LAND COURT OF QUEENSLAND

CITATION:	*Byerwen Coal Pty Ltd v Colinta Holdings Pty Ltd (No. 2)* [2018] QLC 49
PARTIES:	**Byerwen Coal Pty Ltd** (applicant) v **Colinta Holdings Pty Ltd** (respondent)
FILE NOs:	MRA117-16 MRA118-16 MRA119-16
DIVISION:	General Division
PROCEEDING:	Determination of compensation payable for grant of mining leases
DELIVERED ON:	14 December 2018
DELIVERED AT:	Brisbane
HEARD ON:	12, 13 & 15 September 2017; 4 & 5 December 2018 Submissions closed 10 December 2018
HEARD AT:	Brisbane
MEMBER:	PG Stilgoe OAM
ORDERS:	**1. In respect of MLA 10355, MLA 10356 and MLA 10357, compensation is determined in the amount of $3,543,650.** **2. The applicant may file and serve any submissions on costs by 12 February 2019.** **3. The respondent may file and serve any submissions in response by 12 March 2019.** **4. The applicant may file any submissions in reply by 19 March 2019.** **5. Costs, if any, will be determined on the filed submissions without an oral hearing.**

CATCHWORDS: ENERGY AND RESOURCES – MINING FOR MINERALS – COMPENSATION – ASSESSMENT – ADJOINING LAND – where land is divided into lots – where lots operated as a grazing business in aggregation – where proposed leases do not affect all lots in the aggregation – whether applicant entitled to compensation for land not subject to applications – whether applicant entitled to compensation for the cost of obtaining a replacement property – what value is to be given to balance land unaffected by applications.

Land Court Act 2000 s 7(a)
Land Court Rules 2000 r 24C, r 24F
Mineral Resources Act 1989 s 14, s 15, s 252(7)(a)(ii), s 279(1)(a), s 281(3), s 281(3)(1)(a), s 281(3)(b), s 281(4), s 281(4)(a)

Allianz Australia Insurance Limited v Mashaghati [2017] QCA 127, cited
Carabella Resources Limited v Goodwin [2016] QLC 32, applied
Commissioner of Succession Duties (SA) v Executor Trustee & Agency Company of SA (1947) 74 CLR 358, cited
Jones v Dunkel (1959) 101 CLR 298, applied
Spencer v Commonwealth (1907) 5 CLR 418, followed
State of Queensland v Springfield Land Corporations No.2 (2009) LGERA 381, applied
Xstrata Coal Queensland Pty Ltd & Ors v Keys & Anor; Xstrata Coal Queensland Pty Ltd & Ors v Skygrove Pty Ltd; Xstrata Coal Queensland Pty Ltd & Ors v Erbacher; Xstrata Coal Queensland Pty Ltd & Ors v Edmonds & Anor [2013] QLC 34, considered
Wills v Minerva Coal Pty Ltd [No. 2] (1998) 19 QLCR 297, considered

APPEARANCES: JK Chapple (instructed by In-house Legal, Byerwen Coal Pty Ltd) for the applicant, on 12, 13 & 15 September 2017
DG Clothier QC (instructed by Allens Lawyers) for the respondent, on 12, 13 & 15 September 2017

DP O'Brien QC (instructed by In-house Legal, Byerwen Coal Pty Ltd) for the applicant, on 4 & 5 December 2018
DG Clothier QC, with N Andreatidis QC (instructed by Allens Lawyers) for the respondent, on 4 & 5 December 2018

[1] For all practical purposes, Colinta Holdings Pty Ltd is a wholly owned subsidiary of Glencore Coal Queensland Pty Ltd. It exists to manage cattle on land owned, or affected, by Glencore mining projects.

[2] Colinta holds three contiguous Lots about 20km west of Glenden in Queensland. They are: Lot 3 on SP 235898, Lot 14 on SP 271185 and Lot 1 on SP 271184 which adjoins Lot 3. Colinta operates the three Lots as part of a single management unit (the Aggregation)[1] within a wider business of twelve management units throughout Queensland, New South Wales and the Northern Territory. The Aggregation is bisected by the existing Newlands Collinsville Railway.

[3] In June 2010, Byerwen Coal Pty Ltd lodged five applications for mining leases that affected the Aggregation. Compensation was determined and paid for two of the five applications. This decision concerns the remaining three applications: MLA 10355; MLA 10356; and MLA 10357.

[4] MLA 10355 covers an area on Lot 3. MLA 10356 covers an area over both Lots 3 and 14. MLA 10357 also covers an area over Lot 3. None of MLA 10355, MLA 10356, or MLA 10357 covers any of Lot 1.

