

# DE FACTO MINING BUFFER ZONES IN NSW: A CASE FOR REFORM?

**ANDREW BEATTY** and **SHENAL SIRIWARDHANE** write about the clash between mining and traditional agricultural undertakings in the attempt to balance economic and social priorities.

**C**ompensation concepts can sometimes be difficult to grasp. Even experienced practitioners operating in jurisdictions like NSW<sup>1</sup>, with well drafted legislation and the benefit of specialist courts and experienced judges sitting as judicial valuers, sometimes struggle.

However, for those advising land owners adjoining actual or proposed mines, the complexities are further pronounced by a system which not only appears to be biased in favour of mining companies, but which may not produce fair or adequate compensation.

## MINING VERSUS FARMING?

While the value to our economy generated by mining is hard to gainsay<sup>2</sup>, there is likewise no debating that many landowners whose properties are close to mines are or will be adversely affected by noise, dust, blast overpressure, vibration and light spillage<sup>3</sup>.

The state recognises that the degree of that affectation, actual or predicted, may sometimes

be so great as to constitute a legal nuisance<sup>4</sup>, even though mining may be permitted to be carried out on nearby land 24 hours a day.

Accordingly, consent authorities may compel miners, as a condition of their operating consent, to offer to mitigate the impacts to neighbours either by in situ works such as the installation of air-conditioning or double glazing or, in more severe cases, by offering to acquire entire properties.

In such severe cases, a de facto buffer zone is created for the benefit of the miner from land previously used for purposes unconnected with mining. Some argue that by doing this the state places a higher value on mining as a (temporary) land use over, for example, viticulture, grazing, horse breeding or other long-term agricultural land uses. Recently, proposed amendments to planning laws governing consents for mines have drawn the same criticism:

"The government is telling communities it is balancing decisions made in relation to mining developments and seeking to incorporate a triple bottom line approach. But what is actually happening is it is putting short-term economic gains above everything else. It is little wonder that farmers and communities are losing trust in politicians, governments and the resources industry<sup>5</sup>."

<sup>1</sup> Although beyond the scope of this article, similar issues are already starting to emerge in Queensland where new or expanded mining operations are impacting rural communities.

<sup>2</sup> See, for example, Sinclair Davidson and Ashton de Silva, "The Australian Coal Industry— Adding value to the Australian Economy", April 2013. Available at: <http://www.australiancoal.com.au/>

<sup>3</sup> See, for example, Sharyn Munro, *Rich Land, Wasteland: How coal is killing Australia* (2012) and the discussion on social impacts in the Land and Environment Court judgment in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48. Accessible at: <http://www.caselaw.nsw.gov.au/>

<sup>4</sup> See *Environmental Compliance and performance audit: Management of dust from coal mines, NSW Government* 2010. Accessible at: <http://www.epa.nsw.gov.au/resources/licensing/10994coalminedust.pdf>

<sup>5</sup> NSW Farmers President, Fiona Simson quoted in press release, 'Mining Interests trump farmland' accessed 3 August, 2013 at <http://www.nswfarmers.org.au/home>



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## A NEW FORM OF 'PRIVATE EMINENT DOMAIN'?

If neighbours of mines were accorded the same benefits and protections as land owners subject to compulsory acquisition by the state as part of a public purpose project (as opposed to a private venture like a mine), some of this criticism might well be deflected. However, a closer look at how mining-related acquisitions work does not tend to fully answer those critics.

Here is an example of a typical consent used in NSW, which is worth setting out in full<sup>6</sup>:

### Land acquisition

7. Within 3 months of receiving a written request from a landowner with acquisition rights, the Proponent shall make a binding written offer to the landowner based on:

- (a) the current market value of the landowner's interest in the property at the date of this written request, as if the property was unaffected by the project, having regard to the:
- existing and permissible use of the land, in accordance with the applicable planning instruments at the date of the written request; and
  - presence of improvements on the property and/or any approved building or structure

<sup>6</sup> Ministerial Project Approval for BHPB's Mt Arthur North Expansion, 24 September 2010: <https://majorprojects.affinitylive.com/public/5174508b90029485ed0a850ccf8c24b1/Project%20Approval.pdf>

which has been physically commenced at the date of the landowner's written request, and is due to be completed subsequent to that date, but excluding any improvements that have resulted from the implementation of the 'additional noise mitigation measures' in condition 7 of schedule 3, 'additional air quality mitigation measures' in condition 22 of schedule 3, or 'compensatory water supplies' in condition 34 of schedule 3;

- (b) the reasonable costs associated with:
- relocating within the Muswellbrook, Singleton or Scone local government area, or to any other local government area determined by the Director-General; and
  - obtaining legal advice and expert advice for determining the acquisition price of the land, and the terms upon which it is to be acquired; and
- (c) reasonable compensation for any disturbance caused by the land acquisition process.

