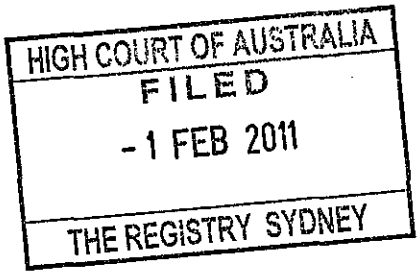
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S312 of 2010

BETWEEN:

JEMENA GAS NETWORKS (NSW) LIMITED
Appellant

AND:



MINE SUBSIDENCE BOARD
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet publication certification

1. These submissions are in a form suitable for publication on the Internet.

Part II: Issues presented by the appeal

2. There are, broadly speaking, two issues raised by the appeal.

3. The first is an issue as to the proper construction of s 12A(1)(b) of the *Mine Subsidence Compensation Act* 1961 (NSW) (the **"MSC Act"**), which provides for compensation to improvement owners for expense in preventing or mitigating damage from subsidence. This issue raises two subsidiary questions:

   (a) Does the subsection impose any temporal requirement at all as to subsidence taking place?

   (b) If it does, can a valid claim be made only if subsidence takes place prior to:

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(i) the time at which the improvement owner proposes or incurs the preventative expense (the majority view in the Court of Appeal); or

(ii) the time at which the Mine Subsidence Board forms the opinion required by the subsection, viz that the improvement owner could reasonably have anticipated damage would otherwise arise from subsidence (the minority view in the Court of Appeal).

4. The second issue is one of causation and only arises if the Appellant is unsuccessful on the first issue (ie if the construction favoured by the Court of Appeal – alternative (b)(i) above – is upheld). It is whether the causal requirement imposed by s 12A(1)(b) of the MSC Act, namely that in the Board's opinion the improvement owner could reasonably have anticipated damage *from* a subsidence that has taken place, is satisfied in circumstances where some subsidence due to the extraction of coal in the course of an ongoing coal mining activity has occurred in a particular place prior to the relevant expense being incurred and further subsidence at the same place from the extraction of coal is expected due to the continuation of the same mining activity, the cumulative effect of which is likely to cause damage to the owner's improvement.

5. If the Appellant succeeds on either issue, the appeal should be allowed.

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

6. The Appellant has considered whether any notice should be given to Attorneys General in compliance with s 78B of the *Judiciary Act* 1903 (Cth) and has determined that no such notice is required.

Part IV: Citation of judgments below

7. The reasons for judgment of Sheahan J in the Land and Environment Court of New South Wales are reported at *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2009) 167 LGERA 308.

8. The reasons for judgment of the New South Wales Court of Appeal (Spigelman CJ, Allsop P and Giles, Basten and Macfarlane JJA) are reported at *Jemena Gas Networks (NSW) Ltd v Mine Subsidence Board* (2010) 175 LGERA 16.

Part V: Statement of relevant facts

9. The relevant factual background is set out in [5]-[6] of the judgment of Spigelman CJ and [101]-[108] of the judgment of Basten JA. The facts were not controversial. The matter proceeded on the basis of a Statement of Agreed Facts (**"SOAF"**).

10. At all relevant times, the Appellant owned and operated the Moomba to Sydney gas pipeline, the primary source of natural gas for the Sydney and Newcastle metropolitan areas. The pipeline crossed an area of land the subject of the West Cliff Mining Lease held by a subsidiary of BHP Billiton Limited (**"Miner"**). The area traversed by the pipeline easement was above a series of parallel strips proposed for longwall mining, known as longwall panels 29-36. A map showing the pipeline easement and longwall panels 30-36 appears at Annexure "B" to the SOAF.

11. The Miner sought advice from mine subsidence and engineering experts as to the potential for subsidence and damage to the pipeline from the planned longwall mining (SOAF [28]-[31]). In December 2003 the Miner's mine subsidence consultants predicted there would be movement of the ground where the pipeline crossed Mallaty Creek. In that area the pipeline was laid underground. Subsidence was identified as likely to occur due to and commencing with the extraction of coal from longwalls 30 and 31. Those effects were not, by themselves, expected to damage the pipeline. However, the cumulative effects of the subsidence from extraction from longwalls 30-32 were expected to be above acceptable stress levels and likely to cause damage to the pipeline, absent preventative works.

