there is no statutory requirement for a document or instrument of transfer between a transferor and transferee which effects the transfer and which needs to be registered. The documents referred to in [s 123\(2\)\(a\)\(b\)](#) of the [Mining Act](#) are different documents serving different purposes to a document or instrument of

transfer. CMA and the Minister submit that in this case [s 123\(2\)\(a\)](#) was not applicable and [s 123\(2\)\(b\)](#) was complied with because the deed that was EL6505 was a document setting out the terms of the new authority, signed by the Minister and the proposed transferee, CMA. All other requirements of Division 2 of [Part 7](#) of the [Mining Act](#) were complied with so as to effect a transfer of part of A216.

101 I agree with CMA and the Minister that the applicant's claim on this ground is founded on a misconstruction of the statutory scheme for transfer of an authority. The statutory scheme for effecting a transfer of an authority is contained in Division 2 of [Part 7](#) of the [Mining Act](#). There is no statutory requirement, either express or implied, for a document or instrument of transfer between a transferor and transferee to effect a transfer of an authority.

102 [Section 120\(1\)](#) of the [Mining Act](#) provides that the "holder of an authority may apply for approval of the transfer of the authority to some other person". "Authority" is defined in the Dictionary to the [Mining Act](#) to include an exploration licence. In this case, the authority was A216 and the holder of that authority was the Director-General. The Director-General applied for approval of the transfer of part of A216 to CMA on 10 April 2006. The application satisfied the relevant requirements of [s 120\(2\)](#) of the [Mining Act](#).

103 The power to approve the transfer of an authority is contained in [s 121\(1\)](#) of the [Mining Act](#). The power resides in the Minister. [Section 121\(1\)](#) provides:

"(1) After considering an application for approval of the transfer and authority, the Minister:

(a) may approve the transfer in accordance with the application,

(b) may refuse the application."

104 When part of an authority is transferred, the exercise of the power under [s 121\(1\)](#) is subject to the requirements of [s 123](#) of the [Mining Act](#). [Section 123\(2\)](#) states procedural conditions to be satisfied before part of an authority is transferred. [Section 123\(1\)](#) states the effect of the transfer of

part of an authority on the original authority and on the new authority created by the transfer. [Section 123](#) provides:

“(1) If part of an authority is transferred under this Division:

(a) the authority (in this section referred to as *the original authority*) is taken to have been cancelled as to the area of the part transferred, and

(b) an authority over the part transferred (in this section referred to as *the new authority*) is taken to have been granted to the transferee for the period ending on the date of expiry of the original authority and to include the conditions determined by the Minister in granting approval of the transfer, and

(c) if the Minister considers that it is necessary to do so as a result of the transfer, the conditions to which the original authority is subject may be amended in the manner determined by the Minister in granting approval of the transfer.

(2) Before part of an authority is transferred:

(a) the Minister and the proposed transferor must sign a document setting out the terms of any proposed amendments of the original authority, and

(b) the Minister and the proposed transferee must sign a document setting out the terms of the proposed new authority.”

105 In this case, on 12 April 2006, the Minister by his delegate, first, approved pursuant to [s 121\(1\)\(a\)](#) of the [Mining Act](#) the transfer of part of A216 in accordance with the application of the Director-General and, secondly, pursuant to [s 123\(2\)\(b\)](#) of the [Mining Act](#) determined that the terms of the new authority be as set out in EL6505. According to the handwritten note on the approved briefing and as had been planned (see email of the Manager, Minerals Development of 6 April 2006), the Minister signed EL6505, being the deed setting out the terms of the proposed new authority for the purposes of [s 123\(2\)\(b\)](#), at the handover ceremony on 12 April 2006. As also had been planned (see letter from Director-General to CMA dated 5 April 2006), CMA also signed EL6505 on 12 April 2006. The Minister and the Director-General did not need to

comply with [s 123\(2\)\(a\)](#) of the [Mining Act](#) as there were no proposed amendments of the original authority of A216.

106 The next step in the statutory scheme after the Minister has approved of the transfer of an authority is registration of the transfer under [s 122](#) of the [Mining Act](#). Registration causes the transfer of an authority approved by the Minister under [s 121\(1\)](#) to become effective; an authority is “transferred” on registration.

107 [Section 122\(1\)](#) provides that the “transferor or transferee of an authority for the transfer of which the Minister has given approval may apply for registration of the transfer.” [Section 122\(2\)](#) requires an application for registration of a transfer to be lodged with the Director-General and accompanied by the appropriate lodgement fee. [Section 122\(3\)](#) provides that “[o]n receipt of such an application the Director-General must register the transferee as the holder of the authority unless registration of the transfer is prohibited by [section 124](#)” (which deals with caveats).

