IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S312 of 2010

BETWEEN:

JEMENA GAS NETWORKS (NSW) LIMITED
Appellant

and

MINE SUBSIDENCE BOARD
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Internet publication certification

1. The respondent's submissions are in a form suitable for publication on the internet.

Part II: Issues presented by the appeal

2. The primary issue presented by the appeal is the proper construction of s. 12A(1)(b) of the *Mine Subsidence Compensation Act 1961* (NSW) ("***MSC Act***"). If the Court adopts the construction preferred by the Court of Appeal and the respondent, a second issue arises concerning the characterisation of the subsidence from which the appellant could reasonably have anticipated damage.

Part III: Section 78B of the *Judiciary Act 1903* (Cth) certification

3. The respondent has considered whether notice to the Attorneys General is required by s. 78B of the *Judiciary Act 1903* (Cth) and agrees with the appellant that no such notice is required.

Part IV: Statement of material facts

4. There is no contest regarding material facts. The decisive fact is that at the time the appellant incurred expenses in undertaking preventative works on the pipeline the appellant did not anticipate (and could not have reasonably anticipated) that, but for those works, damage would otherwise have arisen

Filed on behalf of the Respondent
ADDRESS FOR SERVICE
Crown Solicitor's Office
Level 5, 60-70 Elizabeth Street
Sydney NSW 2000
DX 19 SYDNEY

Date of Filing – 15 February 2011
Tel (02) 8224 5390
Fax (02) 9224 5222
Ref Sarah-jane Morris

from the movement of the ground that had taken place by that time: Statement of Agreed Facts ("**SOAF**") [37], [38], [40], [41]; paragraph 13 of the appellant's submissions.

5. It should also be noted that planning for the preventative or mitigatory works at Mallaty Creek commenced prior to July 2005, that is, before any relevant extraction or consequent subsidence of any kind at Mallaty Creek occurred: SOAF [32], [35].

Part V: Applicable statutory provisions

6. The appellant has accurately set out s. 12A(1)(b) of the *MSC Act*. The respondent accepts that s. 12A(1)(b) is the provision which is directly relevant to the determination of the appeal. Section 12A(1)(b) must be construed in the context of the *MSC Act* as a whole and, in particular, must be read together with ss. 12, 13A, 15, 16 and 16A.

Part VI: Argument

7. The issue of construction in the present case turns on the significance of the words "from a subsidence that has taken place" in s. 12A(1)(b) of the *MSC Act*. Before considering the two alternative constructions advanced by the appellant,[1] it is necessary to note some features of the statutory scheme and set out the respondent's preferred construction (as upheld by the Court of Appeal) and the basis thereof.

8. The *MSC Act* provides for a limited number of circumstances in which payments may be made out of the Fund: see s. 10(3). For present purposes, the most relevant provisions for payment out of the Fund are contained in ss. 12, 12A(1) and 13A.

9. Section 12A(1)(b) provides that a claim may be made for the payment from the Fund of "an amount"[2] to meet certain expenses. Two distinct types of claims are provided – claims in respect of an expense which has already been incurred and claims in respect of an expense proposed to be incurred. The dual coverage of s. 12A(1)(b) is significant, particularly in explaining the tense of the language used in the subsection.

---

1 Although the appellant's submissions contain a separate section addressing the "third alternative" (paragraphs 47-59), the section contains arguments comparing the construction preferred by the majority of the Court of Appeal with the construction preferred by Basten JA. Those arguments are dealt with below in relation to the respondent's preferred construction and Basten JA's preferred construction.

2 Unlike s. 12 and s. 12A(1)(a), s. 12A(1)(b) is not in terms concerned with "compensation".

10. Focusing on the former class of claims, s. 12A(1)(b) contains the qualification that the expenses in question must have been incurred in preventing or mitigating damage that, in the opinion of the Board, "the owner could reasonably have anticipated would otherwise have arisen ... from a subsidence that has taken place".

11. There is no equivalent qualification in s. 13A, which empowers the Board to carry out, or cause to be carried out, works to prevent or mitigate damage "that the Board anticipates would, but for those works, be incurred by reason of subsidence". Sections 12A and 13A were introduced into the *MSC Act* by the *Mine Subsidence Compensation (Amendment) Bill 1969*.