12. In December 2004, the Miner obtained a consent under s 138 of the *Coal Mines Regulation Act 1982* (NSW) for the longwall mining of longwall panels 29, 30 and part 31, 32 and 33, replacing an earlier approval granted in November 2002. That section provided that no method of mining other than the bord and pillar system shall be used in an underground mine except with the approval of the Minister. Accordingly, any plan for longwall mining required an approval under the section. A map showing the pipeline, Mallaty Creek and longwalls 30-32 appears at Annexure "C" to the SOAF.

13. In July 2005 extraction from longwall 31 commenced. On 24 October 2005, subsidence of 31.8 mm was recorded at the intersection of the pipeline and Mallaty Creek as a result of longwall mining to that date. That level of subsidence did not damage the pipeline and was

not expected to damage it in the future. However, the Appellant reasonably anticipated, based on the consultants' predictions (see paragraph 11 above), that further mining, extending into longwall 32, would produce a cumulative level of subsidence likely to cause damage to the pipeline (see SOAF [39]).

14. Between December 2005 and October 2006, the Appellant commenced engineering and design works to prevent damage to the pipeline. In October 2006, preventative and mitigatory works commenced on both sides of Mallaty Creek, which involved excavation of the pipeline, decoupling of the pipeline from the soil and associated filling. The works were completed in January 2007.

10 15. On 20 December 2006, the date of the last survey prior to commencement of mining of longwall 32, the cumulative subsidence recorded at the intersection of the pipeline and Mallaty Creek was 42.3 mm.

16. Mining of longwall 32 commenced on 12 February 2007. On 30 April 2007, cumulative subsidence of 140.4 mm was recorded at the intersection of the pipeline and Mallaty Creek. On 28 August 2007, cumulative subsidence of 274.7 mm was recorded at the intersection of the pipeline and Mallaty Creek. Mining of longwall 32 was completed on 17 June 2008.

17. On 17 July 2007, the Appellant made a claim for compensation from the Mine Subsidence Compensation Fund under s 12A(1)(b) of the MSC Act for the costs of preventative and mitigatory works performed on the pipeline on the northern side of Mallaty Creek.

20 18. On 23 July 2008, the Respondent rejected the Appellant's claim on the basis the works related to damage from anticipated subsidence and not subsidence that had taken place at the time the preventative expenses were incurred.

Part VI: Summary of Appellant's argument

19. It is convenient to deal first with the construction issue and then with the causation issue.

<u>The proper construction of s 12A(1)(b) of the MSC Act</u>

20. The legislative scheme of the MSC Act is set out in the joint judgment of this Court in *Alinta LGA Ltd (formerly the Australian Gas Light Co) v Mine Subsidence Board* (2008) 82 ALJR 826 at [15]-[31]. In short, the Act provides for the maintenance and administration

by the Respondent Board of the Mine Subsidence Compensation Fund (**Fund**), which is funded by compulsory contributions from colliery proprietors, and against which improvement owners may make certain claims for compensation or reimbursement.

21. Section 12A(1)(b) of the MSC Act permits claims by improvement owners against the Fund for the cost of works in preventing or mitigating damage from subsidence. It supplements s 12, which permits (inter alia) claims for compensation for the costs of remedying damage from subsidence *after* damage has occurred.

22. Section 12A(1)(b) relevantly provides:

> *12A(1) Subject to this section, claims may be made under this Act for payment from the Fund of:*
>
> *(a) .....*
>
> *(b) an amount to meet the proper and necessary expense incurred or proposed by or on behalf of the owner of improvements or household or other effects in preventing or mitigating damage to those improvements or household or other effects that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has taken place, other than a subsidence due to operations carried on by the owner.* (emphasis added)

23. The Appellant carried out preventative works prior to the level of subsidence reaching the point at which the pipeline would suffer damage. The prudence of that course cannot be doubted. Yet the Respondent Board refused the claim on the basis that a claimant under s 12A(1)(b) must wait until subsidence sufficient to cause damage has actually occurred before incurring or proposing the relevant expense. It did so in reliance on the decision of the New South Wales Court of Appeal in *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60 (***Wambo***). The trial judge (Sheahan J) followed *Wambo* as he was bound to do.

24. The Appellant's appeal before the Court of Appeal was heard before a 5 member bench. A majority in the Court of Appeal (Spigelman CJ, Allsop P and Giles JA) upheld the construction placed on s 12A(1)(b) in *Wambo*. Basten and Macfarlane JJA considered *Wambo* to be wrongly decided but joined in the orders of the majority on the basis that they did not consider it so clearly wrong that the Court of Appeal would be justified in departing from its own earlier decision.

