

AFFIDAVIT OF PHILLIP POLLICINA, FEBRUARY, 2015

COURT DETAILS

Court	NSW Land and Environment Court
Division	Class 4
Registry	Sydney
Case number	14/40998

TITLE OF PROCEEDINGS

Plaintiff	SHCAG Pty Ltd
First defendant	Hume Coal Pty Ltd
Second defendant	New South Wales Minister for Resources and Energy

FILING DETAILS

Filed for	Plaintiff
Legal representative	Marylou Potts Marylou Potts Pty Ltd 113b Carabella st, Kirribilli 2061
Legal representative reference	Marylou Potts Marylou Potts Pty Ltd
Contact name and telephone	Marylou Potts 0411340775
Contact email	ml@mlppl.com.au

AFFIDAVIT

Name Felice Pollicina
Address 80 Carters Lane, Sutton Forest NSW 2577
Occupation Business man
Date

I say on oath:

- 1 I, Felice Pollicina, landholder, own the property at 80 Carters Lane, Sutton Forest NSW 2577 being Lot 9 DP1040207 (**Pollicina property**).
- 2 Through my company, Fesen Pty Ltd (**Fesen**), of which I am the sole director and shareholder, I purchased an adjoining rural property to the Pollicina property of approximately 350 acres (Lots 29 and 30 DP262738) in June 2003 (**Fesen Property**). Annexed and marked FP1 is a rough map of the properties and the basic infrastructure.
Hume Coal Pty Ltd (Hume)
- 3 The Pollicina and Fesen Properties fall within Hume Coal Pty Ltd's (**Hume**) coal exploration licence area.
- 4 On 5 September 2014, I was copied in on an email from Hume to Mr Watson, the panel arbitrator appointed to arbitrate whether or not Hume should have access to my properties. This email and letter state that Hume's Phase 3 drilling program had been approved (**Phase 3 drilling program**). Annexed and marked FP2 is a copy of that email and letter.
- 5 On 28 November 2014, Hume advised me that it proposed to drill 3 holes on the Pollicina property and 6 holes on the Fesen property. Those hole locations are set out on the maps dated 28 November 2014 in Annexure FP3.
- 6 I do not give my consent to Hume to access my properties to undertake drilling activities or create access tracks between drill sites.
- 7 To the best of my knowledge, neither Hume nor the Department of Resources and Energy have visited my properties or been to the actual position of where Hume is proposing its holes.

Business run on the properties

- 8 At present I am running an Angus bull with 120 black Angus cows on the properties, half of which calve in February and the other half in August. I also have 2 riding horses on the property.

Terrain of the properties

- 9 Annexed and marked FP4 is a rough graph of the topographical contours of the Sutton Forest area. Marked on that map are my 2 properties and how they sit in that terrain. This map shows that the low lying areas of my properties form part of a flood plain that disperses rainfall from the surrounding higher ground. Annexed and marked FP4.1 are copies of 2 videos taken in 2013:

- (i) the first taken by me on 1 July 2013 at 13.58pm from paddock 12 near the intersection with paddocks 8 and 9;
- (ii) the second taken by me on 3 October 2013 at 2.54pm in the laneway between paddocks 11 and 12.

These videos provide an example of how wet the Wells creek area can get. Since then Wells Creek has run in a similar fashion several times.

- 10 Wells Creek is the main watercourse draining the area with several minor watercourses taking the water from the hills and discharging the flow across the flat ground. The result is that this land frequently becomes waterlogged and is generally in a soft condition.

- 11 The impact of rain events on my property is marked. I can give you many examples, but the following three, are examples under differing weather conditions.
- (i) On October 8th 2013 conditions had been very dry for the preceding 3 months, and the ground was mostly firm, but I could not cross the Wells Creek crossing in a 4 wheel drive. I had to use a quad bike.
 - (ii) On July 3rd and 10th 2014 rainfall in the preceding 3 months had been below average. On this occasion the FWD Landcruiser crossed Wells Creek with some difficulty and in addition we observed other areas of the access tracks that would have been unsuitable for the FWD Landcruiser.
 - (iii) On January 23rd, 2015 the area had absorbed heavy rainfall in December and the first 12 days of January, but even though the 10 days that preceded our visit had been quite dry, the main access track across the

property, the Wells Creek crossing and several paddocks where drilling is proposed were totally waterlogged. Crossing with the FWD Landcruiser was nearly impossible, with the vehicle fishtailing particularly in the Wells creek crossing area and where the funnel is on the Pollicina property.