[5] Glencore operates the Newlands and Eastern Creek mines on land immediately to the south-east of the Aggregation. Glencore mining leases cover large parts of the Aggregation, including Lot 1. Colinta has an informal agreement with Glencore that it may graze cattle in those parts of the Glencore leases that are not the subject of mining operations.

[6] On 6 October 2017, the Coordinator-General took 135.49 ha of Lot 3 and 6.01 ha of Lot 14. The land was taken for a rail corridor, enabling Adani to build a standard gauge railway from its North Galilee mine to the Abbott Point coal terminal. The land taken largely follows the Newlands Collinsville Railway, although there are some additional areas set aside for permanent work sites, a permanent construction yard, a temporary construction camp, a temporary concrete batch plant, and a bridge lay down area. On 27 November 2018, Adani announced that, instead of the standard rail project, it would now build a narrow gauge rail from its North Galilee mine to the Aurizon rail network.

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1 Ex 15, page 2, para 9.

[7] The hearing conducted in 2017 proceeded on the basis that Adani had not, and would not, require land for a rail line. The valuers provided a joint expert report on that basis (JER1). Once the land was taken, it was necessary to reopen the evidence. The valuers provided two further joint expert report (JER2 and JER3).

[8] There are four questions for my determination:

(a) What is the post-Adani resumption compensation?
(b) Is Colinta entitled to claim compensation for Lot 1?
(c) Is Colinta entitled to compensation for the land referred to as the balance homestead area and, if so, what is the amount of that compensation?
(d) Is Colinta entitled to be paid for the stamp duty costs and legal fees of obtaining a replacement property?

What is the post Adani resumption compensation?

[9] The valuers engaged by the parties framed their assessments by reference to *Mineral Resources Act 1989* (MRA) s 281(3), which sets out the heads of compensation. In JER1, the valuers agreed that Colinta was entitled to at least $3,327,500 compensation.

[10] Mr Patrick Lyons, of Taylor Byrne Valuers, took the view that Colinta was not entitled to any further compensation. Mr Tim Cavanagh, of Webster Cavanagh, took the view that Colinta was entitled to an additional $935,325. The difference between the two is Mr Cavanagh's inclusion of $712,500 compensation for the balance of the Homestead area and $222,825 for stamp duty costs and legal fees of obtaining a replacement property. Before the Adani resumption, the valuers' assessments of the total compensation payable were about $1M apart:

Agreed	**Mr Lyons**	**Mr Cavanagh**
MRA s 281(3)(a)(i)	$2,375,000	$2,375,000
MRA s 281(3)(a)(ii)-(iv)	$872,500	$872,500
MRA s 281(4)(a)	$80,000	$80,000
Subtotal	**$3,327,500**	**$3,327,500**
Disagreed		
MRA s 281(3)(a)(i)-(iv)	Nil	$712,500
MRA s 281(4)(a)	Nil	$222,825
Subtotal	**$3,327,500**	**$4,262,825**
MRA s 281(4)(a)(e)	$332,750	$426,282
Total Compensation Payable	**$3,660,250**	**$4,689,108**

[11] Post-Adani, the valuers' assessments are almost $2M apart. Mr Lyons assessed the post-Adani base compensation as $2,115,000, whereas Mr Cavanagh assessed the post-Adani base compensation as $2,838,750. Mr Cavanagh then adjusted that figure by $25,000 to take account of the additional farm labour required during construction of the Adani rail line. Again, Mr Cavanagh added $712,500 compensation for the balance of the Homestead area and $222,825 for stamp duty costs and legal fees of obtaining a replacement property.

[12] Mr Lyons took the view that the Adani resumption affected the value of the Aggregation by 30%. Mr Cavanagh considered that the Adani resumption affected the value of the Aggregation by 10%. The major points of difference were:

(a) Would the Adani resumption effectively prevent cattle transfer across the railway line at the Kangaroo Creek crossing?
(b) Would Colinta have to construct new cattle yards to the west of the railway line?
(c) What was the increased cost of operations due to the construction of the railway line and in operating the Aggregation after construction?
(d) How would the resumption affect negotiations between a hypothetical buyer and hypothetical seller (the application of the *Spencer*[2] test)?