First alternative: a "subsidence that has taken place" is part of the hypothetical assessment to be made by the Board

25. The Appellant's primary contention, as in the Court of Appeal, is that the words *"from a subsidence that has taken place"* do not impose any temporal requirement at all. That is, the subsection does not require that subsidence actually occur before a valid claim can be made. Rather, the words are directed to the time when it is reasonably anticipated that *"damage .... would otherwise have arisen"* and are part of the assessment of reasonable anticipation which the Board is required to make. So construed, the subsection is to be read as follows:

> *"an amount to meet the proper and necessary expense incurred or proposed .... in preventing or mitigating damage .... that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has taken place [prior to that damage arising]...."*

26. So construed, the phrase *"a subsidence that has taken place"* is part of the hypothesis upon which the section is based. The point of time at which the condition must be satisfied is the future time at which the damage would otherwise arise if preventative works were not undertaken. That is to say, the section is concerned with preventing or mitigating damage to improvements from a subsidence which it describes as *"a subsidence that has taken place"* as it would have to in order to cause the damage which the owner of the improvement is seeking to prevent or mitigate. The use of the indefinite article is supportive of this construction in that *a* subsidence (not then known) is anticipated to take place in the future causing damage.

27. The section focuses attention on the Board's opinion of the reasonable anticipation of the owner of the improvement. It requires an assessment by the Board of the reasonableness of the owner's anticipation of a future event, namely the future occurrence of damage to the owner's improvement. The section puts a condition on that reasonable anticipation of future damage - that it arise from a subsidence that has taken place. If in the opinion of the Board the owner could reasonably anticipate that *damage would otherwise arise* from subsidence that has taken place *by the time of that damage arising*, a claim for compensation may be made.

28. This construction it is submitted is fully consistent with the ordinary meaning of the words used and gives them a remedial and purposive construction consistent with the underlying theme of these provisions that prevention is better than cure.

29. The practical, commonsense result that this interpretation produces is well illustrated by the facts of the *Wambo* case. The improvement owner knew that planned underground longwall mining would cause subsidence of the land on which its conveyor was located and invariably damage the conveyor. The owner took the prudent and sensible course of relocating the conveyor before the subsidence occurred, which it did as predicted. Alternatively, the owner could have waited until the subsidence occurred as predicted and then, if the conveyor was not already damaged, seek to dismantle and relocate it before damage resulted. No obvious legislative purpose is served by denying the owner's claim when it took the former, and eminently sensible, option rather than the latter, riskier one which might have left the conveyor extensively damaged by the subsidence.

30. Having regard to the serious consequences of subsidence, common sense dictates that if the Fund is to allow owners to make claims for expenditure for preventative or mitigatory works, they should be able to do this ahead of the subsidence occurring. This would not expose the Fund, which remains protected by the requirements that the Board be of the opinion that the owner could reasonably anticipate damage from the subsidence and that the expense incurred be proper and necessary.

31. Further, this construction gives full effect to the remedial purpose of the MSC Act which the presence of s 14 strongly supports. As this Court observed in *Alinta* at [18] (extracted by Basten JA at [139]), an owner's right to claim on the Fund under ss 12 and 12A is the *quid pro quo* for the abrogation by s 14 of the Act of the owner's right to sue the miner at common law for the withdrawal of support for land. Against that background, ss 12 and 12A are properly to be seen as beneficial provisions, not to be emasculated by a close and technical reading. It is a relevant matter to take into account, in construing rights to make claims on a statutory fund, that they are in substitution for general law liability. That is all the more so when the contributors to the fund (here, the colliery proprietors) are also the beneficiaries of the statutory immunity. With respect, the Chief Justice was wrong to discount the interpretative significance of s 14 (at [84]-[89]). It cannot have been

Parliament's intention to limit, for the benefit of colliery proprietors, an owner's right to compensation in such an arbitrary and illogical way.

32. But for the abrogation of an owner's right to sue in nuisance for withdrawal of support for land, coal mining activity would be exposed to potentially immense dislocation through countless proceedings by owners to injunct mining activity unless their improvements were protected. The legislature, having enacted s 14, should be taken to have intended that an owner who, based on accepted scientific and expert assessments, reasonably anticipates subsidence and damage should be able to act in a timely manner to prevent or mitigate that damage before any subsidence occurs and recover from the Fund accordingly. The Fund, as pointed out in paragraph 30 above, remains protected by the provision making payment thereout conditional on the Board's approval.

33. If this construction is rejected, questions then arise in relation to the time when subsidence in fact has to have taken place. This gives rise to awkward questions of construction and (it is submitted) arbitrary results.