12. An important feature of the legislative scheme is the maintenance of control over improvements and works within mine subsidence districts, through statutory controls and through the actions of the Board, pursuant to s. 13A and other provisions including s. 16. Approval of the Board is required to alter or erect an improvement within a mine subsidence district: ss. 15(2A) and 15(7). It is envisaged that the Board should have expertise in relation to mine subsidence: s. 16A.

13. It is correct to say that s. 12A(1)(b) "supplements" s. 12 of the Act, in the sense that s. 12 is concerned with claims for compensation that arise after damage arises from subsidence, whereas s. 12A(1)(b) is concerned in part with claims in relation to expenses incurred or proposed to be incurred in anticipation of damage. However, the provision for payments in respect of mitigatory or preventative works under s. 12A(1)(b) is in significantly qualified terms. It is inaccurate to say that s. 12A(1)(b) permits claims in respect of the cost of works in preventing or mitigating damage "from subsidence": see paragraph 21 of the appellant's submissions. The qualifying words "from a subsidence that has taken place" are significant and must be given work to do.

14. The relevant question in the present case is whether the appellant is entitled to a payment from the Fund on the basis that all of the criteria for such a payment in s. 12A(1)(b) were satisfied at the time the application was determined by the Board. The question of statutory construction must be answered according to orthodox principles. The unspoken premise of the appellant's argument is that the *MSC Act* ought to be read, as a matter of legislative policy, in such a way as to enable payment to a claimant in the appellant's position. There is no textual, contextual or purposive basis for such an assumption.

15. It is not helpful to approach the issue of construction by considering the prudence or otherwise of the actions of the appellant as an owner of an improvement: see paragraph 23 of the appellant's submissions. Nor is it

accurate or helpful to suggest that the Board refused the appellant's claim on the basis that a claimant under s. 12A(1)(b) "must wait" until subsidence of a particular kind has occurred before incurring or proposing the relevant expense. Section 12A(1)(b) describes the conditions which must be satisfied in order for a payment to be made from the Fund in respect of an application for an amount to meet expenses relating to particular preventative or mitigatory works. It does not, on any view, require an owner to "wait" until actual subsidence takes place before taking steps to prevent damage to improvements.

The correct construction of s. 12A(1)(b)

16. The words "that has taken place" refer in their natural and ordinary meaning to an actual, past event: per Spigelman CJ (with whom Allsop P and Giles JA agreed) at [66]. There is no reason of context or legislative purpose to give those words anything other than their ordinary meaning. The only viable point of difference about the construction of the subsection involves identifying the point in time by which the event must have occurred: see [60] per Spigelman CJ.

17. The Court of Appeal found unanimously in the present case (subject only to the partially dissenting reasoning of Basten JA (with whom McFarlan JA agreed)) and in *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60 ("***Wambo***") that the relevant point is the time at which the expense was incurred or is proposed to be incurred, as the case may be. In *Wambo* Tobias JA, with whom Hodgson and Santow JJA agreed, concluded on this basis, at [29], that s. 12A(1)(b) is "directed to expense incurred in preventing or mitigating 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". A majority of the Court in the present case agreed: at [95], [97], [98].

18. This construction is to be preferred as it is consistent with the text and context and serves to further the legislative objects underlying s. 12A(1)(b), having regard also to s. 13A (which was introduced in the same amending Act) and the extrinsic material relating to those amendments.

The appellant's preferred construction – "a subsidence that has taken place" is part of the hypothetical assessment

19. The appellant's primary contention is that the words "from a subsidence that has taken place" in s. 12A(1)(b) refer to hypothetical subsidence which need not have taken place before the expenses were incurred and may never take place. The appellant argues, in effect, that the Board may

properly conclude that an owner "could reasonably have anticipated" that the damage would otherwise have arisen "from a subsidence that has taken place", even if no subsidence has ever taken place.

20. The appellant's argument is contrary to the plain meaning of the text and such a construction would not further any sensible legislative policy. The construction is incompatible with the use of a tense referable to past events (a subsidence that has taken place) and the use of the indefinite article ("a" subsidence) in s. 12A(1)(b): see Court of Appeal judgment per Spigelman CJ (with whom Allsop P and Giles JA agreed) at [68]-[69]. The argument does considerable violence to the language of s. 12A(1)(b) and also involves, as paragraph 25 of the appellant's own submissions makes plain, reading in words that do not appear.