Location of the holes generally

12 I do not know for sure where Hume will be putting its holes or how many holes it will be demanding to put on my land. Since January 2013, it has changed the number of holes from 9 to 25 to 9. Annexed and marked FP5 are the maps provided by Hume:

- (i) on 7 January 2013 as set out in the s142 notices for each of the properties, being 9 holes on the 2 properties;
- (ii) in January 2014 increasing the intensity of the number of holes to 25 holes over the 2 properties, this was in the middle of the arbitration; and
- (iii) on 28 November 2014, attached to its draft access arrangement proposing 9 holes on the 2 properties.

13 For the purposes of this affidavit I will assume that the location of the holes is that set out on 28 November 2014 in the maps attached to Hume's draft access arrangements for the properties.

Pollicina Property

14 The Pollicina Property is a rural property of approximately 160 acres. I purchased the Pollicina Property in May 2001 for approximately \$700,000.

15 There is no direct access to the Pollicina property from a public road. I have a right of way on my title from a public road, being Golden Vale Road, via Carters Lane, owned by the Alexanders, to get to the Pollicina property. Annexed and marked FP6 is a copy of an aerial map of the Pollicina property with the house, the foundation slab for the main house. Annexure FP4 shows the Carters Lane access from Golden Vale Road. The map in Annexures FP6 and FP1 show the rough locations of the fences, dams, house of the Pollicina property.

16 The Pollicina property has on it:

- (i) a house within approximately 200m of the gate with Carters Lane;
- (ii) gardens and ornamental trees which extend from the gate up the formed driveway to the house;

- (iii) improved pastures in 9 working paddocks;
- (iv) an underground water reticulation system of polypiping to troughs in each paddock;
- (v) sheds and buildings;
- (vi) internal and boundary electrified stock proof fences;
- (vi) shelter belts; and
- (vii) formed driveway with gutters, culverts, contours which is regularly maintained from the gate at Carters Lane to the house. This driveway branches approximately 20 m from the gate to go to the rest of the property; and
- (viii) other infrastructure to run a cattle business on the property.

17 Within 50m of my house is the foundation of the main house which I began to construct soon after I purchased the Pollicina Property. It is 1200 m² in area and cost approximately \$350,000. Annexed and marked FP7 is a diagram of that foundation and the contour of the land as it slips away to the north.

18 I have not continued the building of the main house, as the property value has diminished so substantially since 2011. I believe because of Hume's activities in the area, and the uncertainty with what will happen with Hume's activities, make me very nervous about how much I should invest in the property. In fact, since 2011 I have invested very little in the property primarily because of this uncertainty caused by Hume Coal.

Hume's holes proposed on the Pollicina Property

19 Annexed and marked FP6 is a map of the Pollicina property with the paddocks numbered 1 to 9.

20 The hole in paddock 3 of the Pollicina property is at the base of a quite steep hill quite close to a quite soft and often boggy area.

21 The hole in paddock 7 of the Pollicina property is at the furthest away spot and the wettest corner of that paddock.

22 The hole in paddock 8 of the Pollicina property also sits within soft and often boggy ground.

Access to these holes on the Pollicina property

23 Hume's planned 'paths of access' diagram, provided as part of its most recent draft access agreement on 21 January 2015, is annexed and marked FP8.

24 Without being ordered by the Land and Environment Court, I will not give my consent to Hume to:

(i) use my right of way up Carters Lane from Golden Vale Road;

(ii) use my driveway; or

(iii) undertake any activity within 200m of my house; or

(iv) undertake any activity within 50 m of my gardens; or

(iv) cut my fences to allow access from neighbouring properties.

There is no other access to the Pollicina property without gaining consent of neighbouring property owners. I will not consent to the cutting of my fences.

Fesen does not give its consent to Hume to cross the Fesen Property to get to the Pollicina property.

25 Nevertheless, if a court rules that I must give Hume access to the Pollicina property despite these improvements, Hume will need to have access tracks across the flood plain of Wells Creek.

26 Using Hume's maps and the scales in their maps I have measured the length of the Fesen property to be approximately 1.4 kilometres long. The majority of which is low lying land subject to flooding due to Wells Creek.