Second alternative: subsidence must have taken place by the time the Board forms its opinion

34. If, contrary to the Appellant's primary contention, s 12A(1)(b) requires actual subsidence at some point in time, the Appellant adopts with respect the reasoning of Basten JA in [143]-[167] of his Honour's judgment as to why the relevant time is when the Board forms the opinion required by the section. As his Honour points out in [143]–[144] of his judgment, the critical element of the subsection, ignored in *Wambo*, lies in the words *"in the opinion of the Board"*.

35. It is the opinion of the Board as to the reasonable anticipation of damage arising from subsidence that is the criterion by which the validity of claims is to be determined. Whether the improvement owner did or did not in fact reasonably anticipate damage is irrelevant to the statutory criterion. The statutory precondition to payment from the Fund is the forming of an opinion by the Board with hindsight that the owner could reasonably have anticipated damage from a subsidence that has taken place. Unless and until that opinion is formed, no payment may be made from the Fund: s 10(3)(a).

36. The Act prescribes the procedure by which the Board is to consider, and if appropriate, form the opinion upon which a right to compensation under s 12A(1)(b) depends. The improvement owner must notify the Board of the preventative expense incurred or proposed and the Board must investigate the matter with a report of such investigation to be placed before a meeting of the Board for a decision for the payment, if any, to be allowed in respect of the notification: ss 12A(2)(c) and s 12(2)(b) as picked up and applied mutatis mutandis in s 12A(3).

37. On Basten JA's reasoning, the significance of the criterion of a valid claim being the forming of an opinion by the Board is that it provides the temporal grounding point for the words *"from a subsidence that has taken place"* as used later in the section. The relevant time at which the section speaks is that at which the Board forms its opinion. That is, the section requires that a subsidence *"has taken place"* by the time the Board forms the opinion upon which the entitlement to compensation depends. As Basten JA pointed out in [143]-[144] and [166] of his judgment, if the legislative requirement were that subsidence take place prior to the incurring or proposing of the preventative expenses the section would instead refer to subsidence that *"had taken place"* (emphasis added).

38. If, as the Appellant submits, any temporal requirement of the section falls to be determined at the time the Board forms it opinion as to the reasonable anticipation of damage, that requirement was satisfied. Subsidence sufficient to cause damage had occurred by the time the Board determined the Appellant's claim on 23 July 2008 – the mining of longwall 32 (which the Miner's experts advised would cause damage to the pipeline) was completed on 17 June 2008.

39. This construction of s 12A(1)(b) was rejected by Spigelman CJ in delivering the opinion of the majority, who dealt with it at [78]-[83] of his judgment. He rejected this interpretation by reference to the grammatical structure and syntax of the section. He relied on the syntax in two respects.

40. First, the Chief Justice was of the view (at [78]) that the phrase *"from a subsidence that has taken place"* more naturally attached to the immediately preceding words concerning the anticipation by the owner. With respect, that attachment is far from clear and is a less than convincing basis for construction of an important remedial provision.

41. The phrase *"from a subsidence that has taken place"* attaches to and describes the word *"damage"* used earlier in the section, which the claimant is seeking to prevent or mitigate. It is appropriate that the provision should require that the damage would have satisfied that description as at the date the Board is forming its opinion. Between the reference to *"damage"* and the words *"from a subsidence that has taken place"*, the section introduces a requirement of reasonable anticipation. But it is not a requirement that the owner reasonably anticipate damage. It is instead a requirement that the Board form an opinion with hindsight that the owner could reasonably have anticipated damage.

42. Once it is appreciated that there is no requirement that the owner anticipate damage, how can it be said that the phrase *"from a subsidence that has taken place"* more naturally attaches to the anticipation of damage by the owner? There may be no such anticipation on the owner's part but still a valid claim. The only anticipation that is relevant is the notional reasonable anticipation which, in the opinion of the Board, the owner could reasonably have had. The more natural temporal connection of the phrase is therefore with the forming of the Board's opinion, which is a precondition to a valid claim, rather than any actual anticipation by the owner, which is not.

43. It makes sense that the legislature would choose, as the relevant reference point, the time at which the Board forms its opinion, rather than the earlier time when the owner incurs or proposes the expense. The Board has to form an opinion that the owner could reasonably have anticipated damage to its improvement resulting from a subsidence. In doing so, the Board must make an assessment of the causal connection between subsidence and anticipated damage. That assessment will be more informed and more accurate if made based on subsidence that has in fact occurred at any time prior to the Board's decision. There is no reason why Parliament should have intended the Board to be hamstrung in its assessment by ignoring subsidence which has in fact occurred simply because it had not occurred at an earlier time. Where actual facts are known, speculation as to the probability of those facts occurring is an unnecessary second-best: *Willis v Commonwealth* (1946) 73 CLR 105 at 109.