[13] Mr Lyons took the view that there was no practical access for cattle over the Adani rail line[3]. In his view, that had a significant negative effect on the "before" valuation of the Aggregation post-Adani. His assessment of compensation also included a deduction for the cost of building new cattle yards in the southern part of the Aggregation to the west of the rail line towards the southern end near Cerito Rd.[4] He factored in disturbance costs at a present value of $500 per week over a period of five years, onto which he applied a discount rate of 2.5%.[5] He also factored increased working costs of $300 per week, capitalised at 2.5% in perpetuity.[6]

[14] Mr Cavanagh accepted the evidence of Colinta's station manager Mr Nathan Reinke[7] that, while the movement of cattle across to railway lines would be slightly more complicated, it was still practically possible.[8] He also accepted Mr Reinke's evidence that Colinta would not need new cattle yards to the west of the rail line. He assessed

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2 *Spencer v Commonwealth* (1907) 5 CLR 418.
3 Ex 34, paras 23 to 37.
4 Ex 34, para 38.
5 Ex 33, para 29.
6 Ex 33, para 20.
7 Ex 35.
8 Ex 35, page 3, para 15.

the impact of the Adani resumption as a percentage figure overall, factoring in disturbance costs of $25,000 and little, if any, increased working costs.[9]

[15] A summary of the differences expressed in JER2 is as follows:

Agreed	**Mr Lyons**	**Mr Cavanagh**
MRA s 281(3)(a)(i)	$1,550,000	$2,130,000
MRA s 281(3)(a)(ii)-(iv)	$485,000	$708,750
MRA s 281(4)(a)	$80,000	$80,000
Subtotal	**$2,115,000**	**$2,918,750**
less adjustments	Nil	-$25,000
Subtotal	**$2,115,000**	**$2,893,750**
Disagreed		
MRA s 281(3)(a)(i)-(iv)	Nil	$712,500
MRA s 281(4)(a)	Nil	$183,284
Subtotal	**$2,115,000**	**$3,789,534**
Plus MRA s 281(4)(a)(e) – 10%	$211,500	$378,953
Total Compensation Payable	**$2,326,500**	**$4,168,488**

[16] While it is possible to forensically compare the assessments of the two valuers, I do not propose to take that course. An expert's duty to assist the Court overrides any obligation the expert may have to any party to the proceeding.[10] As the President of the Court of Appeal has explained: "This duty may require a level of candour and voluntary disclosure on the part of an expert witness that might involve prejudicing the case of the party that called the expert witness."[11]

[17] I am not satisfied that Mr Lyons properly understands his obligation to the Court. If he does understand it then I am not satisfied that he complied with it. I do not accept any of Mr Lyons' conclusions concerning the effect of the Adani resumption. I have a number of reasons for coming to that conclusion.

[18] First, President Kingham issued three directions about the joint expert report process, which included details about their obligation to meet and confer.[12] Despite those directions, on three occasions during the 2017 hearing, Mr Lyons produced evidence he had not shared with Mr Cavanagh.

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9 2018 T2-32, line 38 to T22-33 line 4.
10 *Land Court Rules 2000* r 24C.
11 *Allianz Australia Insurance Ltd v Mashaghati* [2017] QCA 127, [90].
12 Orders of 3 March 2017, 10 July 2017, and 3 August 2017.

[19] Second, on 16 October 2018 I ordered that, in considering the post-Adani situation, the experts were not to revisit the assumptions and conclusions they had reached in JER1. Despite that, Mr Lyons did revisit the assumptions.[13] When asked about this in the second hearing, Mr Lyons said that he did not ignore an order of the Court intentionally.[14] It is difficult to see what other conclusion could be drawn from Mr Lyons' persistence in addressing an issue that I had ordered should not be revisited, particularly given my reasons for that decision were annexed to JER3.[15]

[20] Third, Mr Lyons' approach to critical issues was untenable. The ability for cattle to cross the rail lines at the Kangaroo Creek crossing was a significant element in the calculation of compensation. Initially, Mr Lyons assumed that no access was possible at Kangaroo Creek,[16] because he was not satisfied that the resumption work would include a bridge at that point. Mr Lyons came to that conclusion even though the Interface Construction Deed[17] between Colinta and Adani shows the construction of a bridge. When Mr Lyons was forced to concede that a bridge would be constructed at that point, he told the court he considered the nature of the terrain around the Kangaroo Creek meant that access was practically impossible.[18] He did not make that assertion in any of the joint expert reports before the court, and there was no evidence to support that assertion.

[21] Mr Lyons also purported to give evidence about the way in which cattle are commonly transferred across railway lines, citing safety issues and the behaviour of cattle near trains.[19] Mr Lyons' evidence was in contrast to Mr Reinke's evidence. Mr Reinke is Colinta's station manager; he regularly handles cattle across the existing railway line. Although Mr Lyons may be a rural valuer of some considerable experience, his curriculum vitae does not disclose any particular expertise in cattle handling. I prefer the evidence of Mr Reinke. I had the very clear impression that Mr Lyons was finding any reason to justify his initial view.