However, if at the end of this period, the Proponent and landowner cannot agree on the acquisition price of the land and/or the terms upon which the land is to be

## THE MINER IS NOT NORMALLY COMPELLED TO ACQUIRE THE AFFECTED LAND - MERELY TO MAKE AN OFFER TO DO SO

acquired, then either party may refer the matter to the Director-General for resolution.

Upon receiving such a request, the Director-General shall request the President of the NSW Division of the Australian Property Institute to appoint a qualified independent valuer to:

- consider submissions from both parties;
  - determine a fair and reasonable acquisition price for the land and/or the terms upon which the land is to be acquired, having regard to the matters referred to in paragraphs (a)-(c) above;
  - prepare a detailed report setting out the reasons for any determination; and
  - provide a copy of the report to both parties.
- Within 14 days of receiving the independent

valuer's report, the Proponent shall make a binding written offer to the landowner to purchase the land at a price not less than the independent valuer's determination.

However, if either party disputes the independent valuer's determination, then within 14 days of receiving the independent valuer's report, they may refer the matter to the Director-General for review. Any request for a review must be accompanied by a detailed report setting out the reasons why the party disputes the independent valuer's determination. Following consultation with the independent valuer and both parties, the Director-General shall determine a fair and reasonable acquisition price for the land, having regard to the matters referred to in paragraphs (a)-(c) above, the independent valuer's report, and the detailed report of the party that disputes the independent valuer's determination. Within 14 days of this determination, the Proponent shall make a binding written offer to the landowner to purchase the land at a price not less than the Director-General's determination.

If the landowner refuses to accept the Proponent's binding written offer under this condition within 6 months of the offer being made, then the Proponent's obligations to acquire the land shall cease, unless the Director-General determines otherwise.

These types of consent conditions highlight three important respects in which mine-related acquisitions differ from, and are arguably inferior to, compulsory acquisitions of land for public purposes by the state.

First, the process is not one which may give timely or final relief. The miner is not normally compelled to acquire the affected land - merely to make an offer to do so. Even this may not occur until one or more environmental limits (typically noise) have been breached, sometimes after a lengthy period of operation by the mine.

If the ultimate figure offered is not accepted by the land owner, the miner's obligations are exhausted. Absent some legal challenge to the process, the miner can keep mining and the land owner stays where they are, presumably still suffering the adverse effects which triggered the valuation and offer in the first place.

Given the seriousness of the impacts which will have prompted the state to impose conditions of this kind in the first place, it may seem odd

## **CONSENT AUTHORITIES MAY COMPEL MINERS, AS A CONDITION OF THEIR OPERATING CONSENT, TO OFFER TO MITIGATE THE IMPACTS TO NEIGHBOURS**

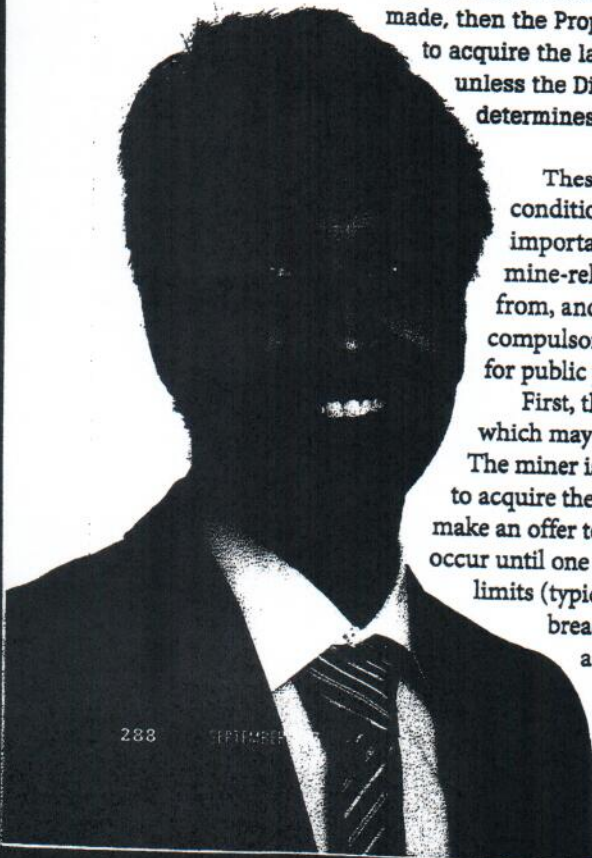
that the affected land owner has no automatic right of recourse to the courts (as is the case for others whose land has been compulsorily acquired), especially where what might otherwise be an actionable nuisance is occurring.