44. Secondly, the Chief Justice considered (at [82]) that the word *"from"* in the penultimate phrase of s 12A(1)(b) was clearly connected to the words *"arisen"* and *"arise"* at the end,

respectively, of the two preceding phrases and not to the phrase *"in the opinion of the Board"*.

45. This is undoubtedly correct but, with respect, of no assistance in the proper construction of the section. The words *"from a subsidence that has taken place"* are referring to *"damage"* which *"would otherwise have arisen"* or *"would otherwise arise"* but for the carrying out of preventative measures. These elements, however, are not sufficient for a claim under s 12A(1)(b). The section imposes a further qualification upon recovery from the Fund, namely that the Board be of the opinion that the owner could reasonably have anticipated that damage. For the reasons given above, that directs attention to the time at which the Board forms the requisite opinion.

46. The Chief Justice then concluded (at [83]) that nothing in the scope, purpose and structure of the legislative scheme warranted a departure from the view he had reached based on the section's grammatical structure. In the Appellant's submission, his Honour erred in adopting a narrow, syntactical approach divorced from the large policy considerations thrown up by the section and the Act as a whole. Those considerations were dealt with in *Wambo*, but in a way which failed to have regard to the subject matter, scope and object of the MSC Act as a whole and to produce a result that was, it is respectfully submitted, perverse and as already submitted (see paragraph 31 above) out of step with this Court's views in *Alinta.*

Third alternative: subsidence must have taken place before the expense is incurred or proposed (the Wambo construction)

47. The Chief Justice (with whom Allsop P and Giles JA agreed) upheld what he regarded as the *Wambo* construction of s 12A(1)(b). In *Wambo*, Tobias JA held that the words *"from a subsidence that has taken place"* import a temporal requirement which is that the subsidence must already have occurred *by the time the relevant expense is incurred or proposed.*

48. The Chief Justice set out (at [43]) the 9 reasons Tobias JA gave in *Wambo* in support of this interpretation, to which the Chief Justice added another at [44], namely the use of the indefinite article *"a* subsidence" which his Honour regarded as indicative of a specific, past subsidence.

49. It is submitted that the criticisms of Basten JA of the reasons given for the *Wambo* view are well founded. His Honour critically analyses each of them at [145]-[161] of his judgment, noting correctly that they involve a measure of duplication. Six main points emerge from that analysis and from a practical and purposive approach to the interpretation of s 12A(1)(b).

50. First, Tobias JA's first two reasons (at [28]-[30]) involve a comparison between s 12(1)(a) and s 12A(1)(b). But, as Basten JA observed, the suggestion that these provisions are complementary – the former providing for claims where both subsidence and damage have arisen; the latter where subsidence but not damage has arisen – assumes the answer to the question of the proper construction of s 12A(1)(b). Moreover, any suggestion of a neat complementarity is undermined by s 12(1)(b) which, like s 12A(1)(b), contemplates expense incurred with respect to damage which has not yet occurred.

51. Secondly, much of the reasoning in *Wambo* was directed to exposing the erroneous assumption by the trial judge in that case that subsidence and damage must occur simultaneously. This was Tobias JA's third reason (at [30]). So much may be conceded. But the converse is not true. As Basten JA noted at [146], subsidence and damage could readily be simultaneous or close in time, which is a matter of great interpretative significance. The *Wambo* construction imposes a highly restrictive interpretation on the section, which is to allow recovery only where there is a delayed effect on the improvement. Such a result can be seen, with little imagination, to have capricious or unfortunate results. It hardly serves the evident purpose of s 12A(1)(b) – that prevention is more often than not better than cure – to reward owners willing to risk damage occurring simultaneously with, or following quickly on, a subsidence but to penalise those who take a more prudent approach.

52. An appreciation that damage can, and often will, occur simultaneously with or quickly upon subsidence focuses attention on the policy behind s 12A(1)(b). No evident purpose is served by limiting claims under s 12A(1)(b) to instances where the improvement owner is willing to wait until the occurrence of actual subsidence before incurring or proposing preventative expenses, even though the owner reasonably anticipates subsidence and the risk of waiting until it occurs before taking preventative measures may be great. Such a

limitation cannot be necessary to protect the Fund, since s 12A(1)(b) already requires that the Board be of the opinion that the owner could reasonably have anticipated damage and that the expense incurred be proper and necessary. With respect, the reasoning in *Wambo* and of the majority in the Court of Appeal in this case fails to grapple with this obvious problem with the *Wambo* construction.