21. The proposition that the words "that has taken place" refer to an actual, past event has been accepted by each of the eight Judges of Appeal presiding in the present case and in *Wambo*. The appellant's preferred construction, which reads the reference to "a subsidence that has taken place" as a reference to a future, hypothetical event, is incompatible with the approach adopted by all eight Judges of Appeal.

22. In essence, the appellant's submission involves reading the words as if they said simply "from subsidence": see Basten JA at [111]. In addition to ignoring the clear words of the section, that approach is incompatible with the textual distinction between s. 12A(1)(b) (where the qualification "that has taken place" appears) and s. 13A (where no such qualification appears), bearing in mind also that the provisions were introduced in the same amendment Act. Ignoring the qualifying words "that has taken place" would frustrate the legislative intention to impose an additional requirement in s. 12A(1)(b). The distinctive operation of the two sections is plain from the text and no reliance on the Second Reading Speech is necessary to demonstrate the distinction: contra Basten JA at [155].

23. The appellant's argument is also impossible to reconcile with the disqualifying element at the end of s. 12A(1)(b). In order to be eligible for payment in respect of an incurred expense the Board must form the opinion that the owner could reasonably have anticipated that damage would otherwise have arisen from a subsidence that has taken place "other than a subsidence due to operations carried on by the owner". The disqualifying rider confirms that the subsection is referring to actual, past subsidence. The Board can only make a sensible assessment of whether the subsidence that has taken place was a subsidence "due to the operations carried on by the owner" by reference to actual subsidence. It would be nonsensical for the Board to make an assessment about not only hypothetical subsidence but also the cause of that hypothetical subsidence.

24. The appellant seeks to justify its preferred construction by referring to the "remedial" character of the provisions and a loose concept that the "underlying theme" of these provisions is that "prevention is better than cure". Such appeals to a broad beneficial purpose do not provide a sound basis for giving the words of s. 12A(1)(b) anything other than their ordinary meaning: see *Director-General, Department of Education v MT* (2006) 67 NSWLR 237 at 248 per Spigelman CJ (with whom Ipp JA and Hunt AJA agreed). Section 12A of the *MSC Act* is beneficial within the scope of its operation: Court of Appeal judgment per Spigelman CJ at [86].

25. As to the proposition that "prevention is better than cure", s. 12A(1)(b) does not serve such a broad purpose in an unqualified way. Its purpose is limited to facilitating "self-help" by allowing for the recovery of expenses only in the prescribed circumstances, that is where the owner acts (or proposes to act) to mitigate or prevent damage which is anticipated from a subsidence that has occurred. The power conferred on the Board under s. 13A was intended to have broader coverage in relation to anticipated damage arising from subsidence (including anticipated subsidence). The related but distinct intentions underlying each provision is apparent from the relevant passages of the Minister's Second Reading Speech in support of the Bill which introduced s. 12A and s. 13A into the MSC Act in 1969, as referred to by Spigelman CJ at [85]-[89] and by Tobias JA in *Wambo* at [29]. The unqualified reference to "subsidence" in s. 13A, particularly when compared with s. 12A(1)(b) makes plain that the Board's power does extend to preventative action in respect of anticipated subsidence. The suggestion by Basten JA at [148] to the contrary should not be accepted.

26. In contrast, the legislative policy underpinning s. 12A(1)(b) was to deal with "emergencies" that may occur where it might be necessary for the owner of an improvement to take action in response to a subsidence that has taken place. While the respondent does not suggest that s. 12A(1)(b) must be read as applying only to "emergency" scenarios, the explanation of the intention in the Second Reading Speech does confirm the natural reading of the text as relating to preventative or mitigatory measures taken in response to a subsidence that has taken place: Spigelman CJ at [89]. Contrary to the appellant's submissions at paragraph 56, the provision in s. 12A(1)(b) for applications to be made for payment in respect of "proposed" expenses is not inconsistent with the subsection being concerned with emergency scenarios where urgent action is required.

27. The appellant's parsing analysis, in paragraph 57 of its submissions, of the precise words used by the Minister in the Second Reading Speech is of no assistance in the construction of s. 12A(1)(b). The significance of the Second Reading Speech is limited to identifying the objective purposes of

the legislature, not the intended meaning or operation of particular words: *Harrison v Melhem* (2008) 72 NSWLR 380 at 384.