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13 Ex 33, para 15; Ex 33 paras 12 to 15.
14 2018 T1-98, lines 41 to 44; T1-99, lines 1 to 6, lines 17 to 18.
15 Ex 34, page 32.
16 Ex 34 paras 10, 12, 37.
17 2018 Ex 37, appendix NRC-1.
18 2018 T1-69, lines 35 to 43; T1-70; T1-71, lines 1 to 11.
19 2018 T1-111, lines 20 to 25.

[22] Fourth, Mr Lyons gave opinions apparently based on his considerable experience in rural matters and the negotiation of access related to major infrastructure projects.[20] Mr Lyons was before this court as an expert witness. His experience outside matters of valuation is not expert evidence, merely opinion evidence. Without primary evidence to support his assertions, - details of the projects and the nature of negotiations – Mr Lyons comments are of little value.

[23] Fifth, Mr Lyons told the court that his opinion was informed by what landowners had told him about their experience in dealing with other infrastructure projects.[21] Again, there was no primary evidence before me; I had no affidavits from any other landowner nor was any other landowner called to give evidence. While it might be true that the Land Court is not bound by the rules of evidence,[22] an expert statement of evidence must include all material facts on which the statement is based,[23] the expert must confirm that the factual matters included in the statement are, as far as expert knows, true[24] and that the expert has made all enquiries considered appropriate.[25] At a minimum, I would expect Mr Lyons' reports to include the sources of his information and exactly what that information entailed. The fact that Mr Lyons told the court that, as a normal course of events, he would not identify the foundation of his views[26] is very concerning and suggests that he has no real understanding of his obligation as an expert witness.

[24] Sixth, Mr Lyons conceded that he may have exaggerated (to the extreme) his assessments of the Adani effects, but he did not resile from them.[27] He took the worst possible case for adverse effects of the Adani resumption yet ignored, or read down, matters that would mitigate the impact of the Adani resumption. As an example, he ignored the two-year construction schedule contained the Interface Operations Deed between Adani and Colinta[28] and calculated compensation on a five year construction period with no evidence to support that assumption.[29] He assumed that the Adani rail

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20 See, for example, 2018 T2-8, 43 to T2-12, 5; T2 – 30, 10 to 16.
21 See, for example 2018 T2-30, lines 17 to 21.
22 *Land Court Act 2000* s 7(a).
23 *Land Court Rules 2000* r 24F(2)(b).
24 *Land Court Rules 2000* r 24F(3)(a).
25 *Land Court Rules 2000* r 24F(3)(b).
26 2018 T2 – 38, lines 1 to 5.
27 2018 T2-37, lines 22 to 44.
28 Ex 37, appendix NRC-2.
29 2018 T2 – 35.

line would operate at maximum capacity, making no allowance for a recent announcement from Adani that it operate in a more limited way.[30] Once again, I had the very clear impression that Mr Lyons was simply trying to justify his initial view, rather than look at the evidence objectively and fulfil his obligation as an independent expert witness.

[25] Seventh, Byerwen conceded that Mr Lyons linked his assessment of compensation to the amounts paid by Adani under the Commercial Terms Agreement. The Commercial Terms Agreement was before the court simply as a fact; the parties had agreed that it did not represent a true assessment of the value of the land. There are many factors that may have influenced Adani's decision to pay the compensation that it did. The communications before the court[31] are only part of the negotiation process and I am not prepared to draw any inference about the premium that may have been paid or, indeed, the factors which influenced those negotiations from an incomplete snapshot of the negotiations.

[26] Finally, as I have already stated, the *Spencer* test requires a valuer to consider the price that might be struck between a properly advised seller and properly advised purchaser, each willing to trade but neither of whom was so anxious to do so that they would overlook ordinary business considerations.[32] Mr Lyons valued the compensation only from the perspective of the hypothetical purchaser.[33] He told the court that rural purchases are risk averse and he would advise a hypothetical purchaser to "assume the worst".[34] He did not consider the perspective of the hypothetical vendor, nor did he attempt to balance the competing interests of vendor and purchaser. A valuation that focuses only on the interests of one party does not fulfil the *Spencer* test, and is of no utility.