53. Thirdly, the power of the Board under s 13A itself to carry out preventative works (Tobias JA's fourth reason) is no justification for failing to give s 12A(1)(b) a sensible or logical operation. Section 13A permits the Board to carry out such works as, in its opinion, would reduce the total prospective liability of the Fund by preventing or mitigating damage that the Board reasonably anticipates would, but for the work, be incurred by reason of subsidence.

54. For the reasons Basten JA gives at [148], s 13A does not provide an answer to the obvious complaint that Parliament could not have intended to provide a remedy for anticipated damage only when the damage and subsidence were sufficiently separated in time that the owner could carry out preventative works after the former but before the latter:

(a) Section 13A is engaged only if, in the Board's opinion, preventative works would reduce the total prospective liability of the Fund. That limitation is shown up by the present case. The costs of repairing a rupture in the pipeline may be no greater, or may even be less, than the costs of preventative measures to ensure against failure. The Board would have no power in those circumstances to intervene under s 13A, despite the enormous costs to the public of a cessation of gas supply to the Sydney and Newcastle metropolitan areas.

(b) It is far from obvious that the subtle difference in language between s 12A(1)(b) and s 13A reflects a legislative choice that one is directed to damage from actual and anticipated subsidence and the other is limited only to damage from subsidence already occurring. Subsidence is described in many different ways in the Act and a consistent theme is impossible to discern: see paragraph [69] of Spigelman CJ's judgment.[1]

[1] See, for example, definition of "Subsidence" in s 4 (*"actual subsidence"*, suggesting that had the intention been to limit s 12A(1)(b) to actual subsidence the same formulation would have been used), s 12(1)(a) (*"arises*

(c) Section 13A is, as Basten JA pointed out, in part directed to an entirely separate purpose, which is to permit the Board to carry out work on land other than the claimant's.

55. Moreover, the purpose of s 13A is not to authorise the Board to carry out preventative works whenever requested to do so by an improvement owner. The Board's power to act under s 13A is not dependent upon a request by an improvement owner. Indeed, the Act contains no provision for the making of such a request; it contemplates the Board acting under s 13A unilaterally. This is to be contrasted with the detailed procedural provisions when the Act contemplates an improvement owner making a request to the Board: see, for example, ss 12A(2) and 15B(1)-(2).

56. Fourthly, the reliance placed in *Wambo* on the Second Reading Speech for the 1969 amendments (extracted by the Chief Justice at [87]-[88]) which introduced both s 12A and 13A is, to say the least, unpersuasive. This was Tobias JA's fifth reason at [33]-[38]. Although the Minister's speech makes reference to the possibility of improvement owners needing to carry out preventative works when emergencies occur, nowhere is it said either in s 12A itself or in the Second Reading Speech that claims under s 12A are limited to emergency situations. There is simply no support for the conclusion at [34] of *Wambo* that it was only in the context of emergencies that it was contemplated that the owner would carry out preventative works. As the Chief Justice and Basten JA both pointed out (at [89] and [154] respectively) that cannot be so because the section extends to expense *proposed* to be incurred.

57. If anything, the Second Reading Speech provides a basis for the view that the slight difference in language between s 12A(a)(b) (*"from a subsidence that has taken place"*) and s 13A (*"by reason of subsidence"*) was not intended to be significant. The Minister referred (at Hansard 1551.4) to s 12A(1)(b) as addressing the need for an owner to carry out works

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from subsidence"), s 12(1)(d) (*"arises from subsidence"*, *"caused by subsidence"*), s 12(1A) (*"the subsidence that caused the damage or necessitated the expense"*), s 12(2)(a) (*"damaged by subsidence"*), s 12(5) (*"damage arising from subsidence"*), s 12B(a) (*"has arisen from subsidence or could reasonably have been anticipated"*), s 13A (*"incurred by reason of subsidence"*), s 14(1) (*"occasioned by subsidence"*) and s 16(1) (*"damage ... from subsidence could reasonably have been, or be, anticipated"*)

to prevent or mitigate damage *"arising from a subsidence"* – essentially the language of s 13A not s 12A(1)(b).

