

Police v Carly Phillips, Scott Daines, Matthew Breen, Shaun Douglas, Jamie Pomfrett, Scott McKenzie, Ned Houghton

Application for Compensation under s77B of the *Victim's Support and Rehabilitation Act 1996*.

1. On 26 September 2010 the 7 Defendants were involved in a protest action on Port Waratah Coal Services property. Each pleaded guilty to the offence of Remain on Inclosed Lands charged under s4(1)B of the *Inclosed Lands Protections Act 1901*. All but Douglas were convicted and fined, Douglas was placed on a bond under s10 of the *Crimes Sentencing and Procedure Act*.
2. On the 26 October, at their first appearance, the Defendants' entered their plea of guilty. On behalf of the Port Waratah Coal Services, The Police Prosecutor, sought compensation under s77B of the *Victim's Support and Rehabilitation Act 1996* ("the Act") citing a figure in excess of \$600,000. The application was strongly opposed. Mr Averre who appears for the Defendants. He submitted that the Court should summarily dismiss the application as it was not appropriate to make such an Order. I declined to take such a course and the matter was adjourned for the Prosecution to serve its evidence. On 14 November, a hearing was set for 31 January and 3 February 2011.

Monetary Jurisdiction of the Local Court

3. s77C (b) of the *Victim's Support and Rehabilitation Act 1996* limits the Court's jurisdiction from giving a direction of compensation for an amount in excess of the maximum amount that, in its civil jurisdiction, the court is empowered to award in proceedings for the recovery of a debt.

4. On 7 January 2011, the civil jurisdiction of the Local Court increased from \$60,000 to \$100,000 - s29 of the *Local Courts Act 2007*. On 31 January the Police Prosecutor claimed that the increase in the court's civil jurisdiction to \$100,000 should apply to this application. However, the application was formally made in Court before the increase in jurisdiction, accordingly the jurisdiction is \$60,000 in relation to each defendant.
5. The Application for compensation had been formally made on 26 October when the jurisdiction was \$60,000 and as the Prosecutor was unable to point me to any retrospective provisions, I held that that was the jurisdiction that this Application was limited to.

#### The Protest Action giving rise to this Application

6. On 26 September 2010 the Defendants participated in a protest action on behalf of an environmental defence group calling itself "Rising Tide. The action involved the defendants entering coal loading facilities owned and operated by Port Waratah Coal Services, at Kooragang Island and Carrington in Newcastle. PWCS conduct a 24 hour fully automated operation.
7. Each of the Defendants entered the respective facilities about 5 a.m and positioned themselves on the stairwells and/or boom-cables of the loaders which are fed by conveyor belts loading coal onto the ships. When they were asked to leave their positions they declined. The facility is a 24 hour automated operation and as soon as there is an unauthorized activity the entire operation is shut down and the conveyors and equipment are checked by employees and security. This is how the protestors were discovered as they had entered the site wearing industrial clothing as if they were employees.
8. In relation to the Carrington facility, there was a ship called the *Mulberry Paris* which was being loaded by shiploader #1 at Dyke 5. Phillips and

Daines attached themselves with abseiling equipment to the boom cables of shiploader #1, they were hanging with their banner about 30 m above the ground. Breen climbed the stair well to shiploader #1 which would have been the same access Phillips and Daines had taken to attach themselves to the boom cables. Breen chained himself to the stairwell. Douglas and Pomfrett positioned and chained themselves about 30 m above ground on the stairwell of Shiploader #2 at Dyke 4 where a ship called *Maritsa* was being loaded.

9. At Kooragang, McKenzie climbed to the top of the stairwell to #K6 shiploader (7.10) which was loading a vessel called *Shinchi Maru* and Haughton was on the stairwell to #K4 shiploader (7.8) which was loading *AOM Spohie* and he climbed to about 40 m above ground. They each chained themselves to the structure. They declined to leave at about 1.30 and police physically cut them free and brought them down with their co-operation.
10. Newcastle is the world's largest coal exporting port, and the apparent aim of the protest seems twofold. The first was to highlight the impact the export and utilization of fossil fuels, in this case, coal, has on "global warming". One of the protest banners depicted in a photograph reads "*coal exports fuel global warming*". The second purpose seems to be an attempt to stop the exportation of coal for a period of time thus reducing its impact on global warming and of course drawing attention to their message. Any economic loss to the coal exportation industry be it to Port Waratah Coal Services or the Primary Coal producers seems to be incidental as opposed to the main focus of the action.
11. Although it is not difficult to conclude that in planning and executing their actions, the Defendants must have contemplated that, if successful, they would cause some economic loss to the PWCS and the producers, the degree of the economic loss, is certainly not one which would fall within

the realm of industrial sabotage, that is, attempting to cause such loss to effect the economic viability of the continuation of the exportation of coal.

12. PWCS identified that the removal of persons from Carrington was the priority because of the impact upon other vessels in the harbour not limited to PWCS operations. Though the ship at Carrington had finished being loaded, the loading spouts could not be moved out of position which would free the vessel to depart. Moving the loading spouts involved movement of the boom cables, which would place the 2 protestors who had attached themselves to the cables at risk of serious or fatal injury.
13. Breen, Douglas and Pomfrett were removed by 9 am and Phillips and Daines by 11.30 am.
14. By 1 pm McKenzie had moved from # K6 (loader 7.10) stairwell position onto the boom cables of the loader, police used an elevated platform to negotiate his removal to which he replied *"I'm staying here to keep the Port closed for at least another seven hours"*.
15. As the police increased the height of the elevated platform, McKenzie would climb higher up the cable until he reached the top of the frame which was some 60 m above ground where he had initially positioned himself. The elevated platform the police were on was only able to extend to 45 m. By 1.30 McKenzie had agreed to come down.
16. There were apparently also 2 protestors at another coal facility called NCIG loader and they had been removed by 1 pm. By 1.45 the PWCS sites cleared of protestors and were free to recommence its loading operations.

### The Legislation

The relevant sections of the Act are set out as follows:

### **77B Directions for compensation**

(1) If a person is convicted by a court of an offence, the court may (on the conviction or at any time afterwards) on notice given to the offender direct that a specified sum be paid out of the property of the offender:

(a) to any [aggrieved person](#), or

(b) to any [aggrieved persons](#) in such proportions as may be specified in the direction,

by way of compensation for any loss sustained through, or by reason of, the offence or, if applicable, any further offence that the court has taken into account under Division 3 of Part 3 of the [Crimes \(Sentencing Procedure\) Act 1999](#) in imposing a penalty for an offence for which the offender has been convicted.

