Supreme Court of New South Wales - Court of Appeal

Jemena Gas Networks (NSW) Limited v Mine Subsidence Board [2010] NSWCA 146 (28 June 2010)

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NEW SOUTH WALES COURT OF APPEALCITATION: Jemena Gas Networks (NSW) Limited v Mine Subsidence Board [2010] NSWCA 146FILE NUMBER(S): 2009/00298413HEARING DATE(S): 17 May 2010JUDGMENT DATE: 28 June 2010PARTIES: Jemena Gas Networks (NSW) Limited (Appellant)Mine Subsidence Board (Respondent)JUDGMENT OF: Spigelman CJ Allsop P Giles JA Basten JA Macfarlan JA LOWER COURT JURISDICTION: Land & Environment CourtLOWER COURT FILE NUMBER(S): 30944/2008LOWER COURT JUDICIAL OFFICER: Sheahan JLOWER COURT DATE OF DECISION: 30 June 2009LOWER COURT MEDIUM NEUTRAL CITATION: Jemena Gas Networks (NSW) Limited v Mine Subsidence Board [2009] NSWLEC 106COUNSEL: R J Ellicott QC with J Williams (Appellant) S Lloyd SC with S Free (Respondent)SOLICITORS: Freehills (Appellant)Crown Solicitor’s Office (Respondent)CATCHWORDS: ENERGY AND RESOURCESstatutory regulationcompensation for subsidence caused by coal miningwhether compensation can be claimed for works done to prevent or mitigate damage from anticipated subsidenceinterpretation of ss 12, 12A, 12B and 13A of the Mine Subsidence Compensation Act 1961APPEALdoctrine of precedentstandard of reconsideration“plainly” or “clearly”

wrongcircumstances in which Court of Appeal will depart from its earlier decisionsapplication of doctrine of precedent to five judge courtwhether Mine Subsidence Board v Wambo Coal Pty Ltd [2007] NSWCA 137 correctly decidedWORDS AND PHRASES“a subsidence”“from subsidence”“by reason of subsidence”LEGISLATION CITED: Coal Mines Regulation Act 1982Land and Environment Court Act 1979Mine Subsidence Act 1928Mine Subsidence Compensation Act 1961CATEGORY: Principal judgmentCASES CITED: Alinta LGA Limited (formerly The Australian Gaslight Co) v Mine Subsidence Board [2008] HCA 17; (2008) 82 ALJR 826Clutha Development Pty Ltd v Barry (1989) 18 NSWLR 86Commonwealth v Hospital Contribution Fund of Australia [1982] HCA 13; (1982) 150 CLR 49Gett v Tabet [2009] NSWCA 76; (2009) 254 ALR 504Henville v Walker [2001] HCA 52; (2001) 206 CLR 459Mine Subsidence Board v Wambo Coal Pty Ltd [2007] NSWCA 137; (2007) 154 LGERA 60Morelle v Wakeling [1955] 2 QB 379R v Roussety [2008] VSCA 259; (2008) 192 A Crim R 32Telstra Corporation Ltd v Treloar [2000] FCA 1170; (2000) 102 FCR 595The Queen v BDX [2009] VSCA 28Wambo Coal Pty Ltd v Mine Subsidence Board [2006] NSWLEC 528; (2006) 147 LGERA 457Williams v Fawcett [1986] QB 604Young v Bristol Aeroplane Co Ltd [1944] KB 718Younghusband v Luftig [1949] 2 KB 354TEXTS CITED: DECISION: Appeal dismissed with costs.JUDGMENT:

IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL

2009/00298413

SPIGELMAN CJ

ALLSOP P

GILES JA

BASTEN JA

MACFARLAN JA

Monday 28 June 2010

JEMENA GAS NETWORKS (NSW) LIMITED v MINE SUBSIDENCE BOARD

FACTS

The appellant is the owner and operator of the Moomba to Sydney gas pipeline. The pipeline traverses an area of land known as Mallaty Creek, which is the subject of an underground coal-mining lease. In December 2004, this lease encompassed a block of parallel, adjacent panels of coal that had been approved for longwall mining (Longwalls 29 to 33).

The appellant did not anticipate that the extraction of coal from Longwalls 29 to 31 would cause such subsidence as to damage the pipeline. However, the appellant anticipated that subsidence occasioned by extraction from Longwall 32 would endanger the pipeline.

In October 2006, prior to the mining of Longwall 32, the appellant commenced works that were designed to prevent or mitigate damage from the anticipated subsidence. On 17 July 2007, pursuant to the *Mine Subsidence Compensation Act* 1961 ("the Act"), the appellant made a claim for compensation upon the respondent ("the Board") with respect to these works. On 23 July 2008, the Board rejected the appellant's claim.

The appellant appealed to the Land and Environment Court.

Sheahan J, applying the decision in *Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137; (2007) 154 LGERA 60 ("Wambo"), held that the works for which compensation was sought were not incurred with respect to a subsidence that had taken place, but were incurred in anticipation of a future subsidence. Accordingly, no compensation was payable.

The appellant contends in this court:

(i) that *Wambo* is distinguishable, as in this case, unlike in *Wambo*, some "initial subsidence" had occurred prior to the commencement of the works undertaken to prevent "further subsidence"; and,

(ii) alternatively, that *Wambo* was wrongly decided.

HELD

Per Spigelman CJ, Allsop P, Giles, Basten and Macfarlan JJA agreeing

1 An intermediate appellate court is entitled to depart from its earlier authority when that authority is "plainly" or "clearly" wrong. It was not submitted that a different test is applicable because the Court has elected to sit a bench of five judges rather than a bench of three. [48] [56] [97] [98] [168] [189]

Gett v Tabet [2009] NSWCA 76; (2009) 254 ALR 504, applied.

Clutha Development Pty Ltd v Barry (1989) 18 NSWLR 86; *R v Roussety* [2008] VSCA 259; (2008) 192 A Crim R 32; *The Queen v BDX* [2009] VSCA 28; *Telstra Corporation Ltd v Treloar* [2000] FCA 1170; (2000) 102 FCR 595, considered.

Commonwealth v Hospital Contribution Fund of Australia [1982] HCA 13; (1982) 150 CLR 49; *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; *Younghusband v Luftig* [1949] 2 KB 354; *Morelle v Wakeling* [1955] 2 QB 379, referred to.

2 The view expressed by the Court in *Wambo* cannot be regarded as one that is "plainly" or "clearly" wrong. Accordingly, this Court is bound to follow the decision in *Wambo*. [95] [97] [98] [172] [189]

Per Spigelman CJ, Allsop P, Giles and Macfarlan JJA agreeing

3 Paragraph [37] of Tobias JA's judgement in *Wambo* is not a basis for distinguishing that decision. His Honour's comments in that paragraph were not part of the ratio of the case. [34] [41] [97] [98] [190]

Mine Subsidence Board v Wambo Coal Pty Ltd [2007] NSWCA 137; (2007) 154 LGERA 60, considered.

4 The trial judge was correct to treat the mining of each longwall as a separate course of conduct with respect to the "extraction of coal". The subsidence occasioned from the mining of Longwall 32 was not, therefore, "further subsidence" following "initial subsidence" and *Wambo* cannot be distinguished on this basis. [38] [40] [97] [98] [190]

Mine Subsidence Board v Wambo Coal Pty Ltd [2007] NSWCA 137; (2007) 154 LGERA 60, considered.

Henville v Walker [2001] HCA 52; (2001) 206 CLR 459, referred to.

Per Spigelman CJ, Allsop P, Giles JA agreeing

5 *Wambo* interpreted s 12A(1)(b) as authorising claims for expenditure that had been incurred to prevent or mitigate damage from "a subsidence that has (*already*) taken place" (emphasis added). The Court in *Wambo* held that s 12A(1)(b) does not authorise expenditure made in anticipation of a subsidence that has not yet occurred. This interpretation is correct. [81] [95] [97] [98]

Mine Subsidence Board v Wambo Coal Pty Ltd [2007] NSWCA 137; (2007) 154 LGERA 60, affirmed.

Alinta LGA Limited (formerly The Australian Gaslight Co) v Mine Subsidence Board [2008] HCA 17; (2008) 82 ALJR 826; *Wambo Coal Pty Ltd v Mine Subsidence Board* [2006] NSWLEC 528; (2006) 147 LGERA 457, considered.

6 There is no syntactical or grammatical link between the reference to "subsidence that has taken place" and the reference to the "opinion of the Board". [78] [82] [97] [98]

Per Basten JA, Macfarlan JA agreeing

7 The reference in s 12A(1)(b) of the Act to "a subsidence that has taken place" is to subsidence that has occurred by the time the Board forms the opinion referred to in that paragraph, rather than the time the owner anticipates damage. [144] [189]

Mine Subsidence Board v Wambo Coal Pty Ltd [2007] NSWCA 137;

(2007) 154 LGERA 60, disapproved.

Alinta LGA Ltd (formerly The Australian Gaslight Company Ltd) v Mines Subsidence Board [2008] HCA 17; (2008) 82 ALJR 826, referred to.

8 The contrary view expressed in *Wambo* (and accepted by the majority in the present case) cannot be regarded as one that is "plainly" or "clearly" wrong. Accordingly, this Court is bound to follow the decision in Wambo, irrespective of the alternative construction of s 12A(1)(b) contended for by the minority. [172] [189]

Per Basten JA

9 Whether or not a particular subsidence, which is exacerbated as mining continues, is part of a relevant subsidence for the purposes of s 12A will involve questions of fact. That being so, on the agreed facts in the present case, it was inappropriate to determine whether the "initial subsidence" was part of the subsidence occurring after the mining of Longwall 32. [185] [186]

ORDERS

Appeal dismissed with costs.

IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL

2009/00298413

SPIGELMAN CJ

ALLSOP P

GILES JA

BASTEN JA

MACFARLAN JA

Date

JEMENA GAS NETWORKS (NSW) LIMITED v MINE SUBSIDENCE BOARD

Judgment

1 SPIGELMAN CJ: Pursuant to the provisions of the *Mine Subsidence Compensation Act* 1961 ("the Act"), the appellant made a claim for compensation upon the respondent ("the Board") with respect to certain mitigation and preventative works undertaken on the Moomba to Sydney gas pipeline, of which the appellant is the owner and operator. Those works were undertaken to prevent damage to the pipeline from subsidence of the ground occasioned by the operation of an underground colliery. The claim was rejected by the Board. Pursuant to the provisions of the Act, the appellant appealed to the Land and Environment Court.

2 In the proceedings below, Sheahan J identified a separate question which, the parties agreed, would dispose of the whole of the appeal if answered in the negative. (*Jemena Gas Networks (NSW) Limited v Mine Subsidence Board* [2009] NSWLEC 106; (2009) 167 LGERA 308.) That question was:

"Whether the Applicant is entitled to an amount under section 12A(1)(b) of the Mine Subsidence Compensation Act 1961 (NSW) in respect of expenses that it incurred in performing work on the Sydney to Moomba Gas Pipeline in circumstances where subsidence occurred at or near Mallaty Creek near Campbelltown in or about October 2005, on the assumption that the applicant can establish that, for the purposes of that section, the expenses incurred by it were 'proper and necessary'."

3 His Honour answered the question "No". To put it shortly, his Honour held that the works for which compensation was sought were not incurred with respect to a subsidence that had taken place, but were incurred in anticipation of a future subsidence. His Honour applied a judgment of this Court which held that the relevant section of the Act provided compensation only in the former case. (*Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137; (2007) 154 LGERA 60 ("*Wambo*").)

4 The appellant contends that *Wambo* is distinguishable. Alternatively, it contends that *Wambo* was wrongly decided.

Background Facts

5 The relevant facts are not in dispute and can be briefly stated:

The Moomba to Sydney gas pipeline crosses an area of land which is the subject of the West Cliff Mining Lease held by a subsidiary of BHP Limited ("BHP").