[27] Mr Cavanagh's evidence is not without some difficulties and I should comment upon some of them. Byerwen's first two criticisms of Mr Cavanagh's evidence compare and contrast his assessment with the Commercial Terms Agreement. As I have already noted, I do not propose to place any weight on the figures contained in that document, given my finding that I do not have "more than sufficient detail to discern

30 Ex 39.
31 Ex 40.
32 *Spencer v Commonwealth* (1907) 5 CLR 418, 441.
33 See for example 2018 T2–14, line 45 to T2 – 15, line 3.
34 2018 T2-50, lines 10 to 14.

the key drivers for Adani". Byerwen also criticises Mr Cavanagh for changing his mind about the need for cattle yards on the western side of the rail line.[35] Mr Cavanagh explained that he changed his mind when he saw Mr Reinke's affidavit.[36] He also stressed that his initial valuation was a preliminary view, based on a desktop assessment.[37]

[28] I am generally prepared to accept Mr Cavanagh's conclusions. I am satisfied that Colinta will be able to transfer cattle across the rail line, even after the Adani resumption, without much difficulty. I am satisfied that, even though Colinta included the cost of new yards in its negotiations with Adani, they are now not necessary. I accept that there will be a modest increase in station manager time to liaise with Adani during the construction of the rail line and that Mr Cavanagh's calculation of $25,000 is sufficient. Therefore I accept the base compensation payable to Colinta is $2,893,750.

Is Colinta entitled to claim compensation for Lot 1?

[29] MRA s 279(1)(a) states that a mining lease shall not be granted unless compensation has been determined between the applicant and each person who is the owner of the land the surface of which is subject to the application and of any surface access to the mining lease.

[30] Byerwen submits that, because none of the surface of Lot 1 is subject to an application, I should not give Colinta any compensation for diminution in value of that Lot. Colinta says that I should treat the whole Aggregation (Lots 1, 3 and 14) as the 'land' referred to in MRA

[31] Gary Johncock, until his retirement from 30 June 2018,[38] had been the General Manager – Pastoral Operations employed by Colinta since 1990. His evidence was uncontradicted. He told the court that the Aggregation Lots share a common Property Identification Code (PIC) issued by the Queensland Government.[39] The PIC is required for the purchase of national livestock identification in system devices or access to national vendor declarations or waybills. He said that cattle from one lot are

35 2018 T1-89, lines 10 to 16.
36 2018 T1-89, lines 18 to 21.
37 2018 T1-83, lines 17 to 20.
38 Ex 35, page1, para 2.
39 Ex 15, page 3, para 9(e).

regularly transferred to paddocks on another lot, depending on pasture quality, water availability and other farm management considerations. He said that several of Colinta's paddocks span more than one of the subject lots. He said that the business performance of the three lots is assessed cumulatively.

[32] Colinta submits that, as a consequence of Mr Johncock's evidence, I should treat the Aggregation as 'the land' referred to in MRA s 281(3) and, therefore, Lot 1 should be included in the calculation even though no proposed lease directly affects the surface area of that lot.

[33] In support of that submission, Colinta points to three additional factors. Firstly, it says that, because compensation should be approached in a "generous, not a niggardly, spirit,"[40] I should interpret 'land' in its wider sense.

[34] Secondly, Colinta relies on the comments by Member Smith in *Carabella Resources Limited v Goodwin*[41] that "When considering what makes up the land of the owner, it is irrelevant whether the owner's land is contained within one or indeed 1000 separate lots."[42] Colinta submits that, because the actual use of the three lots is through a single operation, for all intents and purposes, the 'land' is the Aggregation.

[35] Finally, Colinta submits that had it been the drafter's intention to restrict 'land' to a particular lot that would have been an easy exercise. Indeed, as Colinta points out, the MRA does distinguish between 'land' and a 'lot'.[43] Colinta says the use of the word 'land', rather than 'lot' in MRA s 281(3) must have a wider meaning.

[36] Byerwen, on the other hand, points out that the MRA contemplates two different types of compensation. Where land is taken by a mining lease,[44] the compensation available under MRA s 281(3)(a) has a number of elements, which includes the deprivation of the surface of the land, the diminution in the value or improvements, and the diminution in the use as a consequence of the grant or renewal of the mining lease. The compensation available to an owner of land whose surface area is not included

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40 *Xstrata Coal Queensland Pty Ltd & Ors v Keys & Anor; Xstrata Coal Queensland Pty Ltd & Ors v Skygrove Pty Ltd; Xstrata Coal Queensland Pty Ltd & Ors v Erbacher; Xstrata Coal Queensland Pty Ltd & Ors v Edmonds & Anor* [2013] QLC 34, [83].

41 [2016] QLC 32.

42 Ibid [324]-[326].

43 See, for example, *Mineral Resources Act 1989* s 14 and s 15.

44 *Mineral Resources Act 1989* s 279.

in the use[45] is limited to the diminution in the value of the land or any improvements and diminution in the use the owner may make of the land, and all loss or expenses that arises as a consequence of the grant or renewal of the mining lease.[46] Further, Byerwen submits that, because compensation for the taking of land is a necessary prerequisite for the grant of a lease, and compensation for affected land is not, the legislature intended a different regime for land not directly affected by the lease.