Second, the acquisition and compensation process may be distorted by the relationships between the parties. Although the assessment of the impacts of a project and the grant of any consent for it are fairly public processes, the interaction between the affected land owner seeking acquisition and the acquiring miner is largely private. The miner may often be the largest employer in a region. It will typically be a large - sometimes very large - corporation with bargaining power and resources well beyond that of its neighbours. A land owner who is entitled to an offer of acquisition will typically be subject to actual or predicted impacts which make it intolerable for them or their family to remain on their land. This sometimes makes the process of negotiation an especially stressful one.

Further, the ultimate arbiter of compensation may not be a valuer or even a judicial valuer (ie, a court) but a bureaucrat - perhaps the same bureaucrat whose report may have supported the initial grant of consent by a minister.

Where the State exercises its power to permit an activity which may be so disruptive to the life or livelihood of a person that they may need to leave their home in order to accommodate another private enterprise, considerable care should be taken to avoid distortions in the way in

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which compensation is calculated. Without the prospect of a judicial valuer becoming involved, the usual principle ensuring that the dispossessed owner is always given the benefit of the doubt may not be applied adequately, or at all<sup>7</sup>.

Third, the compensation payable may not properly compensate the land owner.

The heads of "compensation" that comprise the offer do not necessarily encompass all of traditional common law elements which are nowadays codified in s55 of the *Land Acquisition (Just Terms Compensation) Act (NSW) 1991*.<sup>8</sup>

Two examples illustrate the point. In the quoted consent condition, the initial offer from the miner must be for the "current market value of the landowner's interest in the property at the date of this written request, as if the property was unaffected by the project" and, in the same condition of consent, the land owner is entitled to "the reasonable costs associated with relocating within the Muswellbrook, Singleton or Scone local government area, or to any other local government area determined by the Director-General".

Depending on the facts of the case, a land owner might only receive an offer based on an already diminished land value if the "project" which is to be ignored is merely an expansion of an older, existing mine or if the land values in the locality have already been degraded because of other, nearby mining projects.

<sup>7</sup> See: *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Company of South Australia Ltd*; (1947) 74 CLR 358 per Dixon J; and *David Richardson v RTA of NSW*[1996] NSWLEC 117 per Talbot J.

<sup>8</sup> 55 Relevant matters to be considered in determining amount of compensation

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):

- (a) the market value of the land on the date of its acquisition,
- (b) any special value of the land to the person on the date of its acquisition,
- (c) any loss attributable to severance,
- (d) any loss attributable to disturbance,
- (e) solatium,
- (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.

Next, if the landowner operates a business (rather than merely occupying a house) how is he or she to be compensated for the loss of that business including, if it be the case, any "special value"?

The reason that the miner is obliged to offer to acquire is because its activities are making, or will make, an otherwise lawful use or occupation of land untenable. The miner is, however, free to continue to use that land once acquired for the same pre-acquisition purpose – eg. farming or grazing. It may be, however, that the homestead is now deserted or occupied by an employee of, or contractor to, the mining company who is less likely to complain about the noise.

## A CASE FOR REFORM?

Those involved in advising and representing acquiring authorities and dispossessed owners under the *Just Terms Act* are familiar with both the processes and valuation concepts which apply to such acquisitions. The current system has at its heart the goal of 'justly' compensating persons whose land is required to enable the State to pursue a project for the benefit of the public. Importantly, an independent statutory entity, the Valuer-General, and an independent judiciary are closely involved in determining compensation which the acquiring authority cannot then fail.

The matters we have touched on here demonstrate divergence between the well-developed principles and processes governing State acquisitions and those applying when land is taken to benefit private enterprises.

Perhaps these matters warrant closer scrutiny by the State, as it seems inevitable that mining and traditional agricultural undertakings will continue to clash over balancing economic and social priorities. ■

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