On or about 24 December 2004, BHP obtained consent for the longwall mining of Longwall Panels 29, 30, part 31, 32 and 33 at the West Cliff Colliery. Longwalls 29 and 30 (taken together) and 31 to 33 inclusive are

parallel and adjacent longwalls, with Longwalls 29 and 30 being the most southerly and Longwall 33 being the most northerly.

Mallaty Creek passes over the area of Longwalls 31 to 36. The pipeline crosses Mallaty Creek over the area of Longwall 32.

Pursuant to expert advice, the mining of Longwall 30 and 31 was not expected to cause subsidence that would endanger the pipeline. The effect on the pipeline would be "within acceptable stress levels".

The same expert advice indicated that the anticipated pipeline stress at Mallaty Creek, resulting from the extraction from Longwall 32, would exceed acceptable stress levels and, accordingly, the pipeline would be endangered.

Prior to July 2005 the appellant commenced the process of planning works to prevent or mitigate damage to the pipeline.

In October 2005 subsidence of 31.8mm was recorded at the intersection of the pipeline and Mallaty Creek as a result of longwall mining to that date.

Between December 2005 and October 2006 the appellant commenced engineering and design works to prevent or mitigate damage to the pipeline.

In October 2006 preventative and mitigation works commenced on both sides of Mallaty Creek. The works involved excavation of the pipeline, decoupling of the pipeline from the soil, and associated filling.

On 20 December 2006, the last survey prior to the commencement of mining of Longwall 32, the subsidence recorded at the intersection of the

pipeline and Mallaty Creek was 42.3mm.

Mining of Longwall 32 commenced in or about February 2007. On 30 April 2007 subsidence of 140.4mm was recorded at the intersection of the pipeline and Mallaty Creek. This had reached 274.7mm by 28 August 2007.

6 On 17 July 2007 the appellant made a claim for compensation from the Mine Subsidence Compensation Fund for the costs of the preventative and mitigation work performed on the pipeline. On 23 July 2008 the Board rejected the appellant’s claim on the basis that the preventative and mitigation works related to anticipated subsidence and not to subsidence that had taken place.

The Legislative Scheme

7 The claim for compensation was made pursuant to s 12A(1)(b) of the Act which provides:

“12A(1) Subject to this section, claims may be made under this Act for payment from the Fund of:

...

(b) an amount to meet the proper and necessary expense incurred or proposed by or on behalf of the owner of improvements or household or other effects in preventing or mitigating damage to those improvements or household or other effects that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has

taken place, other than a subsidence due to operations carried on by the owner."

8 The critical words which require application in the present case are:

" ... the proper and necessary expense incurred ... in preventing or mitigating damage ... that ... the owner ... could reasonably anticipate would ... arise, from a subsidence that has taken place ..."

9 The legislative scheme within which this provision must be interpreted was set out in a joint judgment of the High Court in *Alinta LGA Limited (formerly The Australian Gaslight Co) v Mine Subsidence Board* [2008] HCA 17; (2008) 82 ALJR 826 at [15]- [31].

10 Section 4 contains the following relevant definition:

"Subsidence means subsidence due to:

(a) the extraction of coal or shale ... and includes all vibrations or other movements of the ground related to any such extraction ... "

11 The Act, as originally enacted, made provision for compensation claims in s 12(1), which, relevantly, provides:

"12(1) Claims may be made under this Act for payment from the Fund of:

(a) compensation for any damage to improvements that arises from

subsidence, except where the subsidence is due to operations carried on by the owner of the improvements,

(b) an amount to meet the proper and necessary expense incurred or to be incurred as a result of such damage in:

(i) building retaining walls or bolting together or underpinning or otherwise supporting, raising or repairing buildings and walls,

(ii) altering the approaches to or the levels of lands or buildings,

(iii) raising, lowering, diverting or making good roads, tramways, railways, pipelines, bridges, fences, sewers, drains or other improvements, ..."

12 Section 12A, which is of direct relevance in this case, was inserted into the Act at the same time as s 13A. That section provides:

"13A The Board may carry out, or cause to be carried out such works as, in its opinion, would reduce the total prospective liability of the Fund by preventing or mitigating damage that the Board anticipates would, but for those works, be incurred by reason of subsidence, whether or not the damage anticipated is damage to improvements or household or other effects on the land on which the works are to be carried out."

13 Section 12A(1)(a) makes provision for a claim to be made for payment of:

"... compensation for damages incurred as a result of the exercise by the Board by its powers under section 13A ..."

14 Section 12B provides for a limited right of appeal in the following terms:

“12B A person claiming compensation under section 12 or 12A may appeal to the Land and Environment Court against the decision of the Board:

(a) as to whether damage has arisen from subsidence or could reasonably have been anticipated, or

(b) as to the amount of the payment from the Fund.”

15 The words “damage has arisen from subsidence” in 12B(a) appears to be a reference back to s 12(1)(a). The words “or could reasonably have been anticipated” appear to be a reference back to s 12A(1)(b).

16 As the High Court observed in *Alinta LGA* supra at [60]:

“[60] ... the subject matter prescribed in pars (a) and (b) is identified and delimited by the language of ss 12 and 12A. This proposition is elucidated by a textual comparison. The disjunctive expression "arisen from subsidence or could reasonably have been anticipated" in para (a) corresponds to the language used to prescribe causal elements of claims under ss 12 and 12A respectively. Under s 12(1), compensation may be claimed for damage which "*arises from subsidence*"(s 12(1)(a) and (d)) (emphasis added). That language is adopted by the first limb of s 12B(a) which refers to a decision "as to whether damage *has arisen from subsidence*" (emphasis added). By way of example, the Board may decide on a claim under s 12(1)(a) that there is no damage or less damage than is

claimed or that the relevant damage pre-existed the alleged subsidence or has some other cause. Those decisions would be decisions as to the subject matter identified by s 12B(a). Similarly, a claim may be brought under s 12A(1)(b) in respect of an amount to meet the expense of preventing or mitigating damage that, in the opinion of the Board, the owner could "*reasonably have anticipated* would otherwise have arisen, or could *reasonably anticipate* would otherwise arise" from a subsidence that has taken place (emphasis added). This language is reflected by the second limb of s 12B(a). This provides a right of appeal against a decision "as to whether damage ... *could reasonably have been anticipated*". Pursuant to s 12B(a), an appeal lies to the Land and Environment Court against the Board's decision as to that subject matter on a claim under s 12A."

17 Section 12B does not create a right of appeal from the exercise by the Board of its discretion to carry out works under s 13A.

The Judgment of Sheahan J

18 The argument before Sheahan J turned to a significant degree on the applicability of this Court's judgment in *Wambo* and, in particular, on the observations made by Tobias JA at paragraph [37] of that judgment, which I will set out below. Tobias JA, with whom Hodgson and Santow JJA agreed, gave detailed reasons for concluding that s 12A(1)(b) did not authorise payment of compensation for expenditure incurred in anticipation of subsidence which had not occurred at the time of the expenditure. This analysis turned on the words "has taken place" in the subsection. I will return to consider his Honour's reasons further below.

19 Sheahan J held:

That there was no basis to distinguish *Wambo* (at [35]).

That paragraph [37] of the reasons of Tobias JA, upon which the appellant relied, had to be understood in the context of the whole of his Honour's reasons (at [43]) and was not part of the ratio of the case (at [45]).

A particular incident of subsidence has to be linked to the damage, both in temporal and causal terms (at [46]).

In this case, even if the appellant had established a temporal connection, it had not proven the causal link (at [47]).

The first observed subsidence of October 2005 was not "part of the subsidence expected from planned later mining" (at [49]).

Each Longwall was a distinct extraction, with distinct consequences (at [49]).

BHP could cease mining at any time and, accordingly, there was no guarantee that mining would proceed to the point where the pipeline was threatened (at [49], [51]).

Each stage of the planned mining had its own "identifiable consequences in terms of subsidence and potential for damage to the improvement" (at [52]).

For compensation to be payable under the Act, "there must be actual movement caused by actual prospecting or extraction" (at [52]).

The avenue that ought to have been followed by the applicant, as it in fact

was by the owner of the adjacent gas pipeline, was that provided by s 13A (at [55]).

The Appellant’s Contentions

20 The appellant contended that, in this case, there was initial subsidence, even though it was not of itself so extensive as to cause immediate or significant damage. Further subsidence at the same location was anticipated.

21 The appellant contended that Sheahan J erred in finding that a particular "incident" of subsidence has to be linked to anticipated damage, real or anticipated, both in temporal and causal terms. The mining of each of the longwalls, it submitted, should not be treated as separate “incidents” of subsidence. On the contrary, it submitted that “the mining programme was essentially continuous from April 2003”, and, accordingly, “the subsidence was ongoing as the mining progressed”. There was, it submitted, a “continuous process of subsidence” rather than “a series of discrete subsidences”. The anticipation of damage, it submitted, could only be based on the “cumulative subsidence from the mining of Longwalls 30 to 32”.

22 The appellant also submitted that the ultimate question is one of causation. It submitted that, whether a “but for” or a “commonsense” test of causation is applied, it is satisfied in the present case. The earlier subsidence observed in October 2005 was “was an essential component of the cumulative subsidence that would have caused damage to the pipeline”. Accordingly, the original subsidence must be regarded as “*a* cause”, in accordance with the analysis of the High Court in *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 at [14], [61] and [63].

23 The appellant contended that the purpose of s 12A(1)(b) is to facilitate preventative works on the premise that prevention is, more often than not, better than cure. In the present case, it submitted, to await the occurrence of actual subsidence could have serious, even catastrophic, results.

24 In this context, the appellant submitted that the trial judge erred in identifying s 13A as the mechanism by which the appellant could have proceeded in anticipation of the damage. As set out above, s 13A requires the Board to carry out preventative works itself.

25 The appellant observed that there is no guarantee that the Board will exercise its discretion to carry out such works and that there may be disagreement between the Board and the owner about the necessity for works. Furthermore, the appellant contended that, as there was no right of appeal under s 12B of the Act from a decision of the Board not to carry out preventative works, the only relief which an unsuccessful applicant could claim was by way of judicial review proceedings in the Supreme Court.

26 Finally, the appellant noted that the power under s 13A is limited to carrying out works that would reduce the total prospective liability of the fund and that there may be circumstances where the cost of preventative works is greater than the cost of repairs after damage. However, the benefits of avoiding the actual occurrence of damage could be substantial.

Is *Wambo* Distinguishable?

27 The appellant submits that *Wambo* is distinguishable on the basis that, in this case, unlike in *Wambo*, there was actual subsidence prior to the appellant carrying out the mitigation and preventative works on the pipeline with respect to which it lodged its claim. As I have noted in [5] above, as a result of the mining of Longwalls 30 and 31, subsidence had

occurred at Mallaty Creek prior to the preventative and mitigating works commencing. Nothing of that character had occurred in *Wambo*.

28 The appellant placed particular reliance on paragraph [37] of the judgment of Tobias JA in *Wambo,* where his Honour said:

"[37] Common sense would indicate that some subsidence may take place but may not be so extensive as to cause immediate or significant damage to surface improvements located over or near to the area which has subsided. Further subsidence may be anticipated which, without the taking of preventative or mitigating measures, is likely to cause damage or greater damage to those improvements. It is only in that sense that s 12A(1)(b) contemplates damage arising from anticipated subsidence. But some initial subsidence must have taken place before the subsection is engaged."

29 It is, however, necessary, as Sheahan J pointed out, to have regard to the passage immediately following paragraph [37] which stated:

"[38] The terms of s 12A(1)(b) are therefore directed to the situation where subsidence has taken place but damage has not yet arisen therefrom but could reasonably be anticipated to do so if works to prevent or mitigate such anticipated damage are not performed."