(2) A [direction for compensation](#) may be given by a court on its own initiative or on an application made to it by or on behalf of the [aggrieved person](#).

### **77A Definitions**

In this Division: ☐ "aggrieved person", in relation to an offence, means a person who has sustained loss through or by reason of:

(a) an offence for which the offender has been convicted, or

(b) a further offence that a [court](#) has taken into account under Division 3 of Part 3 in imposing a penalty for an offence for which the offender has been convicted.

"court" means the Supreme [Court](#), the [Court](#) of Criminal Appeal, the District [Court](#) or the Local [Court](#).

"direction for compensation" means a [direction for compensation](#) under section 77B.

### **77D Factors to be taken into consideration**

In determining whether or not to give a [direction for compensation](#), and in determining the sum to be paid under such a direction, the court must have regard to:

- (a) any behaviour (including past criminal activity), condition, attitude or disposition of the [aggrieved person](#) that directly or indirectly contributed to the loss sustained by the [aggrieved person](#), and
- (b) any amount that has been paid to the [aggrieved person](#) or which the [aggrieved person](#) is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted, and
- (c) such other matters as it considers relevant.

### **3 Objects of Act**

The objects of this Act are as follows:

- (a) to provide support and rehabilitation for victims of crimes of violence by giving effect to an approved counselling scheme and a statutory compensation scheme,
- (b) to enable compensation paid under the statutory compensation scheme to be recovered from persons found guilty of the crimes giving rise to the award of compensation,
- (c) to impose a levy on persons found guilty of crimes for the purpose of funding the statutory compensation scheme,
- (d) to give effect to an alternative scheme under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime.

### The Evidence

- 17 Evidence was only called in the applicant's case which was completed on the first day, submissions were made on the second day.
- 18 Shaun Sears who is an employee of PWCS and performs the role of "Manager Live Run and Operational Improvement" gave evidence by the tender of his Affidavit and annexures (Ex 1-6) and cross-examination. Graeme Davidson, the General Manager of PWCS gave evidence Mr Averre cross-examined him during which he tendered 2 advertisements

placed in the Newcastle Herald by PWCS (Ex 7), A PWCS Directors' Board Meeting memorandum was also tendered (Ex 17).

- 19 An Affidavit of Terry Tynan who is an employee of PWCS whose role is the "Development Manager Terminal 4 Project" was tendered (Ex 8) and he gave evidence. A series of photographs taken of the protestors at Carrington on 26 September were Ex 9. Exhibits 10-16 were the Defendant's respective court papers – charge sheets, facts sheet and antecedents. Mr Sears role involves scheduling of operations including discharging trains, assembling cargo in stockpiles and scheduling loading of vessels at PWCS's two coal terminals. His evidence was primarily to explain what was involved in loading coal into the ships, what impact the protest action had on that process, and what the economic loss was.
- 20 At Carrington there are two berths for vessels known as Dyke 4 and Dyke 5. At the time the protest action commenced, Dyke 4 was occupied by the vessel "Maritsa" and Dyke 5 by "Mulberry Paris". At Kooragang there are 3 berths, K4, K5 and K6. At the time of the protest, K4 was occupied by "AOM Sophie", there was no ship at K5 though one was scheduled to enter at 0630 and there was a ship "Sinchi Maru" at K6.
- 21 A few days before a vessel is scheduled to come into port the coal is stockpiled in very large conical pyramids, delivered by train. A trainload of coal is about 16,000 tonnes. Some stockpiles are between 3 and 20 trainloads in volume. There are such stockpiles over more than 30 locations. Some 200 conveyor belts are operational moving coal from one place to another, ending at the conveyor belts feeding the ship loader spouts. At Kooragang the conveyor belts are in 3 systems of which any can service any of the 3 berths. Only one spout at any one time can be used to fill a vessel. So it can never be the case that the 3 spouts or loaders are used to fill the one vessel in situations such as "making up for lost time".

- 22 A company called the Hunter Valley Coal Chain Co-Ordinator Pty Ltd is responsible for the co-ordination of the planning of the delivery of the coal to PWCS. They are also responsible for co-ordinating the berthing and departure of vessels for the loading of coal. The Newcastle Port Corporation is also involved in the movement of vessels. A document known as the "STEM" shows the schedule for ships on at least a weekly planner. It is updated regularly to indicate any changes. The documents sets out the planning for each of the berths, showing the name of the vessel, the tonnage to be loaded, the arrival time into the berth, the commencement time for loading coal, the time when the loading is completed and the time that the vessel is scheduled to depart the berth. This document is Exhibit 6. There are about 5-7 vessels scheduled over a 7 day period for each berth, depending on the size of the vessel, how long it takes to load it and how long it needs to wait after loading before it can depart.
- 23 The STEM documents show that, generally, loading is scheduled to commence 2 hours after the vessel is berthed and the ship departs generally 2 hours later. These times vary, more so for the end load/departure period, up to about 7 hours but there are also instances of the arrival/start of load, say 11 hours. This is due to the tide and some vessels, particularly once loaded need to wait for the suitable water height. Usually there is a gap of 3 hours between one vessel's departure and the next's arrival. Sometimes the gap is more significant such as 10-20 hours.
- 24 Exhibit 6 is 3 pages of shipping schedules, the first is produced at 4:11:45 pm on 24 September, the second at 5:32:54 pm on 25 September and the third at 2:29:19 pm on 26 September 2010.
- 25 So one can see what the schedule was before the protest action commenced and what the schedule had changed to as a result of the protest action. Mr Sears said his team prepared calculations of loss

based on the latter 2 documents and created a document "*Shipping Movement Changes due to Rising Tide Protest 26 September 2010*" which is Ex 2. He also gave evidence about the content.