28. The appellant also relies on s. 14 of the *MSC Act* as providing support for its broad construction of s. 12A(1)(b). There are two significant flaws in the argument that construing s. 12A(1)(b) against the background of s. 14 leads to the construction contended for by the appellant. First, the abrogation of common law rights pursuant to s. 14 was a feature of the statutory scheme before s. 12A(1)(b) was introduced into the *MSC Act*. Indeed, it was a feature of the original scheme under the *Mine Subsidence Act 1928*, the essential features of which were maintained in the *MSC Act*: see Spigelman CJ at [83]. It follows that it cannot be said that a right to recover an amount from the Fund to meet expenses incurred in respect of anticipated damage from subsidence (whether past or anticipated) was in any sense part of the legislative *quid pro quo* under a scheme which abrogated common law rights (contra paragraph 32 of the appellant's submissions). Second, there is no common law equivalent to the entitlement to payment which the appellant says now arises from s. 12A(1)(b).

The appellant's alternative construction – "A subsidence" must have taken place by the time the Board forms its opinion

29. The appellant's alternative construction, adopting the reasoning of Basten JA in the Court of Appeal, is that "a subsidence that has taken place" means a subsidence that has taken place when the Board forms its opinion for the purposes of determining a claim under s. 12A(1)(b), but not necessarily before the expenses were incurred.

30. It may be accepted that the formation of the Board's opinion is critical to the operation of s. 12A(1)(b): see Basten JA at [143]-[144]. However, that consideration does not resolve the question of whether the reference to "a subsidence that has taken place" refers to a subsidence that has taken place by the time of the formation of the opinion or which had taken place at the time of the expenses being incurred. It is essentially neutral as a matter of construction. So too is the observation that the owner of improvements need not necessarily have formed the opinion in question: paragraph 41 of the appellant's submissions. The resolution of the ambiguity about the nature of the notional opinion required to be formed by the Board must turn on other matters.

31. Looking at the words of s. 12A(1)(b) in isolation, the construction developed by Basten JA is a viable one. However, even viewing the text in isolation there are also textual indications in support of the construction adopted by the majority.

32. Where a claim is made in respect of an expense already incurred, the Board is required to form an opinion about a notional state of affairs in the past. The Board must form an opinion as to whether, at the time the expense was incurred, the owner "could reasonably have anticipated" that damage would otherwise have arisen "from a subsidence that has taken place". While the tense of the language is unusual (but explicable for the reasons set out below), the provision operates in these circumstances to focus upon the time at which the expenses were incurred. Attention is directed not to the time of the Board's determination but to the point in time the Board is directed to consider for the purposes of forming its notional opinion. The majority of the Court of Appeal, with respect correctly, found that, in this context, linking the reference to "a subsidence that has taken place" temporally to the anticipation of damage (and the simultaneous incurring of expenses) rather than the formation of the Board's opinion is more consonant with the syntax: at [78]. It is also consistent with the reference to the indefinite article "a subsidence": at [44]. It is also more compatible with the Board being required to make an assessment of whether the expenses incurred in respect of the anticipated damage were "proper and necessary": see s. 16(1); *Wambo* at [44]-[45].

33. Basten JA considered the use of the word "has", rather than "had", to be particularly decisive: [143]-[144] and [166], appellant's submissions at paragraph 37. However, the use of the word "has" in preference to "had" can be explained by considering the alternative scenarios covered by s. 12A(1)(b). As noted above, the subsection deals with claims in respect of expense already incurred and claims in respect of expense "proposed" to be incurred. In considering a claim of the latter kind, the Board is required to form an opinion as to whether the expense is proposed to be incurred in respect of damage that the owner of the improvements:

> *"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".*

34. Because of the tense used in this thread of s. 12A(1)(b), the use of the word "had" would have been inappropriate. The use of the word "has" was therefore appropriate and sufficiently flexible to cover both scenarios contemplated in s. 12A(1)(b). It follows that the choice of word "has" in preference to "had" provides no support, or only minimal support, for the construction preferred by Basten JA.

35. The remaining ambiguity may be resolved by reference to contextual considerations and by comparing the practical consequences and policy implications of the two constructions. The alternative construction preferred

by Basten JA would lead to unlikely, if not absurd, consequences and should not be preferred.

36. The alternative construction attaches critical importance to the time at which the Board forms its opinion in respect of a claim. That will largely be a matter of chance and no sensible legislative policy is served by having a claimant's entitlement to a payment from the Fund turn on that timing.