108 The act of registration involves making a record as provided by [s 159](#) of the [Mining Act](#) and cl 22 of the *Mining Regulation 2003* (“[Mining Regulation](#)”). In the case of transfer of part of an authority, this involves recording that the original authority has been cancelled as to the area of the part transferred and the grant of the new authority over the part transferred. The records required to be kept under [s 159](#) of the [Mining Act](#) and cl 22 of the [Mining Regulation](#) are of the authorities granted, renewed, transferred or cancelled under the [Mining Act](#).

109 It is to be noted that there is no requirement in [s 122\(1\)](#) or (2) of the [Mining Act](#) for an application for registration of a transfer of an authority to include a document or instrument of transfer between the transferee and the transferor and there is no requirement in [s 122\(3\)](#) or [s 159](#) of the [Mining Act](#) or cl 22 of the [Mining Regulation](#) for the Director-General to register any such document or instrument of transfer. The references in s 122 to registration of “the transfer” is a reference to registration of the act or event of transfer of an authority approved by the Minister and not a document or instrument of transfer.

110 In this case, the Director-General who was the transferor of part of

A216 applied for registration of the transfer of part of A216 by lodging Form 13: Application for Registration of the Transfer of an Authority with the Director-General. The application was received by the Director-General on 10 April 2006. The Director-General by his delegate, on 12 April 2006, registered CMA as the holder of the new authority of EL6505. The decision of the Director-General's delegate is recorded on the same document as the approval of the Minister's delegate to the transfer. Notification of the registration of the transfer on 12 April 2006 was published in the Government Gazette on 5 May 2006.

111 [Section 122\(4\)](#) of the [Mining Act](#) provides that “[o]n registration, the transferee becomes the holder of the authority ...”. The effect of [s 122\(4\)](#) is that the transfer approved by the Minister becomes effective on registration of the transfer by the Director-General under [s 122\(3\)](#) and [s 159](#) of the [Mining Act](#). If the transfer is of part of an authority, the partial transfer becomes effective as provided for in [s 123\(1\)](#) of the [Mining Act](#), including that the original authority is taken to have been cancelled as to the area of the part transferred ([s 123\(1\)\(a\)](#)) and the new authority over the part transferred is taken to have been granted to the transferee for the period ending on the date of expiry of the original authority ([s 123\(1\)\(b\)](#)).

112 In this case, therefore, on registration on 12 April 2006 by the Director-General of the transfer of part of A216 approved by the Minister:

- (a) CMA became the holder of the new authority of EL6505, pursuant to [s 122\(4\)](#);
- (b) A216 was taken to have been cancelled as to the area of the part of A216 transferred, in accordance with [s 123\(1\)\(a\)](#); and
- (c) EL6505 being the new authority over the part of A216 transferred was taken to have been granted to CMA for the period ending on the date of expiry of the original authority of A216, in accordance with [s 123\(1\)\(b\)](#) of the [Mining Act](#).

113 It can be seen that nowhere in this statutory scheme for the transfer of authorities is there a requirement for a document or instrument of transfer between the transferor and the transferee to effect the transfer of an authority either in whole or part. The applicant's claim, therefore, that

there is no such document or instrument of transfer and that EL6505 is not such a document or instrument of transfer is without legal consequence. The transfer of part of A216 was required to be, and would be effective if, carried out in accordance with Division 2 of [Part 7](#) of the [Mining Act](#) and these provisions do not include any requirement for the execution and registration of a document or instrument of transfer between the Director-General as transferor and CMA as transferee. On the evidence, the transfer of part of A216 did comply with the applicable requirements of Division 2 of [Part 7](#) of the [Mining Act](#) and the transfer was effective. It matters not that EL6505 is not a document or instrument of transfer between the Director-General and CMA.

114 There is also no statutory requirement for the registration of a document or instrument of transfer between the transferor and transferee. The documents required to be lodged with an application for registration are as specified in [s 122](#) of the [Mining Act](#). On receipt of an application for registration of the transfer, the Director-General registers the transferee as the holder of the authority transferred, under [s 122\(3\)](#) of the [Mining Act](#), and causes a record to be kept of the authorities granted, transferred or cancelled, as is appropriate to the transfer involved, under [s 159\(1\)](#) of the [Mining Act](#) and cl 22 of the [Mining Regulation](#). However, the Director-General does not register a document or instrument of transfer.