[37] Byerwen submits that *Carabella* is of little assistance to me, as the cases Member Smith considered when coming to his decision involved different compulsory acquisition legislation. Byerwen also submits that *Carabella* is wrongly decided and should not be followed. It is true that the cases Member Smith referred to were not mining compensation cases but *Carabella* was a mining compensation case. It has not been appealed.

[38] On balance, I find that Byerwen's argument takes an overly technical approach to the question of compensation. Here, the 'land of the owner' is three contiguous lots operated as one business venture, with one manager, one homestead and cattle transferring across all three lots. The particular facts support a wider reading of 'land' in MRA s 281(3)(a). That is not to say, as was the case in *Carabella,* that contiguous lots will always be treated as 'the land of the owner'. It is also not to say that land which is remote from the subject land but part of one business operation, will be included as 'land of the owner' for the purposes of this section. As always, each compensation decision, and what will constitute 'land of the owner' will depend on the particular facts of the case.

[39] In its submissions on the effect of the Adani resumption, Byerwen submits that if there is a doubt as to the amount properly payable by way of compensation that doubt should be "resolved in favour of a more liberal estimate",[47] is limited to cases where the evidence is 'finely balanced'. Byerwen submits that a "generous approach" is taken into consideration by MRA s 281(4)(e) which provides for a 10% uplift. Quite apart from the fact that the submissions are late, I'm not persuaded by them. While it is true that the evidence on this issue is not "finely balanced", the task of statutory

45 *Mineral Resources Act 1989* s 280.
46 *Mineral Resources Act* 1989 s 281(3)(b).
47 *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Company of SA* (1947) 74 CLR 358, 374.

interpretation involves similar considerations, and it is on that basis that I am prepared to favour a more generous interpretation of "land".

[40] Lot 1 should be included when calculating compensation.

Is Colinta entitled to compensation for the land referred to as the balance homestead Lot?

[41] To understand the question, and provide an answer, it is necessary to set out in detail the approach the valuers took in JER1. They identified the land affected by the two MLAs for which compensation had been paid, and excluded that land from the available grazing area. They identified the areas affected by the Glencore leases, and excluded that land from the available grazing area. They excluded the land directly affected by the subject MLAs from the available grazing area. They identified land encumbered by the Newlands Nature Reserve and offsets, and excluded that land from the available grazing area. Of a total land area of over 50,000 hectares, after excluding these areas, about 14,500 hectares was unencumbered.

[42] The experts looked at the land that was left. They agreed to discount some of that land by 100% because it was severed from the balance of the land by the MLAs. They agreed to discount other land by 50%. They agreed that there was no diminution to a small area of 461 hectares that was the subject of earlier compensation.

[43] That left an area of about 3,500 hectares straddling Lots 1 and 3 (the homestead balance area). It contains a homestead, workers quarters, machinery sheds and yards. The valuers agreed to discount the infrastructure by 50%. The 'before' value of the homestead balance area of $1,425,000 is not affected by the Adani resumption.

[44] Mr Lyons formed the view that the three MLAs did not further diminish the value of the homestead balance area, and therefore applied no further discount. Mr Cavanagh formed the view that the homestead balance area should be discounted by a further 50%.

[45] Mr Lyons gave three reasons why, in his view, the homestead balance area should not be discounted further. He told the Court that the homestead balance area was already significantly impacted by the Glencore MLAs and a potential purchaser would not see it as being further diminished by the Byerwen MLAs. He expressed the view that

there was a strong market for small grazing properties with a small carrying capacity. He said there were three categories of potential purchaser: adjoining owners, rural lifestyle purchasers (probably employed in the mines) and entry level graziers. He also relied on and applied the sales evidence of 'Broadlea'.[48]

[46] In looking at the three categories of potential purchaser, I do not accept Mr Lyons' contention that there is a strong market for these types of properties.

[47] The only owner adjoining the homestead balance area is Glencore. There is no reason why Glencore would purchase land from its subsidiary.

[48] Unlike areas around Emerald or Clermont, there is no history of land in Glenden being purchased by rural lifestyle purchasers. Mr Lyons said that was because there were no small lots for sale in the area. That might be true, but there is the added consideration that Collinsville, the nearest town, does not provide the infrastructure of other towns such as Emerald or Clermont and it is not as easily accessible. There was no evidence before me of a sale to a 'lifestyle' purchaser in this area.