- 26 Mr Sears noted that Ex 2's recorded "*Maritsa*" at Carrington D4 sailed at 0800 as planned but that the replacement vessel was postponed nearly 9 hours. This was apparently incorrect which he conceded when he was invited to compare it with Ex 6(the STEM).
- 27 The STEM shows that the scheduled replacement vessel was the "*Salvia*" due to arrive at 1045 and start loading at 12.45. According to the STEM that is in fact what occurred and indeed, though the vessel after it the "*Kurenai*" was due to arrive at 1615 on 27 September and depart at 1030 on 29 September it was rescheduled to arrive at 1400 and depart at 0815 on 29 September – some 2 hours 15 minutes ahead of schedule. The schedule for the two following ships the "*Medi Tokyo*" and "*Maple Wave*" were readjusted with an increase of just 15 minutes. So in relation to the protest actions of Douglas and Pomfrett, if one limits it their singular conduct (as opposed to being engaged in a common purpose), there was no loss as a result of the change in schedule or as a result of this protest action.
- 28 At paragraphs 24-27 of his Affidavit, Mr Sears gives evidence about the effect of the protest on operations at Carrington. He says that PWCS coal loading was stopped at 5 a.m (for both Carrington and Koorangang) and I accept that . He then says that Carrington D4 coal loading resumed at 10.48 am and Carrington D5 coal loading resumed at 12.15 pm. I accept those times as being times when the supervisors at Carrington had cleared the site of the protestors and the facility was secured and able to commence operations. However, it was unlikely that loading commenced at D4 at 10.48 as the *Maritsa's* loading was already completed before the protest commenced. The vessel just couldn't be cleared to move from the

berth. The *Mulberry Paris* was in the process of being loaded at D5 so it makes sense that loading continued once the site had been cleared.

- 29 The evidence contained in Mr Tynon's Affidavit has the *Maritsa's* loading as being complete (but that they couldn't move the loading spout as protesters were attached to the boom-cables) which is consistent with the STEM document that loading was due to be complete by 0445 on 26 September. I have already spoken above about the STEM showing that *Salvia's* schedule remained unchanged.
- 30 The Prosecution was unable to point me to any evidence that would suggest that the *Salvia* had berthed some 8 hours and 45 minutes later than had been originally scheduled. Given that Ex 2 has been created from Ex 6, I must prefer the primary document as evidence that can be relied on.
- 31 The hours in relation to D5 are somewhat more complicated. The duration of the protest, 5.00-12.15 is some 7 ¼ hours. When Phillips, Daines and Breen were on site, the ship *Mulberry Plains* was being loaded. It had been scheduled to finish loading at 0800 and depart at 12.15. STEM shows the reschedule as finish loading at 1430 and depart at 1800 which is a 6 ¼ hr difference. The vessel following it was the *Mimosa* which was due to commence loading at 1500 but was rescheduled to load at 21.30 which is some 8 ½ hrs. The *Mimosa* was initially scheduled to depart at 13.45 but rescheduled departure was 2245 some 9 hours difference.
- 32 The vessel following the *Mimosa* which was scheduled to arrive at 23.30 on 28 September and start loading at 0130 on 29 September was the *Hanjin Port Kembla*. This vessel was due to be loaded with 115964t of coal. The plan to have it berth at D5 was cancelled. Instead it berthed at K5 (Kooragang) on 3 October. Due to the change in berth, the tonnage of coal was increased by 23, 536t as it was able to take 139,500t at the different berth. So ironically, if one of the aims of the protest was to

reduce the amount of coal being exported, this vessel left Newcastle with at least 20% increase in load than it had originally been scheduled to take.

- 33 There is no evidence in these proceedings about the costs to any ship, or indeed the benefits such as the additional load for ships such as the *Hanjin Port Kembla* in terms of expecting to be loaded 2 days earlier or whether the increase in load mitigated any loss or indeed allowed it to make a gain given the 20% increase in load.
- 34 Moving onto Kooragang; Mr Sears said, and I accept, that loading stopped at K4 at 4.51 am and resumed at 1.33 pm and K5 at 5.11 am resuming at 1.33 pm. He also says that a vessel due to berth at K6 at 0630 was prevented from entering the harbour by the Port Corporation due to the protest and did not berth until 4 pm and loading commence shortly after – Mr Sears was referring to the *Goodwill*. The STEM shows *Goodwill* was due to berth at 6.30 and was rescheduled to arrive at 6.45 pm, just over 12 hours delayed.
- 35 In relation to how much coal was not loaded as scheduled, Mr Sears relies on documents Ex 3, Ex4 and Ex 5.
- 36 Ex 3 is an email from Wendy Meredith, Senior Associate of Moray & Agnew Lawyers. In this email to Katrina Knight, Specialist Advisor Projects PWCS, Ms Meredith advises that the calculated aggregate loss was 165,155 tonnes of coal based on “live run losses against the plan”. This relates to a cutting of allocations which are offered in a notification to the primary producers by email on 13 October 2010. That email is Ex 5.
- 37 Ex 4 is a copy of an email dated 26 September sent to the Officer In Charge of the arrest and charging of the protestors. That email indicated that the losses for D4 and D5 at Carrington was an estimate of \$97,000. Mr Sears explains that that estimate was given by the Carrington Terminal

Manager John Gibson based on 13 hours lost loading time multiplied by the rate of 2,000 t per hour multiplied by the coal handling charge of \$3.75 per tonne.

38 At paragraph 34 of his Affidavit, Mr Sears says *“an employee in my team calculated the raw live run losses for 26 September utilizing the daily reports generated from the loading activities”*.

39 Those reports have never been referred to or tendered in these proceedings. I do not know how they are generated and how a “raw live run is calculated”. According to paragraph 36 of the Mr Sear’s Affidavit, the live run losses for Carrington was 28,447 tonnes and for Kooragang 136,668 t.

40 This total is 165,155 tonnes. In Ex 3, Ms Meredith refers to an email Ms Knight sent on 8 October to “Geoff and Nadine” that the loss was 136,801 tonnes. Ms Meredith says “I don’t know why it is a different number (it is ok to be different as long as we explain it)”.

41 The value of 165,155 t x \$3.75 is \$619, 331. The value of 136,801 x \$3.75 is \$513003. The difference is \$106,328. I have heard no explanation as to why the numbers are different. PWCS is claiming compensation for 140,000 tonnes which is \$525,000 which they say is a “conservative” estimate.