115 For these reasons, I reject the applicant's claim that the partial transfer of A216 that resulted in the grant of EL6505 was in breach of Division 2 of [Part 7](#) of the [Mining Act](#) and was invalid by reason of the absence of a document or instrument of transfer between the Director-General and CMA effecting the partial transfer. It follows that the applicant's challenge to the registration of EL6505 also fails.

### **The [s 123\(1\)\(b\)](#) claim**

116 The applicant claims that EL6505 provides that its term is five years from the date of EL6505 (12 April 2006) and hence expires on 12 April 2011. However, by reason of [s 123\(1\)\(b\)](#) of the [Mining Act](#), EL6505 should have been granted for the period ending on the date of expiry of the original authority of A216 (28 February 2011). Hence, the applicant submits, EL6505 was granted for a period ending on a date after the date of expiry of A216 in breach of [s 123\(1\)\(b\)](#) of the [Mining Act](#). As a

consequence, the applicant submits that EL6505 is void.

117 CMA and the Minister submit that the period for which the new authority of EL6505 is granted is determined by operation of s 123(1)(b) of the Act and not by the deed setting out the terms of the new authority. Section 123(1)(b) has a deeming effect: if part of an authority is transferred under Division 2 of [Part 7](#) of the [Mining Act](#), the new authority over the part transferred “is taken to have been granted to the transferee for the period ending on the date of expiry of the original authority”. By operation of this provision, the new authority of EL6505 was taken to have been granted for the period ending on the date of expiry of A216. The statement in the deed that the period of EL6505 would expire five years from the date of the deed was legally ineffective; the period of EL6505 was fixed by operation of [s 123\(1\)\(b\)](#) and the deed could not alter this. As a result, there could be no breach of [s 123\(1\)\(b\)](#) because [s 123\(1\)\(b\)](#) operates to fix the period of EL6505.

118 Alternatively, CMA and the Minister make the same submissions they made in relation the applicant’s claim that the renewal of A216 in 2006 was for a period exceeding that permitted by [s 114\(3\)\(a\)](#) of the [Mining Act](#), namely, the validity of EL6505 is preserved by [s 32](#) of the [Interpretation Act 1987](#) or the common law, the breach is not one that Parliament intended should have the consequence of rendering the whole authority invalid, and [s 137](#) of the [Mining Act](#) applies to prevent challenge to EL6505 for this breach.

119 I agree with each of the submissions of CMA and the Minister in relation to this ground of challenge of the applicant. There is no breach of [s 123\(1\)\(b\)](#) of the [Mining Act](#) because the period for which EL6505 is taken to have been granted is fixed by operation of [s 123\(1\)\(b\)](#) and not by the terms of EL6505. Hence, EL6505 is taken to have been granted for the period ending on the date of expiry of A216 and not the date specified in the deed that sets out the terms of EL6505.

120 Alternatively, EL6505 should be construed, by reason of [s 32](#) of the [Interpretation Act](#), as operating to the full extent of, but so as not to exceed, [s 123\(1\)\(b\)](#) of the [Mining Act](#). This would confine the period for which EL6505 is taken to have been granted so as to end on the date of expiry of A216. To do so would not be to create an authority which either

the Parliament or the Minister (by his delegate) did not intend. The authority was clearly not intended to operate fully and completely according to its terms or not at all.

121 The same conclusion can be reached by reference to the test in *Project Blue Sky Inc v Australian Broadcasting Authority*. For reasons similar to those which I have given in relation to the applicant's challenge concerning [s 114\(3\)](#) of the [Mining Act](#), Parliament did not intend that the particular breach of [s 123\(1\)\(b\)](#) in this case should have the consequence of rendering the whole authority of EL6505 invalid.

122 Finally, the privative clause of [s 137\(1\)](#) of the [Mining Act](#) applies to protect EL6505 from challenging these proceedings for this particular breach of [s 123\(1\)\(b\)](#), for reasons similar to those which I have given in relation to the applicant's challenge concerning [s 114\(3\)](#) of the [Mining Act](#).

123 Accordingly, I reject the applicant's challenge that EL6505 was granted in breach of [s 123\(1\)\(b\)](#) of the [Mining Act](#).

### **Conclusion and orders**

124 The applicant has not established any of its grounds of challenge to EL6505 or A216. The proceedings should therefore be dismissed. I will reserve the question of costs to provide the parties with an opportunity to make submissions. A party who seeks an order for costs should approach the Registrar within 7 days for an order fixing a hearing on costs and directions for filing and serving written submissions on costs prior to the hearing.

125 The Court orders:

1. The proceedings are dismissed.
2. The costs of the proceedings are reserved.

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