58. Fifthly, the 3 month time limit for making claims (Tobias JA's sixth reason at [39]) may provide some support for the rejection of the view of the primary judge in *Wambo* that the relevant time was the time of making of a claim, but it does not provide any support for rejection of the constructions advanced by the Appellant in this case. It is, as Basten JA observed, a neutral consideration.

59. Sixthly, the remaining reasons of Tobias JA are a repetition of points already made, as Basten JA noted at [160] of his judgment. The suggestion in Tobias JA's seventh and eighth reasons at [44]-[45] that the task of demonstrating that an expense is *"proper and necessary"* is easier in cases where there has been an actual subsidence is an unpersuasive basis for reading down s 12A(1)(b). As the facts of both *Wambo* and this case show, it is a relatively straightforward exercise to demonstrate that preventative expenses are necessary to avoid damage from subsidence which is projected to occur.

The issue of causation and progressive subsidence

60. Even if the issue of construction is resolved adversely to the Appellant, there is a large issue of causation raised by the Court of Appeal's decision. The Appellant contended that there was subsidence at the relevant point (where the pipeline intersects Mallaty Creek) *prior* to it incurring the expenses of preventative works. It was an agreed fact that there was subsidence of 31.8mm recorded on 24 October 2005 and 42.3mm recorded on 20 December 2006, which subsidence was expected to progressively increase as mining continued. On that basis the Appellant's claim was valid, so it submitted, even on the *Wambo* construction.

61. This subsidence at Mallaty Creek, although not sufficient in itself to cause damage to the pipeline, was part of the cumulative subsidence which would ultimately cause damage to the pipeline if preventative measures were not taken. The ground was progressively moving downwards as the Miner continued mining underground.

62. Although Basten JA did not agree with the majority that an owner's entitlement under s 12A(1)(b) in cases of continuing subsidence could be determined by reference to completion of one longwall and commencement of another (see paragraph 71 below), he

regarded the SOAF as insufficient to determine the issue because the agreed facts did not include sufficient details of the statutory mining regime (at [185]).

63. With respect, it is not obvious why the period of the mining lease, the precise terms of the mining approval or the terms of any subsidence management plan were necessary for resolution of this issue. There were agreed facts that:

(a) the Miner obtained an approval under s 138 of the *Coal Mines Regulation Act 1982* (NSW) for the longwall mining of the relevant longwall panels (longwall panels 29-33) (SOAF [13]-[20]);

(b) the Miner, to the Appellant's knowledge, proposed to seek a further approval for subsequent longwall panels (SOAF [22]);

(c) the Miner obtained expert advice from mine subsidence and engineering consultants as to the potential for subsidence and damage to the pipeline from its approved longwall mining (SOAF [28]-[31]);

(d) on the basis of that advice the Appellant reasonably anticipated subsidence and damage from mining in accordance with such approvals (in particular, the Appellant reasonably anticipated that subsidence would reach the critical level during mining of longwall 32) (SOAF [39]); and

(e) the relevant longwalls were in fact mined in an essentially continuous mining operation (SOAF [26]).

64. Also of relevance is s 70(1)(a) of the *Mining Act 1992* (NSW) which at all relevant times provided that it was a condition of every mining lease that the holder not suspend mining operations without the written consent of the Minister.

65. The agreed facts were sufficient to establish that:

(a) some subsidence had taken place prior to the Appellant incurring preventative expenses;

(b) continuation by the Miner of longwall mining in accordance with approvals granted to it would cause further subsidence at the same place; and

(c) the cumulative effect of this combined subsidence would cause damage to the pipeline.

Those facts, in themselves, are a sufficient basis for resolution of the issue.

66. Subsidence is a process, not an event (as Basten JA recognised at [176]). The first part of that process was as equally causally relevant as the last part. If a 300mm drop in the ground level were necessary to cause damage, how can it be said that the damage is caused only by the last 30mm, or even the last 1mm, of subsidence? The first 30mm of that drop is just as necessary as the last 30mm in a causal sense. As a matter of logic and common sense, both are *"a cause"* of the damage: *Henville v Walker* (2001) 206 CLR 459 at [14], [61] and [63]; *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 515-516.

67. The qualification in the definition of subsidence *"(whether or not the movements result in actual subsidence)"* supports the view that subsidence for the purposes of the Act may occur over a period of time and in punctuated stages, reflecting the fact that subsidence is a process not an event. The words *"a subsidence that has taken place"* in s 12A(1)(b) can therefore include movements of the ground even though they have yet to cause actual subsidence. The notions expressed in the definition are indicative of a process of subsidence and movement of the ground rather than discrete events.