37. A claim for payment from the Fund under s. 12A(2)(b) must be made within three months of the time when the expense became known to the owner: see [80] and ss. 12A(3) and 12(2)(b). The Board is empowered to conduct an investigation and the report of any such investigation must be placed before the Board for a decision as to what, if any, payment is to be allowed from the Fund: see [77] and ss. 12A(3), 12(2)(b) and 16(1). While these provisions will have a bearing on the likely time at which the Board forms its opinion for the purposes of s. 12A(1)(b), the matter is not specifically governed by any provisions of the MSC Act.

38. In *Wambo*, at [39]-[43] Tobias JA noted that it would be anomalous, if not irrational, if a claimant's entitlement to payment depended on the timing of the claim itself (or alternatively upon the timing of payment). In the present case, Spigelman CJ at [80] held that the analysis is equally applicable to the proposition that the time of the Board's opinion is the relevant time.

39. The purely fortuitous aspect of this approach is demonstrated by the facts of this case. As events transpired, the Board did not determine the appellant's claim until subsidence of sufficient magnitude to have caused damage to the pipeline had occurred. The claim was determined on 23 July 2008 (SOAF at [1]) and subsidence of the relevant magnitude was recorded at Mallaty Creek in August 2007 (SOAF at [44]). Questions of timing must be understood in the context that the appellant had been planning the works since before July 2005 (SOAF at [32]), had undertaken the works in 2005 and 2006 (SOAF at [40]-[41]) and had made a claim for payment on 17 July 2007. As it happens, the construction serves the interests of the appellant on the facts of this case but that is a matter of chance rather than the product of a coherent legislative scheme being put into action.

40. The construction preferred by Basten JA would lead to the anomalous, if not irrational result that an owner of improvements who incurs expense in undertaking preventative works in respect of anticipated subsidence may or may not be eligible for a payment from the Fund pursuant to s. 12A(1)(b), depending entirely on whether or not the subsidence takes place before the Board forms its opinion in respect of the claim. Such an owner would have a degree of control over the process, in that the owner could choose when to make the claim within the three month time limit. By virtue of the time

limit, on this construction of s. 12A(1)(b), the owner would have a strong incentive to delay incurring the expense for the preventative works until as late as possible before the anticipated subsidence, so as to maximise the chances of a successful claim. There could be no sensible legislative policy served by such an arrangement. Contrary to the appellant's submissions at paragraph 58 and the reasons of Basten JA referred to therein, the three month time limit for the making of claims is a relevant consideration militating against his Honour's preferred construction.

41. After the claim is submitted and depending on the timing of the subsidence in any given case, the claimant's entitlement to payment from the Fund may depend upon how quickly the Board acts in forming its opinion under s. 12A(1)(b) in respect of such a claim. That will be an unpredictable, if not wholly fortuitous, factor.

42. The absurd consequences of this construction may also be demonstrated by considering the position if a claim for payment under s. 12A(1)(b) is refused and then made the subject of an appeal to the Land and Environment Court. A person who has claimed a payment under s. 12A(1)(b) may appeal to the Land and Environment Court against the decision of the Board "as to whether damage ... could reasonably have been anticipated": s. 12B(a), considered in *Alinta LGA Ltd v Mine Subsidence Board* (2008) 82 ALJR 826 at 836B. For the purposes of determining such an appeal, the Land and Environment Court would be required to determine de novo the question of whether damage "could reasonably have been anticipated". In doing so the Court would have all the functions and discretions of the Board in relation to the question arising for determination: s. 39(2) of the *Land and Environment Court Act 1979*. It would seem to follow that, adopting Basten JA's preferred construction, the Court would be required to consider whether the expenses were incurred in respect of damage which the owner of the improvements could reasonably have anticipated would otherwise have arisen from a subsidence that has taken place by the time of the Court's decision. This would add an additional layer of delay and unpredictability to the process of determining whether a claimant is entitled to a payment from the Fund. It would also introduce the perverse possibility that an applicant may be ineligible at the time of the Board's decision but become eligible by the time of the Court's decision, if relevant subsidence happens to take place in the meantime.

43. Having a claimant's entitlement to payment turn on such arbitrary factors would serve no sensible legislative policy. By contrast, the construction of s. 12A(1)(b) preferred by the respondent and the majority in the Court of Appeal sets clear and objectively ascertainable standards by reference to which owners of improvements can regulate their affairs. So construed, the

section provides for payments where a claimant has incurred expenses in responding to an event which has occurred.