30 It is also pertinent to bear in mind the assumption in the submissions of the respondent in *Wambo*, accepted by the trial judge in that case, to which Tobias JA was directing his remarks in paragraph [37], as set out in the immediately preceding paragraph:

"[36] Thus his Honour, with respect, was in error when he held that the

subsection was both ambiguous and obscure because it referred to expense incurred in preventing or mitigating damage which could be reasonably anticipated from subsidence that 'has taken place' *by which time the damage would have occurred*. As I have observed in [30] of these reasons, the flaw in this reasoning is that it assumes that subsidence and damage inevitably occur simultaneously."

31 Paragraph [30] of the judgment of Tobias JA stated, relevantly:

"[30] Third, the flaw in the respondent's argument accepted by the primary judge is that it assumes that subsidence and damage occur simultaneously. It submitted that s 12A(1)(b) was intended to apply when there has been neither subsidence nor damage. However, that is not what the subsection says: what is to be reasonably anticipated is damage arising from subsidence that has (already) taken place. In other words, subsidence has occurred but has not given rise to damage to the relevant improvements but it is reasonably anticipated it will do so. In these circumstances, an owner of improvements who reasonably anticipates that damage will otherwise arise from that subsidence unless preventative or mitigating works are carried out will be reimbursed with respect to the proper and necessary incurring of, or proposal to incur, expense for such work."

32 It is also pertinent to refer, as Sheahan J did, to the concluding observations of Tobias JA, when his Honour said:

"[46] Finally, and again not without significance, the use of the past tense in the phrase 'a subsidence that has taken place' is confirmatory of a construction of s 12A(1)(b) that applies it only to the reimbursement of expense incurred or proposed to be incurred to prevent or mitigate damage which could be reasonably anticipated to arise, but which is yet to do so, from an existing subsidence. The text of the provision is in my opinion unambiguous ..."

33 Sheahan J was correct to conclude that paragraph [37] was not part of the ratio in *Wambo*. No subsidence had occurred in *Wambo* prior to the owner of the improvements undertaking preventative works. The directly relevant proposition is Tobias JA's statement that s 12A(1)(b) "contemplates damage arising from anticipated subsidence" in the sense that "further subsidence may be anticipated". There is a tension between that proposition and the principal thrust of his Honour's reasoning as indicated in such statements as:

"... damage which is yet to arise but which is reasonably anticipated to arise from a subsidence that has in fact (that is *already*) taken place" (at [29]) (emphasis added).

"... what is to be reasonably anticipated is damage arising from subsidence that has (*already*) taken place" (at [30]) (emphasis added).

"... damage which could be reasonably anticipated to arise ... from an *existing* subsidence" (at [46]) (emphasis added).

34 In my opinion, what Tobias JA had in mind in paragraph [37] was a process of subsidence that had, as a result of concluded conduct, commenced but probably not concluded. In other words, following the completion of mining works, the movement of the ground does not have to be finished for the section to respond. However, his Honour was not referring to further subsidence caused by continuing, let alone future, conduct. It is not necessary, on the facts of this case, to determine whether his Honour's obiter remarks should be accepted.

35 The causal relationship between the subsidence at issue in the present case and the workings of the BHP colliery was addressed by Sheahan J by

treating the mining of each longwall as a separate course of conduct. On this basis, his Honour distinguished between the actual subsidence, which had occurred as a result of the mining of Longwalls 30 and 31, and the subsidence that was anticipated to occur as a result of the mining of Longwall 32. As noted above, the appellant challenges that approach on the basis that what was involved was a single, overall mining operation.

36 Issues of characterisation are often difficult. Usually the text provides helpful guidance. The definition of subsidence, set out above, is helpful.

37 Setting aside the issue of vibration, which does not arise in this case, the focus of the definition is on "extraction" which leads to "actual subsidence". The words "due to" identify an actual causal relationship. In this context the "extraction" referred to must, in my opinion, be an actual extraction. This approach receives further support within s 12A(1)(b) itself which excludes a claim for anticipated damage arising from "a subsidence due to operations carried on by the owner". Again, the "operations" of the owner of the land there referred to, identify actual conduct leading to "a subsidence".

38 The material before the Court strongly indicates that Sheahan J was correct to treat the mining of each longwall as a separate course of conduct with respect to the "extraction of coal". The course of mining a series of longwalls involves the operation of equipment, which is, after the coal from one longwall is extracted, redeployed to the beginning of the block, at the face of the immediately adjacent longwall. This appears to me to be a sufficient discontinuity to constitute a separate course of "extraction of coal". It is, in my opinion, a continuous mining operation with respect to each longwall, but not otherwise.

39 I am reinforced in this view by the fact that the expert reports were all

structured on the basis that the mining of each longwall is to be analysed as a separate event with respect to the identification of subsidence. The fact that the relevant authority to mine, and no doubt the intention of the miner, was to complete a project involving a number of longwalls, is not the appropriate level of particularity to consider the issue of "subsidence" for purposes of the Act.

40 Accordingly, the appellant's reliance on paragraph [37] of *Wambo* fails on the facts. The subsidence that occurred as a result of the mining of Longwalls 30 and 31 was not the "initial subsidence", to which Tobias JA referred. Nor was the subsidence that was anticipated to occur as a result of the mining of Longwall 32, "further subsidence", in the sense Tobias JA deployed those words.

41 Wambo is not, in my opinion, distinguishable. The subsidence that was observed before the mining of Longwall 32 was not "subsidence that has already taken place" to which Tobias JA referred, at [29], [30] and [46], respectively.

The Decision in *Wambo*

42 At first instance in *Wambo,* Lloyd J adopted a particular interpretation of s 12A(1)(b) which was addressed in detail by Tobias JA on appeal. Lloyd J held that the paragraph should be interpreted so that the words "a subsidence that has taken place" referred to the point of time at which the claim referred to in the chapeau of s 12A(1) is made. (*Wambo Coal Pty Ltd v Mine Subsidence Board* [2006] NSWLEC 528; (2006) 147 LGERA 457 at [18]- [19].) His Honour did not undertake any textual analysis of the subsection but held that this interpretation was consistent with the legislative purpose "to expand the scope of claims" (at [18]).

43 On appeal, Tobias JA set out eight reasons for rejecting this interpretation. These were:

(i) Section 12A(1)(b) relates to claims for payment for an expense incurred in preventing or mitigating damage which could reasonably be anticipated to arise "from 'a subsidence that has taken place'" (at [28]).

(ii) Section 12A(1)(b) is directed to an expense incurred in preventing damage which is anticipated to arise "from a subsidence that has in fact (that is, already) taken place" (at [29]).

(iii) The primary judge assumed that subsidence and damage occurs simultaneously, and that s 12A(1)(b) was intended to apply "when there has been neither subsidence nor damage". The subsection does not say, however, that: "what is to be reasonably anticipated is damage arising from subsidence that has (already) taken place", ie, "subsidence has occurred but has not given rise to damage ... but it is reasonably anticipated it will do so" (at [30]).

(iv) An owner can request the Board to carry out preventative or mitigating works, pursuant to s 13A, where damage would be incurred "by reason of subsidence". This contrasts with the words used in s 12A(1)(b) – "from a subsidence that has taken place". The powers under s 13A may be invoked "where a subsidence has not taken place but it is anticipated that damage will arise even when subsidence occurs" (at [31]-[32]).

(v) A complete reading of the Second Reading Speech to the *Mine Subsidence Compensation (Amendment) Act* 1969, which inserted both s 13A and s 12A(1)(b) into the Act, suggests that under s 13A the determination of the reduction of the prospective liability under the

scheme was to be left to the Board. It was in that context, and not in relation to s 12A(1)(b), that the Minister referred to the cost of preventing subsidence as often being cheaper than the cost of curing subsidence once it occurs. The power under s 12A(1)(b) was referred to in the context of an emergency "where presumably the Board's power under s 13A could not be exercised in a timely fashion" (at [34]-[35]). His Honour erred in assuming that "subsidence and damage inevitably occur simultaneously" (at [36]). Section 12A(1)(b) is "directed to the situation where subsidence has taken place but damage has not yet arisen".

(vi) Section 12A(2)(b) requires a claim for payment for an amount under subsection 1(b) to be made within three months of the expense to which the claim relates becoming known. The interpretation adopted by Lloyd J, which permits a claimant to incur expenses prior to subsidence occurring but also requires that claimant to wait until actual subsidence occurs before making a claim, could lead to an anomalous result that if the anticipated subsidence does not actually occur within the period of three months after the expense became known, and the claim is therefore barred by s 12(2)(b) (at [39]).

(vii) The causal relationship between the damage which could reasonably be anticipated to "arise from" subsidence and the subsidence itself, "is more easily demonstrated where there has been actual subsidence in respect of which damage to particular improvements arising therefrom is reasonably anticipated" (at [44]).

(viii) The requirement in s 12A(1)(b) that the expense actually proposed be "proper and necessary" is more readily ascertainable with respect to subsidence that has already taken place (at [45]).

(ix) The use of the past tense in the phrase "a subsidence has taken place"

indicates that the phrase “a subsidence that has taken place” refers to an existing subsidence in the natural and ordinary meaning of the phrase (at [46]).

44 There is one matter which his Honour did not specifically emphasise. I would add another proposition to his Honour’s series of interpretative points as follows:

(x) The use of the article, “*a* subsidence”, where twice appearing in s 12A(1)(b), in contrast with the absence of any article in numerous other references to “subsidence” in the Act, including in the definition, is an indication that what is being referred to is a specific, past subsidence. Significantly, each of s 12(1) and s 13A do not contain an article. These sections, respectively, employ the formulations “from subsidence” and “by reason of subsidence”. The article directs attention to what has occurred up to the relevant point of time.

Overruling a Prior Decision

45 The appellant undertook the burden of convincing the Court that the principles establishing restraint on an appellate court from overruling its earlier decisions are inapplicable. Specifically, with respect to the judgment in *Wambo*, it submitted:

The decision is “manifestly wrong”.

The decision turns on a question of statutory construction which is a more appropriate case for intervention (referring to *Clutha Development Pty Ltd v Barry* (1989) 18 NSWLR 86 at 99).

The decision did not rest upon a principle carefully worked out in a succession of cases. (*Commonwealth v Hospital Contribution Fund of Australia* [1982] HCA 13; (1982) 150 CLR 49 at 56.)

Overruling it would not unsettle the law in other respects. (*Commonwealth v Hospital Contribution Fund* supra at 56.)

Wambo has not been acted upon other than in the case presently under appeal. (*Commonwealth v Hospital Contribution Fund* supra at 57.)

46 The case law on when an appellate court is entitled to depart from its earlier authority has been comprehensively reviewed in a recent joint judgment of this Court. (*Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504 at [261]- [301].) It is unnecessary to repeat the analysis. Of particular significance for present purposes is the weight to be given to the first basis upon which the appellant seeks to rely, namely, that *Wambo* is “manifestly wrong” or, in the formulation often adopted in the authorities referred to in *Gett v Tabet*, that it is “plainly” or “clearly” wrong.

47 It was not submitted in this Court that any different test was applicable because the Court has chosen to sit a bench of five on this appeal. This is not an aspect of the principle of restraint considered in *Gett v Tabet* and it is appropriate to make some observations in this respect.

48 The issue has recently been considered on two occasions by the Court of Appeal of the Supreme Court of Victoria and the relevant case law has been considered in some detail. (*R v Roussety* [2008] VSCA 259; (2008) 192 A Crim R 32 and *The Queen v BDX* [2009] VSCA 28.) These cases do not, however, authoritatively determine whether the test in the case of a five judge bench being asked to overturn the prior decision of a three judge

bench differs from that when a bench of three is asked to do the same.

49 The principal judgment in *BDX* is a joint judgment of Vincent and Weinberg JJA who, after detailed consideration of the relevant case law from [122]-[151], concluded at [152]:

"If there is a difference when the court is constituted by five judges ... that difference is likely to be marginal."