42 Exhibit 5 is a document that is a notification by email from Nadine Judge of PWCS to the Coal Producers. It is about allocation adjustment. The document says that the PWCS capacity for September 2010 was 9.0Mt which is 9 million tones of coal but that 7.9Mt was shipped. The difference is explained: *“Performance during the month was impacted by inbound losses, reliability, weather and protest activity”*.

43 PWCS identify 0.27 Mt as being apportioned to a “*downward adjustment to Load Point Allocations..to reflect the lost capacity of PWCS terminals in September*”. The downward adjustment is cited as being “*in accordance with clause 9.3(a) of the Instrument of Agreement*” which I understand is a document between the Coal Producers and PWCS. Neither a copy of the agreement nor the impact of the downward adjustment or indeed the result of the allocation adjustment has been tendered or indeed referred to other this email Ex 5.

44 The apportionment is set out as

LTSOP Ref	Cause of Capacity Loss	Amount
Cl 9.3(a)(ii)	PWCS has not met its assumptions (reliability issues)	0.07
Cl 9.3(a)(iii)	Capacity effected by the weather (port restrictions)	0.06
Cl 9.3(a)(iv)	Force Majeure (protest activity)	0.14

The document then sets out an invitation to Producers to “*voluntarily reduce its Load Point Allocation for October or November 2010 (Q4)...In the event that the aggregate requests for voluntary reductions exceed the adjustment amount, Producers that submitted voluntary reductions will receive a pro-rata share according to the amount requested...If voluntary reductions are not sufficient to meet the adjustment amount, a pro-rata reduction will be made to the Load Point Allocations of all Producers...if a Producer submits a voluntary reduction that is less than their pro rata share, a further reduction up to the Producer’s pro rata share may be required. If a producer submits a voluntary reduction in excess of their pro rata share, then the Producer will not be subject to a further reduction in respect of this adjustment*”.

45 Mr Sears explained that the calculation 165,155t was subject to a downward adjustment of 8% as per an to account for any losses of load which took it to 151,942t. This figure was then rounded down to 140,000 to become a conservative figure, thus the amount set out in Ex 5 is 0.14Mt.

It is of little moment really because even at 140,000 tonnes at \$3.75 the sum is \$525,000, more than nine-fold the jurisdiction of \$60,000.

46 Mr Sears explained the PWCS offer to coal producers to take voluntary reductions. Coal Producers are given an annual allocation of how much coal they can export. The allocation is set out quarterly, half-yearly or monthly. PWCS says that its capacity is over subscribed every year and they know this the year before. If the Producers do not use their allocation, that is, they don't provide as much coal as they say they will they are penalized. The pro-rata reduction means that they can apply the reductions to their quota so they effectively reduce or offset or even negate any penalties for which they may be liable in the event of failing to provide coal per their allocation.

47 Accordingly, the inability of PWCS to meet its obligations to load 9.0Mt can mitigate any loss through penalty for Coal Producers unable to meet their quota. The effect of that pro-rata allocation is that the loss though not borne by PWCS amounts to a **loss of opportunity** (my emphasis). Mr Sears says that the claim for compensation is not **actual loss** but rather **loss of opportunity**. I will come back to this issue later.

48 Mr Averre submitted that whilst there was 9.0Mt capacity, only 7.9Mt was shipped leaving a balance of 1.1Mt, yet Ex 5 only dealt with a downward allocation of 0.27. He asks what happens to the other 0.83Mt. I don't know, other than I presume that it falls outside the scope of the Instrument of Agreement and the downward adjustment/Load Point Allocations.

49 Ex 5 does not assist me in ascertaining PWCS loss. The aggregate figure for Carrington has not been borne out by analysis of STEM and the fact that I have not been given the tonnage for each loader at Kooragang means that I am unable to identify which protestor action caused loss in relation to the loader upon which they occupied. I understand how PWCS

went from 165,155t to 140,00t but I don't know the 5 amounts which have been added together to reach the sum of 165,155.

- 50 There is no explanation of a live run calculation and there are no daily reports from which those calculations were made. The only primary document I have is Ex 6. From the schedules I have been able to illicit the following information in an attempt to assess how much coal loading was reduced as a result of the protest action.

#### Kooragang K5

- 51 Between 0630 am 26 September and 1900 2<sup>nd</sup> October 528,500t of coal was due to be loaded. After the protest was complete, rescheduling occurred which shows that between 0630 26 September and 1900 on 2<sup>nd</sup> October 453,700t was due to be loaded. That is a difference of 74,800 for K5.
- 52 I do note that there was no protest action in relation to K5. There was no ship being loaded. The *Goodwill* was due to berth at 6.30. According to the STEM it was rescheduled to berth at 6.45 am and loading starting 2 hours later. I have not heard from the Port Corporation so I do not know why the *Goodwill* was unable to berth until 1845. Mr Sear's Affidavit at paragraph 29 says that the *Goodwill* berthed at 4 pm and loading commenced shortly after. I don't know where he gets that time from. Perhaps his team had access to daily records that showed what did happen rather than relying on the STEM document as he attests. Of course, if it was at 4 pm and loading started soon-after, the STEM which says the *Goodwill* berthed at 1845 and loading started at 2045 is some 6-7 hours out. The *Goodwill* was initially scheduled to be loaded with 125,000t over a 24 hour period. 5,200t per hour is 31,200- 36,400t which is \$117,000-\$136,500 over a 6-7 hours period. The PWCS fee for loading the *Goodwill* was \$468,750 (125,000t x \$3.785per t). This is a great amount of money and I would expect that the Prosecution evidence was

of a better quality in terms of both accuracy and reliability. The Prosecutor was unable to offer any other explanation as to the difference of the STEM evidence and Mr Sear's evidence.