44. The appellant's submission, at paragraph 43, that the construction preferred by the majority in the Court of Appeal involves the Board in a speculative exercise about the nature of the subsidence and the anticipation of damage is misconceived. No question arises of the Board speculating about the probability of facts occurring or "ignoring" subsidence that has taken place. The notional opinion which the Board is required to consider turns on the actual circumstances in which the expenses were incurred. Future subsidence (whether it has occurred or not by the time of the Board's decision) is simply irrelevant to the exercise.

45. The appellant, at paragraph 46, criticises the majority's approach as a "narrow, syntactical approach divorced from the large policy considerations thrown up by the section and the Act as a whole". There is nothing unduly narrow or technical about the majority's construction of the text. The applicant's reference to the "large policy considerations thrown up by the section" appears to be connected with the assertion that the "evident purpose" of s. 12A(1)(b) is that "prevention is more often better than cure". The inexactitude of that proposition has been dealt with above.

46. The construction preferred by the majority of the Court of Appeal does not lead to any perverse result. It is consistent with the text and with a legislative scheme which confers primary responsibility on the Board for dealing with subsidence (including anticipated subsidence) but which also provides for limited measures of "self-help" by allowing for the recovery of expenses only in the prescribed circumstances, where an owner of improvements responds to subsidence that has taken place by taking (or proposing) preventative and/or mitigatory measures. Contrary to the appellant's submissions, at paragraph 51 (and the reasoning of Basten JA referred to therein), the fact that owners of improvements may not always have the option of taking self-help measures with the benefit of recoupment of expenses from the Fund provides no logical support for a different interpretation of s. 12A(1)(b). There is nothing in the *MSC Act* or the secondary material relating to the amendments which introduced s. 12A to suggest that the legislature intended to confer a general right on the owners of improvements to undertake preventative or mitigatory works and be indemnified by the Fund.

47. The appellant's argument also wrongly assumes that the situation where subsidence is anticipated is commonplace and the *MSC Act* should be construed accordingly. There is no warrant for such assumptions.

48. The Board's powers under s. 13A of the *MSC Act* are an important feature of the legislative scheme when assessing the appellant's submission that s. 12A(1)(b) should be construed in such a way as to avoid allegedly irrational results. Section 13A is sufficiently broad to encompass situations where the owner of improvements anticipates that damage will arise from anticipated subsidence which has yet to occur: see [92] per Spigelman CJ and *Wambo* at [31]-[32]. The difference in the language used in s. 13A ("damage that the Board anticipates would, but for those works, be incurred by reason of subsidence") and s. 12A(1)(b) (with its qualified reference to damage arising from "a subsidence that has taken place") is significant, particularly as the two provisions were introduced simultaneously. In circumstances where damage is anticipated from anticipated subsidence, the owner may request the Board to carry out (or cause to be carried out) the necessary works to prevent or mitigate the anticipated damage.

49. The appellant, in paragraph 53-55 of its submissions, seeks to identify potential limitations in the scope of the Board's powers pursuant to s. 13A of the *MSC Act.* It is unnecessary to reach any conclusions about the precise scope of those powers. The fact that the Board's powers under s. 13A are qualified does not provide any warrant for any corresponding expansion in the scope of s. 12A(1)(b). As Spigelman CJ held at [92], there is nothing "anomalous" about s. 13A being the only means by which remedial steps can be taken to deal with proposed future conduct which is known to carry the risk of subsidence. Section 13A provides a mechanism for dealing with prudent risk management in relation to anticipated subsidence and there is no warrant for giving s. 12A(1)(b) a strained construction to fill any perceived vacuum. The significance of s. 13A within the statutory scheme is that it provides the only available mechanism under the *MSC Act*, in words which are plainly distinct from the words of s. 12A(1)(b), for authorising payments from the Fund in respect of preventative or mitigatory works relating to anticipated subsidence. Nor is it of any relevance that one aspect of s. 13A is the conferral of power to carry out work on land other than the claimant's: see paragraph 54(c) of the appellant's submissions.