[49] The sales evidence Mr Lyons provided does not persuade me that there is a strong market for entry level grazing in the Glenden area. For the period from May 2015 to June 2017, there were five sales. Three sales were in the Clermont area which, the experts agreed, had a history of sales to entry level graziers.[49] There is no such history at Glenden. Four of the five sales were to existing graziers, adding to their portfolios of properties. Only one sale could be considered a purchase by an entry level grazier; the grandson of the owner purchased the property as part of a deceased estate dispersal. I have no information about whether the grandson was an existing grazier, and even Mr Lyons expressed the view that this sale should be treated with caution.

[50] Mr Cavanagh expressed the view that, although the practical effect of the homestead balance area is that it is a limited area with low carrying capacity, that is not how a potential purchaser would view it. He said, and I agree, that a potential purchaser would understand that the property in question was over 50,000 hectares but only 14,422 hectares would be useable. So, a potential purchaser would be buying 35,578 hectares that could not be used for grazing but which carried obligations.

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48 Ex 23, page 44.

49 2017 T2-13, line 30 to T2-14, line 25.

[51] Mr Lyons said the extra 35,578 hectares represented an opportunity to a potential purchaser, because these areas would eventually become available as the mining operation shifted, or the leases expired.

[52] The Byerwen applications call for a lease period of 25 years. Mr Lyons stated the Glencore leases all have varying dates of expiration. "Some of them are relatively soon, and some of them are out into the future some way".[50] Waiting for such a long time is not, in my view, an opportunity which has any real value.

[53] So, what is the value of the homestead balance area to a hypothetical purchaser? Mr Lyons points out, correctly, that the homestead balance area is already significantly affected by the Glencore leases and the existing rail line. He points out that Glencore will soon extend its mining operations closer to the homestead. He points out that the Glencore extensions will be as close to the homestead as the proposed Byerwen operations.

[54] The reality is that the homestead balance area will be sandwiched between two operating mines. The shape of the homestead balance area is irregular and skirts existing mining activities and infrastructure. The Byerwen MLAs will create new infrastructure, close to the homestead. Existing fences, paddocks and watering points, on the Byerwen MLAs will not be available to the homestead balance area, meaning that a theoretical purchaser will have to re-establish this infrastructure to suit the new configuration.

[55] The valuers had agreed nearby areas severed by the Byerwen leases[51] should be discounted by 50%. Mr Cavanagh thought that the homestead balance area should be informed by that agreed discount and similarly discounted by 50%.

[56] Two of the three nearby areas that were discounted by 50% are adjacent to the Byerwen MLAs. The third area is severed from all other property by a road. The impact of the Byerwen MLAs on these areas is more severe than it will be on the homestead balance area. I do not accept that a 50% deduction is appropriate.

[57] Both valuers referred to the sale of Broadlea as a guide for how to value a property severely affected by mining leases. That property was subject to two mines. It had

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50 2017 T2-78, lines 10 to 15.

51 Severance areas 1, 2 and 4.

two haul roads, a load out facility and was next door to another very large mine. The valuers agreed that the cumulative effect of these factors was to discount the value by 23%.

[58] The situation of the homestead balance area is analogous. A hypothetical purchaser would discount the value of the property based on the adjacent mining operations. The homestead infrastructure has already been discounted by 50%. A further discount for the homestead balance area of 23% is appropriate and justifiable. Colinta should be compensated for the diminution of the homestead balance area by a payment of $327,750.

Is Colinta entitled to be paid for the stamp duty costs and legal fees of obtaining a replacement property?

[59] MRA s 281(4)(a) states:

> (4) In assessing the amount of compensation payable under subsection (3)—
>
> > (a) where it is necessary for the owner of land to obtain replacement land of a similar productivity, nature and area or resettle himself or herself or relocate his or her livestock and other chattels on other parts of his or her land or on the replacement land, all reasonable costs incurred or likely to be incurred by the owner in obtaining replacement land, the owner's resettlement and the relocation of the owner's livestock or other chattels as at the date of the assessment shall be considered;

[60] Mr Johncock gave evidence that the Aggregation is a critical part of the Colinta integrated breeding/fattening chain.[52] He says that, each year, stock from the breeding properties must be transferred out to accommodate the next crop of calves. Some of those calves are transferred to the Aggregation for two to three years before being sold. He says that, in a normal year, about 1700 head are transferred to the Aggregation. He says that, after the loss of the areas to the Byerwen leases, the carrying capacity of the Aggregation will be reduced by about 1,830 head. Mr Johncock told the court that, unless it replaces the land lost to the Byerwen leases, Colinta will be unable to maintain its current level of operations on the Aggregation. He is not aware of any capacity in the other areas of Colinta's operation that would be able to absorb the shortfall. He says he will recommend to the Colinta board that it purchase a replacement property.

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52 Ex 15, para 20.