- 53 I cannot resolve the difference between the 4 pm loading and the STEM schedule of a 2045 loading at K5.
- 54 I move on to K4. On the initial schedule 5 ships (*AOM Sophie, Kinko Mar, Mineral China, Pine Wave, Sekiyo*) were due to load 495002t between 0215 26 September and 2230 on 1 October. The total loading for the rescheduled ships (*AOM Sophie, Kinko Mar, Danae, Mineral China, Sekiyo*) was 484,662t. The difference of 10,340 is the difference between the *Pine Wave* (77060t) being replaced by *Danae* (66720t). The STEM indicates that *Pine Wave* was rescheduled to load at K6 a day ahead of the original schedule. There is no evidence that these reschedulings were due to the protest action and I note that the difference between the 2 pre-protest schedules in relation to K5 and K6 had changed with the *Coppersmith* replacing the *Oceanmaster* so the repositioning of vessels as between berths occurred without it being caused by protestor activity.
- 55 Applying the same calculation with K6: the scheduled loading starting with the *Shinchi Maru* which was scheduled to arrive at 11 am on 25 Sept and start loading at 2230 and complete loading at 1330, which rescheduled to complete loading at 0730 on 27 September (some 18 hours) and finishing at 11 pm on 1 Oct. Scheduled load is 650,700t and the rescheduled is 579,790t which is a difference of 70,900t up to but not including 1 October.

The total for Kooragang K4 and K6 10,340 and 70,900 = 81,240t  
(x \$3.75 = \$304,650).

- 56 Mr Sear's team's calculations of Kooragang's total of K4, K5 and K6 being live run losses of 136,668t. He doesn't identify the quantum for each loader which, as I have said, would have been helpful.
- 57 Deducting my STEM based calculation for K4 and K6 of 81,240 from the PWCS live run loss calculation of 136,668t leaves 55,428t (\$207,855). Given that my STEM calculation for K5 was 70,000t this is a conservative figure. But the figures are still unreliable as the documents are unreliable, but it is a case, for the point of the exercise, to do the best with what there is.
- 58 The evidence surrounding K5 is unreliable and inaccurate- there is a very big difference between when Mr Sears says that the *Goodwill* commenced loading and when it was rescheduled to start loading, there is no tender of the daily reports from which the raw live run losses were calculated and there is no evidence from Newcastle Port Corporation, as to why the *Goodwill* could not enter the berth before 4 pm or indeed 1845 given that the protest action finished at 1.30-1.45 pm at Kooragang.
- 59 I note that the PWCS explanation is again inconsistent with the STEM, as that document shows the *Salvia* was able to enter Carrington D4 at 10.45 am. Finally, the Prosecution evidence of lost opportunity to load 136,668 tonnes at Kooragang has not been broken down per coal loader/vessel. I do not understand why this was not done given that the facts tendered against each Defendant make it clear that the Prosecution do not rely on common purpose to prove the charge to which each of the Defendant's pleaded guilty.
- 60 This is a significant omission particularly in light of my not being satisfied with the evidence of lost tonnage at Carrington. The Prosecution carry the onus to satisfy me that the loss of K5 tonnage was caused by the protest action. There was no protest action directed towards K5. There is no evidence from NPC as to when and why the *Goodwill* entered the berth.

- 61 Even if I accepted that the vessel was barred from entering the port it may not have been causatively linked to the protest at K4 or K5, in that it was at the discretion of the Port such as to break any causative link. There is evidence that there was a concurrent protest at another coal loading facility called NCIG which is not part of PWCS's operation. That site was not cleared until 1-1.30pm. What impact that protest had on vessels arriving at Kooragang as per the NPC determination in relation to the movements of the *Goodwill* is not known but the possibility exists that there was some impact. There is simply no Prosecution evidence called from NPC about this aspect and there should have been.
- 62 Given that the Prosecution has not given evidence of loss of tonnage per coal loader it is difficult to calculate the loss in relation to K4 and K6 though I have attempted to do so as set out above.
- 63 Mr Sears says that his team calculated that Carrington had lost a total of 13 hours loading time which equated to 28,487 tonnes of coal that was due to be loaded but was not. This was a raw live coal run calculated from daily reports. Mr Gibson had initially put the figure at about \$97,000 based on 13 hours at 2,000t per hour charged at \$3.75 per tonne. On Mr Gibson's calculation the tonnage would have been 25,866t. I don't know why the figures are different. It matters little
- 64 Mr Sears agreed that coal is not being loaded 24 hours a day because of the time it takes vessels to arrive and depart. There also seems to be a multitude of factors such as maintenance of dykes that would apply. Mr Searl denied in cross-examination that he obtained the figure of 28,487 from the STEM but did agree that he used them in his calculations. If he did, I don't know how.

- 65 However, an approach to calculate the loss could involve calculating the scheduled loading between 26 September and the last available date on the STEM schedule and calculating the difference for Carrington. Using the STEM documents for Carrington, there is no difference. Apparently, using the daily reports to calculate the raw live runs provides a result but those documents have not been tendered. Mr Sears says that PWCS could not attempt to catch up on time lost due to the protest. The STEM evidence in relation to Carrington, at least, contradicts Mr Sears on this point alone.
- 66 I am going to proceed on the basis that the difference between that scheduled to be loaded and that was rescheduled to be loaded at K4 and K6 as indicated on the STEM is 81,240t. There is a degree of disquiet in taking this approach given that there have already been demonstrated differences between the STEM and Mr Sear's evidence and also given that the STEM reschedule suggests that the *Hanjin Port Kembla* was due to berth at 23.30 on 28 September and load 125,000t at D5 and the same document suggests that it was due to berth at 6.30 am on 3 October and load 139,500 at K4.
- 67 It would seem unlikely in the extreme that there would have been no loss during the period and the only calculation based on tendered data that I could use was the 81,240t from K4 and K5.
- 68 Mr Averre rightly warns against "*plucking a figure out of the air*" (*R v Swann and Webster* (6 CrAppR(S) 22, CA). He also submits that PWCS need to prove loss and to prove that that loss has a causative link to the charge. He says that PWCS has not proved loss because it is not actual loss but a loss which Mr Sears describes as a "loss of opportunity".
- 69 I do not think there is any difficulty in finding a causative link between the offence and the loss in relation to K4 and K6. Mr Tynan's evidence together with the facts sheet about the conduct of Messrs Haughton and

McKenzie which is unchallenged as well as the nature of the charges demonstrate each protestor's actions caused the coal loader to be stopped so that coal was not loaded into the vessels at K4 and K6 respectively.