50 Nettle and Redlich JJA concluded at [202] that the case was not an appropriate vehicle to determine the issue and stated they did not necessarily agree with the conclusion of Vincent and Weinberg JJA.

51 A contrary view was expressed by Ashley JA who concluded in *BDX* at [210] that he would not add to the observations he had made in the earlier case of *Roussety* supra at [57], where his Honour had said:

"I provisionally consider there should be a different and lesser level of inhibition against departing from an earlier decision in such circumstances, by comparison with a situation where a court of three considers an earlier decision of a court similarly constituted. ... But I think that it is unnecessary to state precisely the minimum point at which departure by a court of five is authorised."

52 The relevant case law in England, commencing with *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 at 725, is summarised in the joint judgment of Vincent and Weinberg JJA in *BDX* and it is unnecessary to repeat it. This aspect of *Young v Bristol Aeroplane* is not affected by the Australian case law which refused to follow it in certain respects. (See the authorities referred to in *Gett v Tabet* supra at [274]-[276]). There are,

however, three additional cases not identified in *BDX* to which reference can be made.

53 First, in *Younghusband v Luftig* [1949] 2 KB 354, Lord Goddard CJ, who delivered the judgment of a divisional court of five judges said at 361:

"Before considering the law applicable to the case, we think it well to emphasise that a divisional court of five judges has no greater powers than one of three or even two. This court is bound by its own decisions as is the Court of Appeal whatever the number of judges that may constitute it: see *Huddersfield Police Authority v Watson* [1947] KB 842. The principles of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 apply equally to this court."

54 Secondly, there is the public policy identified in *Morelle v Wakeling* [1955] 2 QB 379 at 406-407:

"Although, as was pointed out in *Young v Bristol Aeroplane Co Ltd* a 'full court' of five judges of the Court of Appeal has no greater jurisdiction or higher authority than a normal division of the court consisting of three judges, we cannot help thinking that, if the Attorney-General's argument were accepted, there would be a strong tendency in cases of public interest and importance, to invite a 'full court' in effect to usurp the function of the House of Lords and to reverse a previous decision of the Court of Appeal. Such a result would plainly be inconsistent with the maintenance of the principle of stare decisis in our courts."

55 Thirdly, in *Williams v Fawcett* [1986] QB 604, Sir John Donaldson MR said at 615, after specifying that an earlier authority was decided by five judges:

“ ... I hasten to add that it is now well-established that a five-judge Court of Appeal has no more authority than a three-judge Court of Appeal.”

56 It is unnecessary to determine this issue in the present case. The point was not argued. The appellant proceeded on the basis that the general principles applied. It did not advocate that any lesser test was applicable when the Court is constituted by a bench of five.

57 As the appellant correctly noted in its written submissions, it is necessary to keep in mind that the court has a duty to give effect to the intention of Parliament when interpreting a statute. As Gleeson CJ said in *Clutha Developments* supra at 99:

“One such principle is a principle of restraint embodied in the axiom *stare decisis* ... Another equally important principle is, however, that the Court should give effect to the intention of Parliament. If it concludes that an earlier decision construing a statute is erroneous then the corollary is that to apply the earlier decision is to defeat the intention of Parliament. Clearly, there is a tension between these two principles. Neither can be disregarded”.

58 In contrast, Branson and Finkelstein JJ observed in *Telstra Corporation Ltd v Treloar* [2000] FCA 1170; (2000) 102 FCR 595 at [28]:

“The view which we prefer is that unless an error in construction is patent, or has produced unintended and perhaps irrational consequences not foreseen by the court that created the precedent, the first decision should stand ... [W]e venture to suggest it would be on a rare occasion that an intermediate appellate court ... will allow an issue concerning the

construction of a statute, past and closed and especially a repealed statute, to be thrown open, producing as it clearly will, uncertainty, disruption to the conduct of affairs, a sense of grievance in those who may consequently receive treatment less favourable that that received by others under the same statute and additional cost and expense".

59 As will appear below, I do not find it necessary in the present case to adopt the approach set out by Branson and Finkelstein JJ. It is sufficient for present purposes to apply the nuanced approach of Gleeson CJ in *Clutha Developments*.

Should *Wambo* be Overruled?

60 The natural and ordinary meaning of the words "a subsidence that has taken place" refer to a past event. The issue posed on this appeal is to identify the point of time at which the event must have occurred. Mr R J Ellicott QC, who appeared for the appellant, made three alternative submissions as to the identification of the point of time.

61 In response to questioning from the Bench, Mr Ellicott QC accepted that it may be that subsidence can occur up to the point of time when the claim was made, as was held to be the case by Lloyd J in *Wambo* at first instance. This option was not one that he was prepared to "readily embrace", but nor was he prepared to reject it.

62 For the reasons given by Tobias JA on appeal from Lloyd J, together with the tenth proposition I added at [44] above, this option should be rejected. I would add further that the proposition does too much violence to the structure of the section. The reference to claims appears in the chapeau. The reference to "subsidence that has taken place" appears in the very last two subordinate subclauses of s 12A(1)(b). It is a considerable syntactical leap to connect those references to the reference to claims.

63 The second, and Mr Ellicott QC emphasised, his primary submission was that the words “subsidence that has taken place” encapsulate a hypothesis. The very purpose of the clause, he submitted, is to permit the owner to incur expenses to prevent or mitigate damage which has not yet occurred. The reference to “subsidence that has taken place” should be understood as a component part of the hypothesis, being the damage which the owner of the improvements is seeking to prevent or mitigate. The “subsidence” to which the subsection refers is not actual subsidence but a hypothetical subsidence.

64 The characterisation of the reference to “a subsidence that has taken place” as a “hypothesis”, in accordance with Mr Ellicott QC’s submission, carries with it the implication that no subsidence needs to take place. On this basis the reference remains hypothetical throughout although, of course, in the usual case there will be subsidence, the effects of which have been avoided by the work carried out by the owner.

65 This proposition is clearly contrary to the reasoning of Tobias JA in *Wambo*. I refer to his Honour’s reiteration of the proposition that the subsidence must have “already” taken place at the time of the reasonable anticipation of prospective damage caused to be assessed. To repeat his Honour’s proposition (at [30]):

“ ... what is to be reasonably anticipated is damage arising from subsidence that has (already) taken place. In other words, subsidence has occurred but has not given rise to damage to the relevant improvements but it is reasonably anticipated it will do so.”

66 It is clear that the purpose of the section under consideration is to prevent or mitigate damage and, in that sense, there is a hypothetical

element in s 12A(1)(b). There is no reason, however, to conclude that any other element in the section is similarly hypothetical. Specifically the words “that has taken place” are, in my opinion, intractable. They refer in their natural and ordinary meaning to an actual, past event.

67 The interpretation of s 12A(1)(b), adopted in *Wambo* is reinforced by the immediate textual context.

68 First, the use of the article “from *a* subsidence that has taken place” cannot be set aside as irrelevant. The phrase cannot be read as if it said “from subsidence” (c/f s 12(1)) or “by reason of subsidence” (c/f s 13A).

69 I accept, as Mr Ellicott QC submitted, that there are numerous other references to “subsidence” in the Act, some unadorned by any preposition or article and others preceded by prepositions such as “by” or “from”. Section 12A(1)(b) is, however, the only example in which an article is used. Together with the past tense of the phrase “has taken place”, the formulation suggests an *actual,* not a hypothetical occurrence.

70 This conclusion is reinforced by the fact that the article appears twice in immediate successive clauses in s 12A(1)(b), namely: “from a subsidence that has taken place, other than a subsidence due to operations carried on by the owner”. The identification of a specific subsidence caused by the “operations” of the owner is a further indication that what is involved is an actual, rather than a hypothetical, occurrence.

71 In my opinion, the interpretation for which the appellant contends should be rejected. I would do so even if this was a case in which the degree of restraint involved in overruling an earlier judgment of this Court was not applicable. The fact that such restraint is applicable, in my

opinion, puts the matter beyond doubt.

72 The third interpretation was first raised by the bench and adopted by Mr Ellicott QC in reply. He submitted that the time at which the subsidence must have occurred is when the Board is deciding whether or not to make a payment and determining whether the owner's anticipation of damage was reasonable.

73 A submission that the time of payment was the relevant time was put to the Court in *Wambo*. That submission was in reply to the disconnect between the point of time at which a claim is made and the three month time limit contained in s 12A(2)(b). (See proposition (vi) set out at [43] above.).

74 Tobias JA rejected this further alternative on the basis that it could not be reconciled with the clear words of s 12A(1)(b). (It appears to me that his Honour's references at [40] and [41] to this submission being advanced by the "appellant" are in error.)

75 His Honour said:

"[42] ... The requirement for damage that the owner could reasonably anticipate would have arisen or would arise 'from a subsidence that has taken place' is temporally linked to the making of a claim, not to the payment of a claim already made ... there is ... a temporal link required between the making of the claim and that to which the claim relates, namely, the incurring or proposal to incur an amount to meet the proper and necessary expense ...

[43] The better view, therefore, is that the Board should be in the position to assess and pay the claim upon it being made: not that it be merely

notified of a claim the assessment of which must be postponed unless and until a subsidence ‘takes place’ some time in the indeterminate future.”

76 His Honour made these observations with reference to the time for payment submission. No specific submission was put to him in terms of the time of the formation of the opinion by the Board. In this Court, Mr Ellicott QC assimilated the two matters. The scheme of the Act does suggest that, relevantly, the two decisions will be considered by the Board at the same or at a similar time.

77 Upon receipt of a claim under s 12A(1), s 12A(3), applying s 12(2)(b), confers an express power on the Board to conduct an investigation and requires the report of any such investigation to be placed before the Board for a decision as to what, if any, payment is to be “allowed in respect of the damage” to which the claim relates. The report of the investigation would clearly also be the basis for the formation by the Board of its opinion about the reasonableness of the anticipation of damage, for which s 12A(1)(b) provides.

78 This third alternative interpretation attaches the phrase “from a subsidence that has taken place” to the words “in the opinion of the Board”. This has the advantage over the first interpretation, which attaches the phrase to the word “claims” in the chapeau, that the syntactical violence is minimised. Nevertheless, it remains more consonant with the syntax to attach the phrase to the immediately preceding words concerning the ‘anticipation’ by the owner of damage. The more natural syntactical relationship is, in my opinion, to be preferred.

79 Clearly, the reference to the opinion of the Board in s 12A(1)(b) applies at a later time than the time at which the owner anticipates damage in his or her or its mind. Indeed, the time at which the Board forms the statutory opinion will, on the basis of the application of s 12A(3), be even later than

the time of the claim.

80 The analysis of Tobias JA rejecting the time of the claim as the relevant period, and the time of payment alternative, is applicable to the proposition that the time of the Board's opinion is the relevant time. I refer particularly to his Honour's analysis of s 12A(2)(b) requiring a claim to be made within three months of the time when "the expense ... became known" to the owner (at [39]), as specifically extended to the time of payment alternative submission (at [40]-[43]).

81 His Honour's analysis and conclusion flows naturally from the grammatical structure of s 12A(1)(b) which authorises claims for "proper and necessary" expenditure that:

has been "incurred ... (to prevent or mitigate) damage ... that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen, ...";

is "proposed ... (to prevent or mitigate) damage ... that, in the opinion of the Board, the owner ... could reasonably anticipate would otherwise arise, ...".

in each case "from a subsidence that has taken place".

82 The word "from" in the penultimate clause is clearly connected to the words "arisen" and "arise" at the end, respectively, of the two preceding clauses. There is no grammatical link between the word "from" and the phrase "in the opinion of the Board".