[61] Colinta submits that I should accept Mr Johncock's evidence as being sufficient support for additional compensation for the stamp duty and legal costs involved in purchasing another property. It submits that 'necessary' in MRA s 281(4) should be read as 'reasonably required'.

[62] Byerwen submits that the test for additional compensation under MRA s 281(4) has two elements. Firstly, the land owner must establish that it is necessary to purchase replacement land. Secondly, compensation is limited to the costs that are likely to be incurred.

[63] As to whether it is necessary to purchase a replacement property, Byerwen relied on the evidence of Mr Andrew Perkins, an agronomist with a particular interest in agricultural economics. Mr Perkins considered the stocking rates in the Aggregation and, together with fellow agronomist Mr Mick Alexander, concluded that the stocking rates were probably too high. Both agronomists were of the opinion that Colinta could not continue to stock the Aggregation at its current levels, even if none of the land was affected by a mining lease. That evidence is interesting, but not determinative.

[64] Mr Perkins thought that the reduction in carrying capacity was only about 3%. He stated that the requirement for a replacement property is a question of the most economic use of capital and that an owner would not purchase replacement property when the loss of carrying capacity was only 3%. That view was echoed by Mr Lyons.

[65] Neither Mr Perkins nor Mr Lyons had access to Colinta's profit and loss statements or balance sheets. Neither of them knew the precise business model Colinta operates over the Aggregation. Despite requesting disclosure of Colinta's stocking rates, Byerwen did not ask Colinta for any financial information. The comments of both Mr Perkins and Mr Lyons are speculation and I will not have regard to them.

[66] Mr Johncock's evidence supports a finding that Colinta needs a replacement property to continue its existing operations without a change to stocking rates.

[67] However, for three reasons, I am not satisfied that Colinta is likely to incur the costs involved in purchasing a replacement property. Firstly, although Colinta operates as a grazing operation, it is obvious that its method of operation is always subject to the requirements of Glencore's mining operations. It loses land to mining. It gains land from expired mining leases. In every case, it adjusts its business operations to suit.

As Mr Johncock confirmed, generally, Colinta adjusts its stocking rate to the available land.[53]

[68] Secondly, in the 27 years Mr Johncock was employed by Colinta, despite the ebb and flow of property available to it for its operations, Colinta has never purchased additional land. Colinta says that it has never been given compensation before, and I accept that, but if Glencore wants to maintain Colinta as a viable, independent grazing operation, then there must have been opportunities when Colinta could have bought buffer land in its own right.

[69] Finally, the best evidence I have that Colinta will purchase replacement land is that Mr Johncock would have recommended that purchase to the Board. I do not have any evidence to suggest that Mr Johncock's recommendation will be accepted. Mr Johncock is a pastoralist. He frankly acknowledged that he did not know much about the mining operations.[54] The members of Colinta's Board are mining and/or financial experts. Whether they will accept Mr Johncock's recommendation is unknown.

[70] No one from the board gave evidence. The failure to call evidence from a member of the Board invites a conclusion that such evidence, if a member had been called, would not have been in Colinta's favour.[55] I do draw that conclusion and I am not satisfied that Colinta is likely to act on Mr Johncock's recommendation and purchase replacement land.

Conclusion

[71] I have accepted Mr Cavanagh's assessment of compensation at $2,893,750 for most heads of compensation. Colinta is entitled to a further $327,750 for the diminution of the homestead balance area and a 10% uplift because of the compulsory nature of the acquisition.[56] The total compensation to which Colinta is entitled is:

Base assessment	$2,893,750
Diminution of homestead balance area	$327,750
Subtotal	$3,221,500
Plus MRA s 281(4)(a)(e) – 10%	$322,150
Total Compensation Payable	**$3,543,650**

53 2017 T1-52, lines 10 to 46.
54 2017 T1-53, lines 30 to 35.
55 *Jones v Dunkel* (1959) 101 CLR 298.
56 *Mineral Resources Act 1989* s 281(4)(e).

[72] As to the costs of the proceeding:

(a) The applicant may file and serve any submissions by 12 February 2019;
(b) The respondent may file and serve any submissions in response by 12 March 2019;
(c) The applicant may file any submissions in reply by 19 March 2019; and
(d) Costs, if any, will be determined on the filed submissions without an oral hearing.

Orders

1. **In respect of MLA 10355, MLA 10356 and MLA 10357, compensation is determined in the amount of $3,543,650.**

2. **The applicant may file and serve any submissions on costs by 12 February 2019.**

3. **The respondent may file and serve any submissions in response by 12 March 2019.**

4. **The applicant may file any submissions in reply by 19 March 2019.**

5. **Costs, if any, will be determined on the filed submissions without an oral hearing.**

PG STILGOE OAM
MEMBER OF THE LAND COURT