70 PWCS is seeking compensation for K5. The quality of the evidence does not identify a loss *per se* nor a causative link that can be solely attributed to the actions of either Mr Haughton and Mr McKenzie. In have previously gone through the exercise of calculating the difference of coal loaded to that was initially scheduled and then rescheduled up to 1 October. Another exercise is to limit the loss to just the ship and the period relevant to each ship. The total loss comes out about the same though the loss for each ship is quite different:

71 The STEM records indicate that at the time the protest commenced the *AOM Sophie* was being loaded at K5. The capacity of the vessel was 104,482t. Prior to the protest action the schedule of 5.32 pm on 25 September, the STEM schedule says that the vessel was scheduled to load between 0215 and 22.15 on 26 September at K4 at a rate of 5,220t per hour. The reschedule at 2.29 pm on 26 September had the load to complete at 0500 on 27 September, which was 7 hours later than scheduled. However, the load rate was adjusted to 3910, which is an accurate reflection of the average load tonnage over the entire period given that it was extended by 7 hours. 5,220t per hour for 7 hours is 36,540t

72 The *Shinchi Maru* at K6 was stopped from 4.50 am to 1.45 pm. The reason it was stopped, which is not disputed, was because of the action of protestors. It was scheduled to load 89,000t over 15 hours at a rate of 5,930t per hour. Over 8 hours this is 47,466t. That is a total of 84,006t less 8% (say 10% for ease) leaves 75,600t, say 75,000 t.

73 It is fair to say that the protest action of Ned Haughton at K4 has caused the PWCS not to be able to load at least 35,000t of coal onto the *AOM*

*Sophie* and the protest action of Scott McKenzie has caused the PWCS not to be able to load at least 45,000t of coal onto the *Sinchi Maru* during a period when the coal loaders were stopped due to their respective protest action.

- 74 Comparing the STEM analysis of the difference between the pre-protest schedule and the post-protest schedule for 26 September – 1 October, where a loss of 81,000t was evident, applying either calculation reaches the same round figure of 80,000 (adjusted down). This suggests that unlike Carrington, Kooragang K4 and K5 were not able to make up for the coal loading time lost due to the protest. Concluding that 80,000t of coal was not loaded at Kooragang due to the protest action is not “plucking a figure out of the air” but the process of calculating the value in terms of actual loss might traverse such complaint.

#### Is Loss of Opportunity an Actual Loss?

- 75 The PWCS was unable to load 80,000t for a period of time, (\$131,250 for K4 and \$168,750 for K6 if using the \$3.75 per tonne calculation– still significantly in excess of the court’s \$60,000 jurisdiction). PWCS says it was deprived of that revenue because it was unable to load that amount of coal. But I am not convinced that the loss of that revenue for the period of the protest action represents the actual loss.
- 76 PWCS has not sought to establish its actual loss. There has been no evidence called from an accountant to establish that PWCS nett profit on X tonne of coal is X amount. Rather, Mr Sears says that the loss is a Loss of Opportunity to load coal during a period of time. Mr Sears says that the cost of the operation is not deducted from the value of the coal because the costs are fixed costs, that is, the automated plant costs and labour costs are the same whether the site is closed down or remains open. It is an automated 24 hours a day 365 day per year operation where there is coal available to load and where there are ships available (because

sometimes coal producers are unable to deliver their quota and sometimes vessels are unable to enter or leave berths). Though PWCS coal loading capacity was 9.0Mt for September it achieved only 7.9 – a deficit of 1.1Mt of which only 0.27 (.14 was attributed to protest activity) could be offered to Coal Producers for reduction to Load Point Allocations (Ex 5). Ex 5 suggests that though the capacity to load 9.0Mt, that capacity is not necessarily achieved for a great variety of reasons and one would suspect that that margin of lack of performance or loss of opportunity is factored into the cost of \$3.75 per tonne.

- 77 PWCS's claim for \$3.75 per tonne fails to take into account 2 values that should have been taken into account by way of a downward adjustment, one at each end. The first is the deduction or taking into account the non-loading portion of the coal handling charge/fee. The second is the nett value of the fee when taking/making deductions such as taxes and dividends to shareholders.
- 78 The PWCS are paid \$3.75 not merely to load the coal onto the ship. The figure is a coal handling charge. The coal is received by train, it is broken down into small pieces by a process which was not elaborated upon in these proceedings, it is then stockpiled in a particular fashion and moved from one location to another in readiness for the load. It is then loaded. Each of these steps, but the last, were already carried out when the protesters stopped the loading. Mr Sears was unable to say what portion of the \$3.75, the loading would represent. He speculated perhaps half but he did not really know. Accordingly, the claim for compensation of loss of opportunity is based on a valuation that has not been apportioned when it should have been.
- 79 At the other end of the calculation, there has been no consideration given as to the payment of taxes, dividends to shareholders and other matters which indicate what the true loss is to PWCS. I do not accept that the

claim of \$3.75t is an accurate representation of loss caused by the shiploaders being stopped by the protesters as it does not take into account the coal handling already performed.

- 80 Mr Sears did not indicate that such a calculation could not been done, it is that no-one had asked for it to be done. The compensation sought is compensation for loss of revenue and though PWCS consider it a nett figure as the operating costs are fixed with few if any variables, I do not think it accurately reflects the amount of actual loss as is required. Accordingly, the Court is left with a figure of poor specificity which to attempt to determine it, invites speculation which then indeed would end up with a “figure plucked from the air”.

#### Ordering Compensation when none is sought

- 81 It seems that PWCS is unable to ascertain who it was instructing the police to seek compensation on its behalf on 26 October 2010. Mr Graeme Davidson, the General Manager, said he definitely did not instruct the police in that regard nor does he know who did. Indeed he was not at work during the period of the protest for about 3 weeks. He became aware of the application after it was made in court on 26 October.
- 82 On 29 October Mr Davidson wrote to the Police Prosecutor advising him that PWCS did not want the monetary aspect to overshadow the safety aspect. That is, the PWCS number 1 priority has been about the safety of protestors coming onto a dangerous site and not only putting themselves at risk of very serious harm, perhaps fatal, but also PWCS employees and police officers tasked with their removal from the site. Mr Davidson said that the compensation is being pursued because PWCS needs to change the protestors behaviours because of safety, saying :  
*“I’m either going to be in this court or the Coroner’s”.*