83 Nothing in the scope, purpose and structure of the legislative scheme suggests that the grammatical structure of the paragraph should not be

given its natural effect. The *Mine Subsidence Compensation Act* 1961 replaced the *Mine Subsidence Act* 1928. The present legislative scheme, like its predecessor, created a statutory scheme for the regulation of the divergent interests involved where conflicting land uses arise. The common law right to the support of land was curtailed by s 6 of the 1928 Act in the context of a scheme of compulsory statutory insurance against subsidence, administered by the Mine Subsidence Board. In this respect the provisions of s 14 of the 1961 Act continue the basic structure of a regime that has been in place for a very long time.

84 In such a context it is not helpful, for the purpose of interpreting amendments introduced in 1969, to have regard, as Mr Ellicott QC did in his submissions, to the abolition of common law rights and the establishment of a scheme of compensation in order to characterise the *Mine Subsidence Compensation (Amendment) Act* as "beneficial legislation".

85 The *Mine Subsidence Compensation (Amendment) Act* added both ss 12A and 13. It introduced additional opportunities for the carrying out of preventative work by the owner of the land and by the Board. The position of an owner adversely affected was improved in the sense that, prior to these amendments, the owner of the land had no right to payment for preventative or mitigatory work. I should note that it does appear, from the second reading speech of the 1969 Amendment Act, that the Board had in fact carried out preventative works without express statutory authority and the 1969 Amendment Act expressly validated its prior conduct in this respect.

86 The introduction of s 12A is beneficial in the sense that it provides an alternative option to act, in emergency situations, without the prior approval of the Board. It also provides the option, in non-emergency situations, to make a claim on the Board where the owner would conduct the work, rather than requiring the Board to exercise its powers under s

13A. However, this is not a characterisation which should lead to a strained interpretation of the provision.

87 In the second reading speech for the *Mine Subsidence Compensation (Amendment) Bill* 1969 the Minister for Mines identified the significance, not least by reason of the past practice to which I have referred above, of empowering the Board to carry out works before damage to improvements has occurred. He said:

"This power to repair is to be supplemented by power to carry out preventative works, as the costs of prevention are often cheaper than of cure".

88 The minister went on to explain the introduction of s 12A as follows:

"It is recognised also that emergencies may occur where it might be necessary for the owner to carry out works to prevent or mitigate damage arising from a subsidence. In such cases [the] proposed new s 12A(1)(b) would empower a claim to be made for the proper and necessary expense so incurred."

89 The minister's reference to "emergencies" does not encompass the full scope of the section, in view of the fact that a claim can be made with respect to work that is proposed to be carried out. The reference to an emergency is more clearly applicable to work that has been incurred prior to the making of a claim. Nevertheless, the reference does suggest that it is not appropriate to give an expansive interpretation to s 12A(1).

90 I am similarly not assisted by Mr Ellicott QC's reliance on the contrast between s 13A and s 12A. The former, he submitted, applies only where the Board forms an opinion that carrying out works pursuant to the

exercise of the power would reduce the prospective liability of the fund. Furthermore, no right of appeal under s 12B of the Act extends to the decision of the Board under s 13A. An owner of improvements would be required to take judicial review proceedings, rather than an all grounds appeal, in the event they were aggrieved by a decision of the Board under s 13A.

91 There are such differences, but they represent a legislative choice which is not, in my opinion, unfair, let alone irrational.

92 The Act does make provision in s 13A for work to be conducted by the Board prior to any act of subsidence occurring. There is nothing anomalous about this being the only means by which remedial steps can be taken in a case, such as the present, where proposed future conduct is known to carry the risk of subsidence.

93 The Board is given numerous powers which can be exercised to reduce the prospective liability of the Fund, in addition to the power in s 13A. I refer, for example, to:

The requirement that prior approval be obtained from the Board before any work in connection with the erection or alteration of an improvement is carried out within a mine subsidence district (s 15(2A) and (7)).

The option given to the Board, in lieu of making payments under s 12 or s 12A(1)(a), of acquiring land or improvements on the land, or any estate or interest therein (s 13(1)(a)).

The option given to the Board, in lieu of making payments under s 12 or s 12A(1)(a), of executing works to restore the damaged land or

improvements.

The option given to the Board to acquire land to carry out preventative or mitigative works where the proposed erection of an improvement on vacant land has been adversely affected by subsidence or the likelihood of subsidence (s 13C).

94 Furthermore, as the High Court noted in *Alinta LGA Ltd* supra at [26] to [27]:

“[26] The statute also imposes obligations upon the owners of improvements and those effecting improvements. Observance of those obligations assists the interests of the colliery proprietors. That observance is encouraged by provisions denying the competency of claims to compensation from the Fund to which the colliery proprietors are required to contribute.

[27] It is an offence for a person to do or cause to be done any work in connection with the erection of alteration of an improvement within a subsidence district without the Board’s approval or in disconformity with such approval as is given (s 15(7)). It is also an offence for a person to subdivide or cause to be subdivided any land within a subsidence district without approval of the Board (s 15(8))”.

95 In this statutory context, and on the basis of my analysis of what the natural syntactical structure of the section implies, I agree with Tobias JA in *Wambo*. There is, in my opinion, no proper basis for not exercising the restraint that is required to be exercised when the Court is asked to overturn a prior judgment.

Conclusion

96 In my opinion the appeal should be dismissed with costs.

97 ALLSOP P: I agree with the Chief Justice.

98 GILES JA: I agree with the Chief Justice.

99 BASTEN JA: The short issue raised by this appeal is whether the appellant was entitled to make a claim to the respondent Board for expenses which it had incurred in order to prevent damage to its gas pipeline, which was threatened by subsidence caused by underground longwall coal mining in its vicinity.

100 The issue was raised before the Land and Environment Court by way of an appeal under s 12B of the *Mine Subsidence Compensation Act 1961* (NSW) ("the Act"), following the refusal of a claim lodged by the appellant with the Board. On 30 June 2009 Sheahan J gave judgment by answering a separate question, adversely to the appellant: *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* [2009] NSWLEC 106. The answer led to an order dismissing the proceedings.

Background

101 The separate question was determined by reference to a statement of agreed facts. The following matters are derived from that statement.

102 The pipeline, laid underground in the relevant area and to which

damage was anticipated, is the primary source of natural gas for the Sydney and Newcastle metropolitan areas. It was constructed prior to 30 June 1976. The coal mining lease covering the relevant portion of the pipeline was granted to a subsidiary of BHP Billiton Ltd ("the miner") on 4 July 1991. The coal mining area the subject of the lease, known as the West Cliff Colliery area, near Appin south-west of Sydney, was subject to a proposal for underground longwall mining. The area traversed by the pipeline easement included a series of parallel strips proposed for mining, known as longwalls 29-36.

103 In December 2004, the miner obtained final approval under s 138 of the (now repealed) *Coal Mines Regulation Act 1982* (NSW) for extraction of longwall panels 29, 30 and parts of 31, 32 and 33. The underground mining was expected to cause subsidence, which was itself the subject of an environmental impact assessment, which accompanied the application for the s 138 approval.

104 In December 2003 the miner's engineering consultants predicted there would be movement of the ground where the pipeline crossed Mallaty Creek. In that area the pipeline was laid underground. Minor subsidence was identified as likely to occur commencing with the extraction of coal from longwalls 30 and 31. Those effects were not, by themselves, expected to damage the pipeline. Nevertheless, the cumulative effects of subsidence from extraction from longwalls 30-32 were expected to be above acceptable levels and likely to cause damage, absent preventative works.

105 In July 2005 extraction from longwall 31 commenced. By 24 October 2005 subsidence of approximately 32mm was recorded at the critical point, where the pipeline crossed Mallaty Creek. That level of subsidence had not damaged the pipe and was not expected to damage the pipe in the future. However, further mining, extending into longwall 32, was expected to produce a cumulative level of subsidence which was expected to cause

damage.

106 The amount claimed from the Fund was the sum of $2,770,664. Precisely when the amounts making up that sum were incurred did not appear from the statement of agreed facts. The estimates of subsidence obtained in December 2003 and the likely consequences for the appellant's pipeline and other pipelines in the easement were obtained by the miner. Although it is not entirely clear, it appears that the miner incurred the expense of measuring subsidence at relevant times. In July 2005 mining of longwall 31 commenced. On 24 October 2005 subsidence of 31.8mm was recorded at Mallaty Creek. It resulted from the longwall mining but was not, of itself, expected to cause damage to the pipeline. That subsidence resulted from the extraction from longwalls 30 and 31: it was the further subsidence resulting from extraction from longwall 32 which, it was anticipated, would cause significant damage to the pipeline. The appellant obtained reports from consultants, thereby presumably incurring expense, from December 2005. The preventative measures were undertaken between October 2006 and January 2007. Mining of longwall 32 commenced in February 2007.

107 On 20 December 2006 (that is, prior to the commencement of the mining of longwall 32) subsidence was measured at 42.3mm. On 30 April 2007 (after the commencement of mining of longwall 32) subsidence had reached 140.4mm and, by the completion of longwall 32 in August 2007, 274.7mm.

108 In September 2006 the Board itself had approved funds for preventive works to be carried out, described as "similar to" the works carried out by the appellant, in respect of a separate natural gas pipeline within the easement. The approved expense for that work was $6.2 million.

Issues on appeal

109 The key to the appeal turns on s 12A of the *Mine Subsidence Compensation Act*, the terms of which are set out by the Chief Justice at [7] above. In its terms, s 12A deals with "claims" for payments from the Fund. It provides, relevantly, that a claim can be made when expense has been "incurred" by the owner "in preventing or mitigating damage to" an improvement of the owner. The term "improvement" is defined to include any building or work erected or constructed on land and includes a pipeline: s 4. Thus, the first group of requirements is that –

(i) the owner of an improvement (including a pipeline);

(ii) has incurred (or proposes to incur) expense in carrying out works;
(iii) the works being for a particular purpose, namely preventing or mitigating damage to the improvement.

Those elements are not in dispute.

110 The second group of requirements depends upon an opinion of the Board, the opinion being that –

(i) the owner could reasonably have anticipated that the damage sought to be prevented would otherwise have arisen (or could reasonably anticipate would otherwise arise),
(ii) from a subsidence that "has taken place".

The critical question in relation to the Board's opinion concerns the significance of the words "has taken place", referring to the subsidence.

111 The primary argument for the appellant was that they form part of the hypothetical assessment required to be made by the Board. That is not an assessment of any opinion held by the owner when incurring the expenditure, but an assessment made by the Board in considering the claim. When expense is incurred to prevent damage, the feared damage is not damage which has occurred, but damage which could reasonably have been anticipated. Further, it must be damage that would have arisen "from

a subsidence”. The subsidence, the argument proceeded, may also be hypothetical, for the purposes of the formation of an opinion by the Board. That is logical because, where subsidence and damage are likely to be coincident, the relevant steps will need to precede both to be effective. This construction does not depend upon a subsidence occurring at any particular time or at all. It is equivalent to reading the provision as requiring an anticipation of damage ‘from subsidence’, or from a subsidence, ‘if that were to take place’.

112 This approach was inconsistent with the reasoning of this Court in *Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137; 154 LGERA 60. This construction should therefore not be adopted unless the Court were now of the view that the reasoning in *Wambo* was distinguishable, because it was addressing a different point, or that it was clearly wrong. In a sense discussed below, *Wambo* was addressing a different point, but not in a way which renders the reasoning distinguishable. Unfortunately, the formulation of the separate question which was in issue in that case inevitably obscured the central element of s 12A(1), noted above. It also appears that the submissions in *Wambo* did not address a number of critical questions in relation to the language of the Act and its structure.

113 Before turning to those issues, it is necessary to identify the question answered by the Land and Environment Court in this case and the manner in which it came to be determined.