68. The Chief Justice at [38] (with whom Allsop P, Giles and Macfarlane JJA relevantly agreed) rejected the Appellant's contention in paragraph 66 above, on the basis that the mining of each longwall was a separate course of conduct, each being a "separate extraction of coal" for the purposes of the Act. His Honour characterised the Miner's activity as a continuous mining operation with respect to each longwall but not otherwise. On that basis his Honour held that it is only subsidence caused by mining of the particular longwall being mined at the point when damage would occur to the improvement that is relevant to a claim under s 12A(1)(b). As damage was predicted to occur during the mining of longwall 32, the Appellant's claim failed because the preventative expenses were incurred shortly prior to the commencement of longwall 32 in February 2007.

69. That distinction is, with respect, arbitrary and artificial and calculated to drive the provision mad. It finds no support in the Act and is impossible to reconcile with the general approach to causation in law. It has the perverse result that an improvement owner's right to

compensation depends on the intricacies of the miner's mining plan. If right, an owner who incurs preventative expenses following the observance of initial subsidence may or may not have a valid claim, depending upon whether the miner's plan is to continue along the same longwall or to start a new one, a matter about which the owner may have no knowledge whatsoever.

70. Further, the treatment of each longwall as a *"separate extraction of coal"* is at odds with the definition of subsidence in s 4 of the MSC Act, which relevantly is defined to mean subsidence *"due to ... the extraction of coal"* and *"all vibrations or other movements of the ground related to any such extraction"*. There is no warrant for imposing an additional limitation, not found in the Act, that subsidence for the purposes of a claim on the Fund is to be limited to subsidence from a particular longwall. The Act provides for claims in connection with subsidence *"due to ... the extraction coal"* by any means including, inter alia, by one or many longwalls. In practical terms, a question of fact arises as to what is the relevant extraction of coal causing the subsidence. In this case the mining approval and the extraction of coal pursuant to it should dictate that the ongoing process of mining longwalls 29-33 in pursuance of that approval was the relevant extraction of coal to which the subsidence at Mallaty Creek was due.

71. Basten JA's criticisms of an approach to causation based on the miner's longwall mining plan are well made. As his Honour observed (at [182]) it is by no means clear why the completion of one longwall and the commencement of another should determine the entitlement of the landowner to recover under s 12A where some subsidence has occurred.

72. Moreover, the agreed facts disclosed that the mining process was essentially continuous, with the miner moving from one longwall to the next in succession (see SOAF [26]). A longwall was mined for between 12 and 18 months before the next one was started, the interval between each being a matter of weeks as the machinery was moved from the end of one to the beginning of the next. The treatment of each longwall as a separate extraction of coal involved not only a legal, but also a factual, fiction.

73. With great respect, the Chief Justice's approach to causation involved serious error. A conventional analysis would have attributed causal significance to the subsidence evident prior to the Appellant incurring the preventative expenses, that subsidence being part of a

process of ongoing subsidence and an essential element of the anticipated damage to the pipeline. There could never be subsidence from mining of longwall 32 separate from, and without there first being, subsidence from mining of longwalls 30 and 31. On that basis, the Appellant's claim was valid even on the *Wambo* construction.

Part VII: Applicable statutory provisions

74. Section 12A(1)(b) of the MSC Act as in force at all relevant times was in the following form:

> ***12A Claims arising out of actions to prevent or mitigate damage***
>
> *(1) Subject to this section, claims may be made under this Act for payment from the Fund of:*
>
> .....
>
> *(b) an amount to meet the proper and necessary expense incurred or proposed by or on behalf of the owner of improvements or household or other effects in preventing or mitigating damage to those improvements or household or other effects that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has taken place, other than a subsidence due to operations carried on by the owner.*

75. The section remains in force in this form.

Part VIII: Orders sought by Appellant

76. The Appellants seek the following orders:

(a) Appeal allowed.

(b) Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 28 June 2010 and in their place order that:

(i) the appeal to that Court be allowed;

(ii) the preliminary question of law identified by Sheahan J of the Land and Environment Court of New South Wales be answered in the affirmative; and

(iii) the Respondent pay the Appellant's costs of the hearing of the preliminary question before the Land and Environment Court and the costs of the appeal to the Court of Appeal.

(c) The Respondent to pay the costs of the Appellants of the appeal to this Court.

1 February 2011

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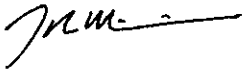

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