50. In assessing the appellant's submissions regarding the alleged general policy that prevention is better than cure, it must be borne in mind that the construction preferred by Basten JA, if adopted, would do no more than expand the coverage of s. 12A(1)(b) to a curious new class of claimants – those who take measures to prevent damage in anticipation of subsidence and who have the good fortune (and/or calculated risk taking, to the extent that the incurring of the expenses is delayed until immediately before the anticipated subsidence) that the anticipated subsidence "takes place" before the Board forms its opinion. That leaves matters to chance in a way which is strongly suggestive of a misconstruction of the section.

The issue of causation and progressive subsidence

51. The appellant contends, in the further alternative, that even on the construction preferred by the majority it was entitled to a payment from the Fund in respect of the expenses incurred. The applicant's argument depends upon "subsidence" being defined by reference to planned mining activities and cumulative measurements over time. That approach is incompatible with the definition of "subsidence" in the MSC Act and the particular subsidence to which s. 12A(1)(b) refers. Section 12A(1)(b) operates by reference to anticipated damage from "a subsidence that has taken place". Subsidence is actual movement of land caused by actual extraction of coal (or shale): see definition in s. 4 of the *MSC Act* and Spigelman CJ at [37]. The question arising from s. 12A(1)(b) is what movement has occurred at the relevant time and what is the damage that could reasonably have been anticipated from that movement.

52. The facts are clear as to the position which pertained at the time the appellant incurred the relevant expenses. As at that time, the actual movement of ground which had occurred was not such as to give rise to any anticipation of damage: SOAF at [37], [38]. That is sufficient to dispose of the question of "causation" which arises under s. 12A(1)(b).

53. The agreed facts do not include the proposition that "the ground was progressively moving downwards": see paragraph 61 of the appellant's outline of submissions. The appellant apparently seeks to argue that because subsidence of the ground at Mallaty Creek was measured as a cumulative amount, the total movement of ground which occurred over the two-plus year period may be characterised as a single subsidence for the purposes of s. 12A(1)(b). That approach is incompatible with the *MSC Act* and with the practical reality as described in the SOAF. Section 12A(1)(b) refers to "a subsidence" that has taken place. The definition of "subsidence" refers to subsidence (as ordinarily understood), vibrations and other movements of the grounds related to the extraction of coal or shale or prospecting for coal or shale. Contrary to the appellant's submission at paragraph 67, the extended aspect of the definition dealing with vibrations and other movements (whether or not the movements result in actual subsidence) provides no logical support for the view that subsidence "is a process not an event". Over the period described in the SOAF, subsidence occurred on a number of occasions according to a series of foreshadowed mining operations. The fact that the overall subsidence was measured cumulatively does not mean that there were not distinct instances of subsidence or that the subsidence that had taken place as at October 2005 did not have identifiable consequences which were wholly distinct from the consequences which might follow from subsequent subsidence. After all, the entire premise of the subsidence analysis undertaken for the appellant

was that different mining activities over different periods of time would produce predictable subsidence, in different amounts at particular places, in such a way as to facilitate planned measures, as were adopted by the appellant.

54. The appellant, at paragraph 69, resists the conclusions reached by Spigelman CJ by arguing that it would be perverse if an owner's right to compensation under the *MSC Act* depended on the "intricacies of the miner's mining plan". However, the appellant's own argument, as at paragraphs 63-64 and 70, places much greater weight on mining plans, as opposed to actual subsidence. The relevant factor in s. 12A(1)(b) is the subsidence of the ground in a particular location, not the mechanics of coal mining or the operational intentions of a coal miner: see Basten JA at [133] and [136]. The appellant's contention is that damage can be anticipated to arise "from a subsidence that has taken place" even if it is only anticipated to arise if a miner undertakes future mining activities in accordance with a known mining plan.

55. Comparisons with common law causation cases, as at paragraph 66 of the appellant's submissions, are unhelpful. Section 12A(1)(b) does not involve an assessment of various causal factors said to be related to damage which has occurred with a view to determining whether a given factor is "a cause" of the damage. Instead, s. 12A(1)(b) requires the Board to consider a particular moment in time before some or all of the damage has occurred with a view to determining whether damage could reasonably have been anticipated "from" a subsidence that has already taken place.

Dated 15 February 2011

Stephen Lloyd
Sixth Floor Selborne Chambers
Ph: 9235 3753
Fax: 9221 5604
Email: stephen.lloyd@sixthfloor.com.au

Stephen Free
11th Floor Wentworth Chambers
Tel: 9233 7880
Fax: 9232 7626
Email: stephenfree@wentworthchambers.com.au