Identification of separate question

114 The separate question identified and answered in the Land and Environment Court read as follows:

“Whether the Applicant is entitled to an amount under section 12A(1)(b) of the *Mine Subsidence Compensation Act 1961* (NSW) in respect of expenses that it incurred in performing work on the Sydney to Moomba Gas Pipeline in circumstances where subsidence occurred at or near Mallaty Creek near Campbelltown in or about October 2005, on the assumption that the Applicant can establish that, for the purposes of that

section, the expenses incurred by it were 'proper and necessary'."

115 The question is replete with difficulties. It is neither factually nor legally precise, and contains unexpressed assumptions. First, it assumes that s 12A(1) is concerned with entitlement to an amount, rather than merely the making of claims. That assumption should be accepted.

116 Secondly, the question refers to expenses incurred, without identifying when they occurred. Thirdly, it identifies subsidence which occurred in or about October 2005, without identifying the significance of the subsidence. So far as the relevant time of the incurring of expense is concerned, on the basis of the facts set out above, it should be accepted that the expenses were incurred after the subsidence referred to in October 2005. In respect of the subsidence itself, it is clear that it was not a single isolated event. The agreed facts identified predicted movement in the ground at Mallaty Creek as the result of mining longwall 30, between July 2004 and June 2005. Mining of longwall 31 commenced on 26 July 2005 and the measurement taken in October was said to reflect cumulative subsidence which could have occurred at any time between August and October 2005. It is also clear that subsidence continued thereafter during the mining of longwall 31. It increased further (and became critical) during the mining of longwall 32, which commenced two months after the completion of longwall 31. By referring simply to "subsidence ... in or about October 2005", the question ignored the significance of these agreed facts.

117 Accepting that expense was incurred by the appellant over a period which commenced in December 2005 and continued to January 2007, the question assumed that the expenses were incurred after the subsidence to which it referred. It also assumed that no date thereafter was relevant.

118 As noted above, a critical element in s 12A(1)(b) involves the

formation of an opinion by the Board. Neither the facts nor the question make any reference to the formation of the relevant opinion by the Board.

119 The question is based on the assumption that "the expenses incurred" (the section refers to "expense incurred") were "proper and necessary". The assumption must be that the expense was "proper and necessary" for an identified purpose. The relevant purpose must be that identified by the section, namely the prevention or mitigation of damage, as to which the Board holds a particular opinion.

120 On one view, these difficulties suggest that the question was inappropriate to answer. However, neither party challenged the statement of the separate question, nor did either party suggest that the Court should not have answered it. Accordingly, it is necessary to resolve the difficulties noted above on the material to which reference may properly be made. The statement of agreed facts (par 2) referred to the claim and the letter of rejection, each of which was annexed to the application in the Land and Environment Court. These documents were tendered as exhibits in the Land and Environment Court. The appellant's claim of 17 July 2008 covered 35 pages. It is by no means clear what use was proposed to be made of that document. It appears to have played no part in the reasoning of the primary judge.

121 Of greater relevance is the Board's rejection of the claim, notified by letter dated 28 July 2008. The letter stated in part:

"On 23 July 2008, the Board decided to refuse [the appellant's] claim for compensation under s 12A(1)(b) on the basis that the damage to the pipeline anticipated by [the appellant] would not 'otherwise have arisen ... from a subsidence that has taken place', as that provision requires.

... [I]t is the Board's view that s 12A(1)(b) requires a casual [causal?] connection between the anticipated damage and the subsidence that has taken place, in the sense that the *damage* would, if it occurred, arise from the subsidence. Whether [the appellant's] *anticipation* has arisen from a subsidence that has taken place is not the test imposed by s 12A(1)(b)."

122 The factual inference which should be drawn from this communication is that the Board did not form the relevant statutory opinion because, in its view, the (whole of the) subsidence from which damage could reasonably be anticipated, must occur prior to incurring the expense of preventative works. It formed the view that that condition was not satisfied.

123 The primary judge properly considered himself bound to apply the reasoning of this Court in *Wambo*. However, he was pressed with the statement of Tobias JA in *Wambo* at [37] to the following effect:

"Common sense would indicate that some subsidence may take place but may not be so extensive as to cause immediate or significant damage to surface improvements located over or near to the area which has subsided. Further subsidence may be anticipated which, without the taking of preventative or mitigating measures, is likely to cause damage or greater damage to those improvements. It is only in that sense that s 12A(1)(b) contemplates damage arising from anticipated subsidence. But some initial subsidence must have taken place before the subsection is engaged."

124 Sheahan J appears to have rejected the proposition that "subsidence is a process, not an event": at [48]. He further concluded that "it cannot be said that subsidence as at October 2005 is part of the subsidence expected from planned later mining": at [49]. His Honour stated that extraction of coal from each longwall was a "distinct extraction with distinct consequences": also at [49]. He noted that it was open to the miner to cease mining at any time, so that the degree of subsidence necessary for

the reasonable anticipation of damage may never eventuate.

Nature of appeal

125 The matters last set out give rise to a question as to whether the case was determined in the Land and Environment by reference to a question of law or by reference to inferences drawn from the agreed facts. This is a matter of some importance, as his Honour was dealing with an application in class 3 of the Court's jurisdiction from which an appeal lies to this Court only "against an order or decision ... of the Court on a question of law": *Land and Environment Court Act 1979* (NSW), s 57(1).

126 The statement that subsidence could not be a process, but only an event, may involve a decision on a question of law as to the proper construction of the Act. If his Honour were saying that the subsidence identified at October 2005 could not be treated as part of the subsidence which continued into 2007, because there were two separate mining operations, that might constitute a mixed finding of fact and law, depending upon the legal relevance of the concept of separate mining operations.

127 For reasons explained below, the proper construction of s 12A(1)(b) renders this question moot. However, if that construction be wrong (or rather, in the circumstances, not clearly right) the issue will arise. Accordingly, it becomes necessary to ask whether subsidence "has taken place", at a particular geographical place, if:

(a) the subsidence is ongoing, although the immediate cause is not;
(b) further subsidence is expected to arise from the ongoing mining operation, or
(c) further subsidence is expected to arise at that place, but from a different

mining operation, albeit undertaken by the same miner under the same legal authority.

It will be necessary to consider the extent to which these distinctions depend on the proper construction of the Act.

128 It is convenient to deal next with the statutory language, the context of s 12A and particular issues arising from the structure of the Act.

Section 12A(1)(b) - concepts and context

(a) specific concepts

129 There are three concepts central to an understanding of the operation of the Act. These are the terms “extraction of coal”, “subsidence” and “damage”.

130 The first is not separately defined, but forms part of the definition of the second. Thus the Act deals only with subsidence “due to” the extraction of coal or shale or, in the case of vibrations or other movements of the ground, “related to” any such extraction. Only coal extraction is presently relevant; to the extent that a proper understanding of the statutory concepts depends on the nature of shale extraction, there is no material before the Court which would assist with that exercise. The “extraction of coal” will generally be a process taking place over a period of time, which may, but need not be, contemporaneous with the subsidence. (The causal link requires that the subsidence not precede the commencement of the extraction.)

131 Dealing next with “subsidence”, the ordinary meaning of that word, relevant to the present context, is a fall in the level of the ground. That was the relevant meaning of the term in the Act, until it was expanded in 1989 to include “all vibrations or other movements of the ground” due to extraction of coal, and “whether or not the movements result in actual subsidence”. The precise scope and operation of the amendment is not

presently relevant.

132 Subsidence is also a process; albeit one which may occur rapidly or slowly, in punctuated stages or steadily, and with localised or broader effects. The amendment may be significant in relation to locality, in that subsidence in one area may cause a lateral movement of the ground, with no lowering of the level, in another. Each part of the effect is within the definition in the Act. The phenomenon of subsidence will be directly related to the geological features of the ground, the nature and extent of the mining process, the time at which the mining process is undertaken and other factors. A particular subsidence may be identified by reference to geographical limits, temporal limits or both. It may also be identified by reference to a particular process or stage of extraction, to which it is due.

133 Apart from the need to prove the causal link with the extraction of coal, from the claimant's perspective, the relevant factor is the subsidence of the ground in a particular location, and not the mechanics of coal mining.

134 The third important concept is "damage". Relevantly for present purposes, damage refers to a detrimental change in the land and any structure erected on the land. However, the occurrence of damage may also be a process occurring over time. Particular forms of damage can have consequential effects which will also constitute damage. For example, damage to the roof of a building permitting the entry of rain, may lead to damage to an internal ceiling or wall. There is no limit in the language of the Act on the kinds of damage covered, so long as the relevant causal connection with subsidence is established.

135 For present purposes, it is not the particular causal connection between subsidence and damage which is significant, but the degree of

temporal coincidence. For example, in *Wambo*, this Court criticised the judgment there under appeal on the basis that it relied upon an assumption that subsidence and damage occur simultaneously. It is, of course, incorrect to say that they will always occur simultaneously, but it would not be incorrect to say that they *may* occur simultaneously. An assumption that they never occur simultaneously would also be incorrect. In fact, the temporal relationship is likely to be complex. A particular degree of subsidence may lead to damage which continues to accrue over time, without any further subsidence occurring. On the other hand, continuing subsidence may or may not give rise to further damage.

136 It is, therefore, unlikely that the legislature intended to use the words "subsidence" and "damage" as limited to defined events or moments in time, or as bearing some simplistic temporal relationship to each other. Rather, the language should be construed as encompassing the range of potential relationships. It is also unlikely that the right of a landowner to make a claim was intended to be dependent on the operational intentions of the coal miner.

137 There is a fourth aspect to the language used in the Act which is significant. Thus, what may be recovered from the Fund is either "compensation" or an amount to meet "expense" incurred or to be incurred. Although the distinction is not entirely clear, the words are not used interchangeably, but appear to contemplate different circumstances. Thus, in both ss 12 and 12A, it appears that "compensation" will include a sum for diminution in value resulting from damage, whereas "expense" refers to amounts expended to prevent or mitigate damage, or rectify or repair damaged improvements.

(b) structure of Act

138 It is convenient to consider next the legislative structure within which these concepts appear. This was considered by the High Court in *Alinta*

LGA Ltd (Formerly The Australian Gaslight Company Ltd) v Mines Subsidence Board [2008] HCA 17; 82 ALJR 826, and it is only necessary to identify the features relevant for present purposes. The first substantive provision of significance concerned the constitution of the "Mine Subsidence Board", the present respondent. As noted in *Alinta* at [15]:

"Section 5(1) constitutes the Board. It is a body corporate capable of suing and being sued in its corporate name (s 6(1)). Its functions and duties include directing and controlling the Fund (s 10), collecting the contributions of colliery proprietors (s 11), investigating and determining claims for compensation (ss 12 and 12A), purchasing damaged improvements and effecting remedial works (s 13), carrying out preventative or mitigatory works (s 13A) and determining approvals and certifications (ss 15 and 15B)."

139 The second matter involved the constitution of the "Mine Subsidence Compensation Fund" ("the Fund"), the scheme being described by the High Court in the following terms:

"17. The Fund consists of the contributions of colliery proprietors (s 10(2)(b)) and certain other sums (s 10(2)(a) (c) and (d)), such as interest accruing from the investment of moneys in the Fund (s 10(2)(c)). Colliery proprietors are obliged to make contributions to the Fund in accordance with s 11(1A), (1B) and (1C) and the amount so calculated is deemed a debt due to the Crown and recoverable by the Board (s 11(8)).
18. The statutory *quid pro quo* for the contributions of colliery proprietors to the Fund lies in s 14(1) of the Subsidence Act. Provided the proprietor of a colliery holding is not in arrears with contributions (s 14(1)(a)) and observes operational covenants of the kind described by s 14(1)(b), the proprietor 'shall not be liable for any damage to improvements or household or other effects occasioned by subsidence' (s 14(1)). This statutory immunity is stated not to extend to relieve the liability of a proprietor for damage caused by subsidence due to negligence (s 14(2)). Alinta submitted that s 14(1) would displace the liability of a proprietor

under the tort of nuisance; it is unnecessary to determine whether that is so."