- 83 Mr Davidson agreed with Mr Averres in cross-examination that the prime objective about this compensation claim is safety. Two full page advertisements that appeared in the Newcastle Herald were shown to Mr Davidson. Those articles are dated 29 and 31 January 2011 respectively. The page shows 3 photographs taken of protestors at Carrington and one at Kooragang, where they are swinging at great heights above the ground. The advertisement fairly sets out what the protestors did and what was required to remove them and the impact this had, not on PWCS production or profits but on the risk to safety of those persons involved. The advertisement seeks to show that the Rising Tide protestors have ignored both PWCS requests to meet and written expressions of its concerns about safety.
- 84 The advertisement also seek to justify or explain why the compensation matter is before the court claiming that the motivation is to prevent future protest activities that could result in someone being killed or seriously injured and that the extreme safety risks should be aired publicly. The message from PWCS is fairly clear that protest activity must not be within the site due to the danger to safety.
- 85 Mr Davidson confirmed that he authorized the advertisements and that they reflect the motivation behind the compensation claim. Mr Averre showed Mr Davidson a copy of a Minute of the Meeting of the Directors of PWCS dated 11 January 2011 whereby the Board affirmed Management's efforts to manage future protest action to minimize the risk of safety of all persons on site at PWCS terminals. The meeting resolved that **"proceeds from any successful legal action against Rising Tide be donated to a charity to be agreed between the Chairman and General Manager"**.
- 86 In his evidence, Mr Davidson explained that he hoped that any Order for the Defendant's to pay compensation would act as a deterrant from conducting such dangerous protest actions.

87 It has never been suggested and it certainly does not seem apparent from any of the evidence before me that PWCS's explanation for its compensation claim is anything other as set out in the advertisement or as said by Mr Davidson in the witness box.

88 I accept that PWCS is genuine in its wish to prevent any conduct that poses a risk of harm to anyone on its sites. Its sites are highly dangerous, the protestors actions were also highly dangerous and put police officers who were tasked at getting them down from 40-60m above ground level at risk. Any other view would be simply ignorant and arrogant and no other view has thankfully be made in court.

89 Mr Averre makes the submission that PWCS's application for compensation is an abuse of process. He relies on a number of factors:

1. PWCS does not intend to use any money as compensation at all.
2. PWCS seeks to have the compensation order serve as both a general and specific deterrent against these and any future offenders
3. The Police in making the application without instructions or authority from PWCS are attempting to punish the Defendants by way of compensation.

90 Mr Averre has not sought a stay of proceedings (though his written submissions set out the points in relation to stay of proceedings due to abuse of process). However, he submits that the Court should take this aspect of the case into account under s77D(c) factors to be taken into consideration and keeping in mind the Objects of the Act (s3):

77D: "In determining whether or not to give a [direction for compensation](#), and in determining the sum to be paid under such a direction, the court must have regard to:

(c) such other matters as it considers relevant.

### 3 Objects of Act

The objects of this Act are as follows:

(d) to give effect to an alternative scheme under which a court may order the person it finds guilty of a crime to pay compensation to any victim of the crime.

Points (1) and (2) above are not in issue. I reject the 3<sup>rd</sup> point raised by Mr Averre. I don't accept the Police Prosecutors have sought or maintained the application for compensation on behalf of PWCS to punish the Defendants. It was entirely appropriate for Detective Butcher to include a request for an estimated financial loss provided to the police by Mr Gibson who was working at the Carrington site.

91 The Prosecution submit that it matters not that the claimant has a legitimate collateral purpose in seeking compensation . I take the term "legitimate" to mean genuine, lawful and relevant to the subject (in this case the offence) for which the application is made. Whilst I, appreciate Mr Averre's complaint about PWCS's compensation, it falls short of being an abuse of process such as to warrant a stay of proceedings. However, I do think it is a matter which, under 77D(c) of the Act, the Court should take into account in determining whether compensation should be Ordered.

92 Mr Averre submits the following as matters for consideration under s77D(c) :

- The *Victims Support and Rehabilitation Act* 1996 is not the correct vehicle for a claim of this size, (\$525,000) given the limited jurisdiction of this Court, and that the appropriate jurisdiction would be through a civil action so that mitigation of loss, insurances and other matters could be properly litigated. Mr Averre refers to Smart J's comments in *R v Thuoc*

*Van Huong* (2002) NSWCCA 406 : “the provisions of the legislation are of a summary nature designed to do a measure of justice to the victim of crime without the delay, expense and formality of a civil action for, for example, assault, trespass or conversion (see *Bowen* (1969) 90 WN (pt1) (NSW) 82 at 84).

93 There is nothing in the legislation that separates corporate victims of offences from individual aggrieved persons nor the magnitude or otherwise of the claim as measured against the summary or criminal nature of the offence. Mr Averre has not pointed me to any authority that the amount of compensation awarded should be adjusted in relation to the nature of the charge against the Defendant. What is important is the impact of the offence upon the aggrieved party. I do not think it is logical to look at the nature of the charge *per se*. For example, a very simple fraud may have been committed resulting in the loss of hundreds of thousands of dollars. Why should the victim not be compensated because the fraud was not a very serious or complicated one committed over a long period of time? Why should the aggrieved party not be entitled to compensation because they offender was charged with a less serious offence than could have otherwise be the case though the impact on loss was exactly the same. It is the harm done rather than the offence committed that is relevant.

94 However, the intent or purpose of the offender is a matter which I think is a matter for consideration under s77D(c). For example, the evidence in this case that as soon as unauthorized entry is noticed on the site of PWCS the site is closed down to protect the safety of people on site be they workers or unauthorized intruders. A protestor entering the site thinking that such conduct would not cause the operation to close down may be a matter which the court would take into account. However, in this matter, as I have previously said, Mr Tynon’s evidence firmly establishes that the protestors at Kooragang intended the operation to close down for as much as “another 7 hours”. It is inevitable that such intent was accompanied by an understanding and appreciation that PWCS would suffer some form of

financial loss.

95 The legislation limits the jurisdictional limit to that of the civil jurisdiction of the Court in which the application is being made so really the application in this court should be made for no more than \$60,000. Seeking \$525,000, knowing that the jurisdiction is \$60,000 is curious at best and highly emotive and perhaps cynical at worse, but the application has always been made on the basis that PWCS is aware that the jurisdiction of the court is much less than what it says their total loss is worth.