140 The fact that liability of a colliery proprietor under the general law "for any damage to improvements or household or other effects occasioned by subsidence" has been replaced by a right to make claims against the Fund does not necessarily mean that the scope of the statutory right is to be equated with the scope of the general law liability. Nevertheless, it is legitimate to take into account, in construing the provisions conferring the right to make claims, the fact that they are in substitution for the general law liability, rather than providing a voluntary alternative remedial system for such claims.

141 The next feature of the statutory scheme which formed the basis of comparative analysis, both in these proceedings and in *Wambo*, is the separate provision in ss 12 and 12A for claims against the Fund in respect of damage and expense incurred in relation to subsidence. The headings to the sections being "Claims for damage arising out of subsidence" (s 12) and "Claims arising out of actions to prevent or mitigate damage" (s 12A) do not accurately reflect the distinctive scope and operation of the two provisions. Thus, in relation to s 12, it is clear that the purpose of sub-s (1)(a) is to allow a claim for compensation for damage to improvements "that arises from subsidence". However, the subject matter of a claim under paragraph (1)(b) includes "building retaining walls or ... underpinning or otherwise supporting, raising or repairing buildings and walls". That description includes acts which may be taken to prevent further damage. It must be damage that "arises from subsidence" but that language adopts the continuing present tense, rather than the past tense. It is also reflective of the nature of both subsidence and damage, as discussed above, namely that each may involve an on-going process. (There is an element of futurity in the reference in the chapeau of paragraph (b) to expense "incurred or to be incurred", but that does not imply an element of prospective damage, a conclusion which flows entirely from the language of sub-par (i).)

142 It is convenient to turn now to the provision which is central to the appellant's case, namely s 12A(1)(b).

Construction of s 12A(1)(b)

143 The subject matter of the paragraph involves a claim for an identified expense, where the Board forms a relevant opinion. Critically, that opinion is as to the reasonable anticipation of damage arising from a subsidence, that not being the view which the claimant actually formed (although in practical terms it is likely that the claimant did form such an opinion). Importantly, the Board is not directed to assess the claimant's actual opinion at the time that it may have been formed, but, with the light of hindsight, to determine whether such an opinion could reasonably have been formed, so as to anticipate damage, absent the preventative measures. In formulating that opinion, the Board must assess the likelihood of damage arising from a subsidence, being a subsidence that "has taken place". If the Board were required to form an opinion as to the reasonableness of the claimant's conduct in incurring the expense, when it was incurred, and so as to exclude reference to anticipated subsidence, the section would have referred to subsidence that '*had* taken place'. That language was not used.

144 Once it is understood that the relevant assessment is not that made by the claimant, the relevant time at which the section speaks, is that at which the Board forms its opinion. It is, on that view, necessary that a subsidence "has taken place", but prior only to that time. It is not necessary that it *had* taken place at the time the expense was incurred, nor at a point prior to that time, such as when the claimant decided to incur the expense.

145 It remains to consider the aspects of the Act which were thought in *Wambo* to support a different construction. The first two reasons involved a comparison between s 12(1)(a) and s 12A(1)(b). There are three reasons for not placing weight upon that comparison. The first is that the comparison is justified by the proposition that the provisions are complementary in relevant respects. However, that is to assume the answer to the question as to the proper construction of s 12A(1). The second reason, which is not independent of the first, is that complementarity is only achieved by ignoring what has been identified above as the central

feature of the second limb of par (b) in sub-s 12A(1), namely that it is posited upon the opinion of the Board. The third answer is that by not taking into account the scope of s 12(1)(b), which contemplates expense incurred with respect to damage which has not yet occurred, there is an artificial construct placed on s 12, in order to conclude that it does not address future events, which are solely the province of s 12A.

146 The third argument relied upon by this Court in *Wambo*, at [30] and repeated at [32], was that the argument below had relied upon an assumption that subsidence and damage were simultaneous. This aspect has been partly addressed above at [135], two answers being given: first that, although it was part of the reasoning in *Wambo* in the Land and Environment Court, it was not a feature of the argument in this case. The second answer is that, even if the assumption, so expressed, were erroneous, the fact that subsidence and damage could readily be simultaneous or close in time is a matter which should not be disregarded.

147 The fourth argument relied on in *Wambo* depended on the operation of s 13A. It was relied on for two different purposes. First, s 13A is said to be clearly directed to anticipated subsidence, a conclusion reached from the different language adopted in s 13A, compared with s 12A(1)(b) at [32]. Secondly, it is said to provide an answer, at least in part, to the complaint that Parliament cannot have intended to provide a remedy with respect to anticipated damage only when the damage and subsidence were separated in time. Thus, it is argued, s 13A provides a power for the Board to carry out preventative or mitigating works in cases where damage is anticipated by reason of subsidence which has not yet occurred: at [33]-[34].

148 There are a number of countervailing considerations. First, s 13A only empowers the Board to carry out such works if it is of the opinion that to do so would "reduce the total prospective liability of the Fund". If the owner of the improvements (or others) were in danger of suffering a detriment which would not be recoverable as compensation from the Fund

should the damage occur, but the likely cost to the Fund would be the same whether the works were undertaken before or after the damage, s 13A would not be engaged. Secondly, it is by no means self-evident that to identify damage that the Board anticipates "would ... be incurred by reason of subsidence" involves anticipated subsidence, as opposed to anticipated damage from existing subsidence. Undoubtedly the wording is different from that in s 12A(1)(b), but so is the principal purpose of the provision, focussing on the comparative cost to the Fund of different courses of action. Thirdly, the structure of the provision owes something to an entirely separate purpose, which is to permit the Board to intervene in anticipation of damage where the required works are to be carried out on land other than that on which the improvements stand.

149 In any event, the construction accepted above allows for s 12A(1)(b) and s 13A to have different consequences. Under s 13A, if the Board intervenes it takes the risk that prevention was unnecessary because the feared subsidence did not occur. Under s 12A, where the claimant acts to protect its own property, it takes the risk that it will not recover if the subsidence does not occur before the Board determines its claim.

150 Part of the fifth reason given by the Court in *Wambo* was that the Second Reading Speech of the Minister, introducing the 1969 amendments to the Act, indicated that the power to carry out preventative works with "the objective of reducing the prospective liability of the Fund" (*Wambo* at [34]) was intentionally left to the Board. That would be quite understandable, but it does not mean that the owner was given no power under s 12A to carry out preventative works, and recover the necessary and proper expense incurred, in anticipation of subsidence. Further, as already noted, recovery of a claim under s 12A(1)(b) will only be permitted where the Board forms the opinion as to the identified factors.

151 The reasoning in *Wambo* further called in aid the fact that statements in the Second Reading Speech, to the effect that "the costs of prevention

are often cheaper than of cure”, were made in the context of s 13A and not in the context of s 12A. However, that aphorism accurately reflected the purpose of s 13A, namely to allow the Board to choose the cheaper course, which was not the underlying purpose of s 12A.

152 Finally, as part of the reliance on the Second Reading Speech, reference was made to the following statement (Hansard, 2 October 1969, Assembly) p 1551, col 1:

“It is recognised also that emergencies may occur when it might be necessary for the owner to carry out works to prevent or mitigate damage arising from a subsidence.”

153 It was accepted in *Wambo* that that passage related to s 12A, the following sentence in the Second Reading Speech stating that “[i]n such cases proposed new s 12A(1)(b) will empower a claim to be made ...”. Of it, the Court said that it was “only in the context of emergencies (where presumably the Board’s power under s 13A could not be exercised in a timely fashion) that it was contemplated that the owner of improvements would carry out preventative or mitigating works arising from a subsidence that had taken place”: at [34].

154 With respect, that reliance is unpersuasive. Not only is there nothing in s 12A itself which limits the power of the owner to take preventative steps to cases of emergency, but, as the Chief Justice has pointed out at [89] above, the section envisages a claim where the preventative work, and the expense involved, are merely proposed. Nor is it immediately apparent why the Parliament would have assumed that the Board might not act in a “timely fashion”: it appears to have done so in the present case.

155 Thus, not only does the Second Reading Speech not provide a limitation upon the exercise of the power under s 12A, but it also does not provide a legitimate basis of distinctive operation between that provision and s 13A. In fact, the last quoted passage in the Second Reading Speech suggests that the semantic differences between the two provisions were not significant, the Minister, referring to s 12A, rather than using the precise language of s 12A(1)(b) (arising "from a subsidence that has taken place") having used the language of s 13A ("arising from a subsidence"). If anything is to be drawn from that passage in the Second Reading Speech, it is that the reference to subsidence that "has taken place", was not intended as language of limitation.

156 Having stated (at [37]) that "some initial subsidence must have taken place before the subsection is engaged", the judgment in *Wambo* concluded (at [38]) that the section was "directed to the situation where subsidence has taken place but damage has not yet arisen therefrom but could reasonably be anticipated to do so if works to prevent or mitigate such anticipated damage are not performed." It then continued, adding a sixth ground in support of its preferred construction, namely that a claim for compensation or expenses under s 12A "shall be made", relevantly, "within three months after the day on which the expense to which the claim relates became known to the claimant": s 12A(2)(b). Construing s 12A(1) as requiring that subsidence merely occur "at or before the time of making the claim", introduced, the Court said, a temporal element which was itself "anomalous, if not irrational": at [39].

157 That characterisation was not entirely inapt, but invited comparison with the conclusion that the owner could recover its expense if willing to risk damage following quickly on a subsidence, but not if minded to take a more cautious approach. In any event, rejecting the time of claim, being the temporal reference point accepted by the primary judge (Lloyd J) in *Wambo*, does not provide much support for the preferred reference point, unless those are alternatives which exhaust the relevant possibilities. I would view the temporal limitation on making claims as a neutral consideration in the circumstances.

158 The Court then considered whether it were sufficient that subsidence occur before the claim was paid, rather than before the claim was made: at [40]. That contention was rejected, on the basis set out at [42], namely that:

"The requirement for damage that the owner could reasonably anticipate would have arisen or would arise '*from a subsidence that has taken place*' is temporally linked to the making of a claim, not to the payment of a claim already made."

159 That reasoning may be accepted: the time of payment has no point of reference in the language of the provision. However, its rejection fails to address the role to be played by "the opinion of the Board" in the structure of the provision.

160 The final arguments addressed in *Wambo*, at [44]-[46], although set out as supportive arguments, after the conclusion had been stated, are in fact a repetition of the aspects of statutory construction discussed above.

161 The Chief Justice adds to these reasons reliance upon the use of the indefinite article "a" before "subsidence" in s 12A(1)(b). His Honour relies upon this language as support for the requirement of "an *actual*, not a hypothetical occurrence": at [69]. That reasoning may also be accepted, but does not affect the conclusion reached above, which is to require actual subsidence, the question being by what stage the subsidence must occur.

162 Some of the difficulties with the reasoning in *Wambo* may be traced to the separate question considered in that case, stated by a judge of the Land and Environment Court, in the following terms:

“Whether for a proprietor to have an entitlement under section 12A(1)(b) of the *Mine Subsidence Act 1961* (NSW) to claim compensation for expense incurred in preventing or mitigating anticipated damage to improvements:

(a) it was necessary for a subsidence to have occurred prior to the expenditure being incurred; or alternatively
(b) that the expense could be incurred prior to any subsidence occurring.”

163 The formulation of the question was unfortunate in several respects. It did not follow the form of s 12A. In part that may have been because of the grammatical difficulties created by the form of the section, which does not in terms identify criteria for payment of a claim, but for the making of a claim. It is that feature which may well have distracted attention from the importance of the phrase “in the opinion of the Board”. More importantly, the separate question assumed that the only relevant time was the time when the expenditure was incurred. As a result, the debate was not focused on other potentially relevant times, nor on the relevant time in a case where expenditure had not been incurred, but was merely proposed.

164 A second difficulty in *Wambo* was, as noted by Lloyd J in the Land and Environment Court, that it did not appear to have proceeded on agreed facts, and certainly not on found facts. Thus, his Honour stated that he did “not understand that any material facts in the present case are in dispute”: at [2]. His Honour then noted that the relevant improvement (a conveyor), to which damage was feared from subsidence, was removed in two stages between February and November 2004: at [5]. The claim was apparently lodged on 19 February 2004, “for expenses [the applicant] incurred in dismantling and removing the conveyor”: at [7]. It appears that, as at the date of claim, at least some of the expense (if not a substantial part thereof) had not yet been incurred. Nevertheless, it appears that the claim did not involve proposed expense. Further, it was not clear when subsidence occurred, nor when the mining operations took place: cf [6]. The claim was refused on 27 April 2005. Again, whether that was before or after subsidence occurred is not known.

165 These unsatisfactory features of the procedure adopted in *Wambo* render it difficult to be sure of the factual premise on which the argument was based.

166 The critical aspect of s 12A(1)(b), ignored in *Wambo*, is the express reference, in the second limb, to "the opinion of the Board". Giving full weight to that language, the provision is grammatically internally consistent. Had the relevant criterion been not the opinion of the Board but the reasonable anticipation of the owner, the section would naturally have referred to damage that 'the owner reasonably anticipated would otherwise have arisen, or would otherwise arise, from a subsidence that had taken place ...'. In that case, the language would unambiguously referred to an opinion held at the time the expense was incurred or proposed in respect of subsidence which had then taken place. On that approach, *Wambo* would have been correct. But that is not the language used by the section: it refers to an opinion of the Board as to that which the owner "could reasonably have anticipated", not from a subsidence "that *had then* taken place" but from a subsidence that "has taken place". That construction must, in my view, refer to a subsidence which has taken place when the Board forms its opinion.

167 This reading of the provision has a second, consequential effect. It means that, despite the chapeau to sub-s (1), paragraphs (a) and (b) respectively identify the conditions of entitlement. The subsection thus serves two purposes, analogously to a provision which, by identifying the circumstances of exercise of the powers of a court, implicitly confers jurisdiction.

Was *Wambo* clearly wrong?

168 All of these considerations are relevant to determining the precedential status of *Wambo*. I accept the approach outlined by the Chief Justice, as I understand it, namely that:

(a) this Court should not depart from the statutory construction preferred and applied in *Wambo* unless satisfied that it is clearly or plainly wrong,

and
(b) the fact that this is a five judge bench does not confer upon the Court any greater authority to depart from its own earlier decisions, than would be the case were it consisted, as is usual, by three judges.

169 As this is a minority judgment, it may be thought unnecessary and invidious to consider what approach should be taken to this question. On the other hand, it might be thought appropriate to address the matter on its merits, this not being a minority judgment until it is published and the parties having an entitlement to a full expression of the reasons of each member of the Court on matters which are relevant to the determination of the appeal, on the approach adopted by that member of the Court.

170 A further relevant consideration is that the outcome of this case involves the allocation of the cost of works which it was assumed were proper and necessary to protect the main natural gas pipeline serving the major metropolitan areas of Sydney and Newcastle. The threat to the pipeline came from underground coal extraction activities. The Fund against which the appellant sought to claim is a statutory fund maintained by colliery proprietors, which provides the consideration for their statutory immunity from liability under the general law for damage occasioned by subsidence, absent negligence. The correct legal allocation of responsibility for such expense is a matter of significant public interest. The (agreed) fact that the Board had accepted responsibility for the expenditure of a sum considerably in excess of the present claim, in order to protect another pipeline on the same easement highlights the importance of ensuring that the statutory Fund is disbursed strictly in accordance with the law and not capriciously.

171 Furthermore, as was explained by Gleeson CJ *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 99, referred to at [57] above, it is necessary, in considering whether to exercise the power to overrule an earlier authority construing a statute to give effect both to the principle of restraint embodied in the axiom of *stare decisis* and to the "equally important principle" that the Court should give effect to the intention of Parliament, as understood by the Court in construing the statutory provision.

172 Taking into account all these considerations, and my own view as to the proper statutory construction, I do not think it is open to me to say that the view unanimously adopted in *Wambo,* and now by a majority of this Court, is "clearly wrong". Accordingly, subject to what follows I would treat the question of construction as a matter which can only be resolved in the High Court.

What is subsidence which "has taken place"?

173 For the reasons set out above, I would not accept the appellant's submission that "subsidence which has taken place" should be read as referring to an entirely hypothetical exercise, in which both subsidence and damage were anticipated, but neither had eventuated. There remains, however, the appellant's reliance upon the fact that some subsidence had occurred, as recognised in the separate question, prior to the appellant incurring the relevant expense.

174 The separate question was based upon the assumption that the section requires that the subsidence had taken place prior to incurring the expense. Because that is not how I read the provision, it is necessary to make some hypothetical assumptions about how the section is intended to operate. On this construction of s 12A(1)(b), the following logical possibilities arise in relation to subsidence from which damage was reasonably anticipated:

(a) the subsidence must have arisen before the expense was incurred;
(b) some, though not sufficient, subsidence must have arisen before the expense was incurred, where further subsidence, with cumulative effect, reaching the critical level, is anticipated as a result of –
(i) mining which has already occurred;
(ii) continuation of the same mining operation;
(iii) a future and separate mining operation, or

(iv) any of the above.

175 The first possibility (a), requires that the reference to "subsidence that has taken place" prior to incurring recoverable expense, means subsidence which, of itself, is sufficient to give rise to a reasonable anticipation of damage, absent preventative measures. Such a construction (as already noted) would impose a highly restrictive operation on s 12A(1)(b). It would allow the owner of an improvement to claim the expense incurred in preventing damage only in circumstances where there was a delayed effect on the improvement. Such a result could be seen, with little imagination, to have capricious or unfortunate results. The present question is whether, accepting the posited construction, a proper understanding of the reference to "subsidence that has taken place" requires that result. Relying on the ordinary meaning of the statutory language, that is the approach adopted by the Board.

176 Although the Board's submissions supported such a construction, it has unattractive consequences, as was recognised in *Wambo* at [37]. Some account must be taken of the fact that subsidence is, or may be, an ongoing process. On this basis, legal error may be revealed in the rejection by the primary judge of the proposition that "subsidence is a process, not an event": at [48].

177 The other possibilities, identified in (b), accept that it may be sufficient that some subsidence has taken place, although more is reasonably anticipated. The question then raised is the criterion by which present subsidence may be identified as the same subsidence as that anticipated in the future.

178 On one view, it may be sufficient that what is anticipated will be cumulative upon that which has already occurred. That will be so when the geographical location is the same. On that view, it will be sufficient that the subsidence occurs at a particular place (no doubt in the vicinity of particular infrastructure or improvements) and where it can reasonably be expected that the process of subsidence is incomplete. (That is option

(b)(iv) above.)

179 Although the primary limitation relied on by the Board was to deny the relevance of *any* later subsidence, whatever its cause, secondly, and partly in response to reliance on the observations at [37] in *Wambo,* the Board noted that any further subsidence would not suffice because it would not be due to the same activity of coal extraction as the earlier subsidence. The primary judge accepted both submissions: at [46] and [49] respectively.

180 A limitation based on the characterisation of mining operations is unattractive. The extraction of coal is not an event which takes at a point in time, but is rather an ongoing process. Precisely how that might work in a particular case would be a matter of inference from the facts.

181 The primary judge, as noted above, held that the subsidence as at October 2005 could not be said to be "part of the subsidence expected from planned later mining". The test of "planned later mining" may have been intended to set that subsidence apart from any which resulted from mining on 25 October 2005, on 1 November 2005, or at some other point over the subsequent months during which longwall 31 was mined, or only that which resulted from mining the next longwall (32). If the reference to "planned later mining" was intended to refer to any future mining, because there was "no guarantee that a Miner will continuously follow its approved plan" (at [51]), it appears that s 12A will be satisfied if further subsidence occurs at the same location, but only from mining which has occurred prior to the date of the expense being incurred.

182 The preventive works were not commenced until a year later, in October 2006, and continued until January 2007. Some further subsidence had occurred over the 15 months from October 2005, as demonstrated by

the reading at 20 December 2006. His Honour's treated the reference to October 2005 as relevant because that was approximately when the appellant commenced to plan the proposed works (and may have incurred its first claimed expense although the agreed facts did not show that): at [50]. Alternatively, the reference may have been intended more generally, to subsidence which preceded the commencement of longwall 32. However, it is by no means clear why the completion of one longwall and the commencement of another should determine the entitlement of the landowner to recover where some subsidence has occurred, for the purposes of s 12A.

183 As already noted, the time between the completion of one longwall and the commencement of the next was a two month period, encompassing the Christmas-New Year holiday of 2006/2007. It did not necessarily reveal any major operational delay on the part of the miner. For example, the turnaround time between the completion of longwall 29 and the commencement of longwall 30 was one month and in two other of the four examples revealed in the agreed facts, it was approximately six weeks. Whether longwalls are (or actually were in this area) mined continuously is not known.

184 Once the security of subsidence which has already occurred is abandoned, as the basis on which damage can reasonably be anticipated and expense recovered, there is no clear indication in the statutory language for limiting the causes of continuing subsidence. Although factors such as the scope of the existing mining lease, relevant approvals to commence mining and the planned operations of the miner cannot be determinative, it is plausible that each of these factors may be a relevant consideration in identifying the scope of a particular subsidence. On that view, whether or not a particular subsidence, which is exacerbated as mining continues, is all part of a relevant subsidence for the purposes of s 12A will involve questions of fact.

185 To the extent that the appellant sought to rely on a continuing process of subsidence, neither in this Court nor in the Court below, was there adequate attention to the statutory mining regime. The period of the mining lease was not an agreed fact, nor were the details as to the terms and conditions of the approvals, nor as to the terms and conditions of the subsidence management plans. The case proceeded on the basis that the separate question could be answered solely by reference to legal principles of statutory construction. That assumption, on the appellant's case, was erroneous. Upon that becoming apparent, the question should have been recognised as one which it was inappropriate to answer, absent proper findings on all relevant facts. The appellant did not propose that course.

186 In my view, the matters raised by the appellant in reliance on existing (but then harmless) subsidence may help to demonstrate the implausibility of the Board's principal argument, namely that the section required subsidence to have taken place prior to incurring the expense. However, once the construction preferred above is adopted, the capricious results diminish. Adopting the Board's construction as to the temporal element, the language of the section requires acceptance of the Board's submission as to the meaning of "subsidence which has taken place". To the extent that this conclusion is inconsistent with the remarks in *Wambo* at [37], the approach adopted there was unnecessary in the light of the preferred construction.

Conclusions

187 For these reasons the appeal must be dismissed. The appellant should pay the costs of the appeal.

188 MACFARLAN JA: I have had the advantage of reading in draft the judgments of Spigelman CJ and Basten JA.

189 I agree with the following conclusions of Basten JA and with his

Honour's reasoning in relation to them:

(a) The reference in s 12A(1)(b) of the Act to "a subsidence that has taken place" is to subsidence that has occurred by the time the Board forms the opinion referred to in that paragraph;

(b) The contrary view expressed in this Court's earlier decision in *Wambo* (and accepted by Spigelman CJ in the present case) cannot however be regarded as one that is "plainly wrong"; and

(c) Accordingly, this Court is bound to follow the decision in *Wambo*, irrespective of the views of members of this Court as presently constituted as to the proper construction of the paragraph.

190 I agree with the view of Spigelman CJ that the decision in *Wambo* is not distinguishable. As that decision must be followed, the orders to be made on the present appeal should be as proposed by the Chief Justice.

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