96 Mr Averre's next submission:

- That the aggregation of compensation as a single claim against the Defendants invites the Court to treat them as joint tortfeasors yet any compensation Order would be an imposed individual liability and to impose compensation in this way would offend the principle of *De Simoni* as each of the Defendant's ceased their offending conduct at different times to each other.

97 The principle of parity has no application in compensation as it does for penalties (Smart J in *R v Thuoc Van Huong*.) Whilst it is the case that s2 of the *Criminal Appeal Act 1912* prescribes in its definition of *sentence* Orders of the Court such as those under s77B, compensation is not a penalty as reiterated by Dowd J in *R v Thuoc Van Huong*. The jurisdiction of the Court to impose the compensation is not founded in the *Criminal Procedure Act 1986* or under the *Inclosed Lands Protection Act 1901*. Any remedy to recover unpaid compensation monies is within the civil jurisdiction rather than the criminal. I do not think that the sentencing principles of *De Simoni* apply to compensation awards.

98 However, the Court has a discretion to apportion compensation commiserate upon the conduct of the offender as this is a matter which can be considered under s77D(c) just as the Court can treat joint tortfeasors under the civil

regime as prescribed by s5(2) of the *Law Reform (Miscellaneous Provisions) Act 1946* which provides that the amount of contribution recoverable from any person shall be just and equitable having regard to the extent of that person's responsibility for the damage.

99 The different roles played by each Defendant at different times and sites and the damage done by each is a matter relevant to be considered under s77D(c) in terms of either awarding compensation at all relevant to each Defendant or in awarding specifically different amounts to varying Defendants.

100 I have already been critical of the fact that the Compensation claim is an aggregate claim for a protest action where the criminal proceedings do not allege a common purpose and though the charge is the same against each Defendant, the facts tendered against each are respectively different from each other – accordingly it would be appropriate to treat them separately as opposed to joint tortfeasors. Mr Averre also submits that the Defendants are generally impecunious, a factor, he concedes has little moment, given the authorities. Further, an aggrieved person should not be deprived of compensation because the offender has little, if nothing, to lose by causing the loss.

101 Finally, Mr Averre nominates the nature and purpose of the protest being the protection of the environment and the fact that no damage to property or persons was occasioned are matters to be taken into account. He also cites the environmentally damaging practices of PWCS contributing to global warming by exporting coal and the facilitation of emissions intensive electricity.

I understand the point that PWCS is making – the compensation claim is about safety and not about money. It is about a corporation trying to engage in dialogue with a group, in this case, apparently Rising Tide, who invade their premises without any regard to the risk to their member protestors, the workers

on site or the police officers and other staff who are required to remove them from the site.

102 To date they have refused dialogue and engage in ultimately futile courses of action. These Defendants are necessary and sometimes applauded members of our community which in a way, is reflected in the charge laid against them. It carries a minor financial penalty only. The Defendants are intelligent, committed environmental warriors who were spurred into action by Newcastle's ever increasing export of fossil fuels when the world is supposed to be limiting it and turning to cleaner energy sources. It is a frustrating picture but is it one that weighs against awarding or determining the level of compensation?

103 I do not think that PWCS should be deprived of compensation because of a perception that the protestor is a small David, noble and erstwhile, against a global Goliath bent on polluting the world for financial gain. Nor, do I think that PWCS should benefit from a public relations exercise by donating compensation money to a charity yet to be nominated because it does not want compensation at all.

104 The advertisements that Mr Davidson published in the Newcastle Herald, which are exhibits, and the apparent media attention about this claim for compensation highlights that the protestors didn't appreciate that such a claim would be made. Now they know. Any protestor who enters PWCS or other coal loading facilities are on notice that if the outcome of their actions results in loss, which is proven, they are liable to have a compensation liability and one that they cannot afford as the quantum is so huge.

105 Corporations such as PWCS are also on notice that if a claim for compensation is being made the actual loss need be proved which will involve proper figures and sums, the incurrence of accountant fees and the like. An aggregate coal handling fee without support by primary

documents and proper financial proof of actual loss will not discharge the onus incumbent upon the applicant.

106 I decline compensation to the individual protestors at Carrington for the reasons I have already expressed. Likewise I decline compensation for ship loader K5 at Kooragang. In relation to K4 and K6 I decline to order compensation for two reasons.

107 The first is that although the application was based on an aggregate amount, and although the STEM documents were not entirely reliable, I am satisfied on a balance of probabilities that at least 80,000t of coal was unable to be loaded during the period of the protest. However, I am unable to quantify the actual loss this involves for the reasons I have already expressed. I have considered awarding a nominal amount of \$1 per tonne but then in terms of actual loss it might be less. I have considered awarding a token amount such as \$5,000 but I think I am unable to do so in the absence of satisfactory evidence. In those circumstances together with the fact that PWCS has no intention to use any money awarded as compensation, such an Order would really amount to a punitive deterrent which is not the purpose of compensation at all.

108 I have also considered if I was to make an award of compensation in relation to K4 and K6 whether the compensation order would be made against each of the Defendants. For the record, in this case, I decided not. Though, on the face of it, the protest appears to have been well planned, coordinated and carried out simultaneously, any award of compensation would have taken into account the actions of each protestor separately to arrive at the appropriate compensation order. That exercise would have been somewhat academic in circumstances that the applicant could prove an amount of actual loss in excess of jurisdiction in relation to each loader. In those circumstances the protestor could expect the maximum award of compensation.

109 The second reason and this reason has overshadowed the entire case – PWCS doesn't want compensation. It doesn't want the money. PWCS understands that its operation is going to always be a target for environmentalist's action. Indeed, it is not and never has as far as I am aware sought anything other than exclude persons from its site for their protection. There will always be people who think how convenient to cite protection of safety when it is really protection of the pocket, but as I have commented repeatedly, I am satisfied that PWCS's concern about safety and its desire to engage with protestors so that no ones safety or life is put at risk is genuine.

110 I trust that these proceedings have made this clear. I do not think, that now making any orders for compensation is going to advance that position further. However, there may be another occasion where PWCS forms the view that there is no respect for their concern for safety and make it about the money, and given that the corporation now knows what it needs to do to prove its claim, a claim is made so that the financial loss is alleviated by compensation which would be an extremely onerous liability on any individual.

The application for compensation is dismissed.

E. Truscott

LCM

3 March 2011