Fesen Property

27 The Fesen Property is located at 20 Kardinia Lane, Sutton Forest, from the Hume Highway. I purchased the Fesen property of 350 acres for \$4.1 million. Using Hume's maps and the scales in their maps I have measured the length of the Fesen property to be approximately 1.3 kilometres long. The majority of the Fesen Property sits within the Wells Creek flood plain.

28 The Fesen property consists of 15 paddocks of improved pastures. Annexed and marked FP1 and FP8 are copies of rough maps which include the Fesen Property showing the paddocks, the gates, the dams, the fence lines, Wells Creek.

29 Wells Creek runs through paddocks 10, 11, 12 and 15 of the Fesen Property.

30 These paddocks are always soft and become very water logged and boggy and as a consequence of any rain event.

31 Wells Creek floods on a regular basis. The last time was in December of 2014 and before that in September of 2014.

32 I find it is very difficult to navigate paddocks 10, 11, 12 and 15 with anything heavier than the quad bike for some time after rain events. If I do use the 4 wheel drive, the wheel ruts are deep and also dangerous to navigate and they remain.

Issues with the locations of Humes currently planned holes and access Fesen property

33 Hume's latest proposed bore hole locations for the Fesen property are set out on the map marked as annexure FP9.

34 One of Hume's bore holes is within paddock 11 of the Fesen property which is the paddock Wells Creek runs through. This paddock is very soft and often very boggy. I do not travel much in this paddock other than on a quad bike because it is too soft and boggy even after long dry periods.

35 The second of Hume's bore holes is in paddock 12 of the Fesen property which wells Creek also runs through. For the same reasons I do not often drive in this paddock with anything more than a quad bike because it is too soft and boggy even after long dry periods.

36 The third, fourth, fifth and sixth of Humes bore holes on the Fesen Property are in paddocks 7, 8, 2 and 1 all which sit within the lowest or second lowest lying areas of the contour map.

37 The holes in paddocks 8 and 2 are in the middle of the paddocks. These locations will interfere with my ability to use these paddocks.

38 There is no existing track to any of these holes on the Fesen Property.

39 A number of the holes are located almost on top of the water trough for that paddock and trough water reticulation infrastructure.

Generally

40 I fear that Hume will have to construct a formed road through my property to get to its proposed drill sites. I have measured the length of formed track that I think Hume would have to install on the Fesen and Pollicina

properties to get from hole to hole at approximately 5.5 to 6.0 kilometres. They would also have to navigate lengthy boggy areas.

41 I have seen the damage the construction of such a road does, as I saw Hume building the road on the Koltai property to the drill rig on that property close to the boundary with Carters Lane.

42 I fear if Hume does build a road across the flood plain that it could create a barrier to the natural drainage of water across the property and lead to paddocks upstream of the road becoming even more waterlogged than they currently can be and the downstream paddocks drier.

Impact in resisting access in arbitration - uncertainty

43 I have spent millions of dollars purchasing and improving my properties.

44 I had plans for both these properties. I no longer know whether I can execute these plans as I do not know what will happen in the district because of Hume's activities. I do not know how long I will be engaged in arbitration or in the Land and Environment Court trying to protect my significant improvements. I do not know if Hume will or will not be successful in gaining access to my properties and I do not know how long Hume's activities will take on my properties or how long it will take for the properties to rehabilitate subsequent to Hume leaving the properties.

45 If Hume does get onto my properties, I have been told by Ross Alexander, my neighbour, who had a report undertaken by Mark Lucas of Pasture Agronomy Services, in relation to drilling by Hume on his property, that it will take 2 years after the drilling has finished for pastures to return to their current state.

Arbitration a huge distraction from my other business activities

46 Hume sent me section 142 notices in January 2013, section 143 notices in February 2013 and the Director General appointed a panel arbitrator in September 2013, a Mr Phillip Watson. Annexed and marked FP10 are copies of the s143 and s143 notices served on Fesen Pty Ltd and the arbitrator's letter to me notifying me of his appointment.

47 The first date of the arbitration hearing was on 8 October 2013 and since then we have had 3 or 4 days of arbitration hearing over the span of the last 16 months, the last being on 28 November 2014.

- 48 There are 2 folders of submissions and a folder of correspondence between the parties. I have been represented by two agents throughout the arbitration process and advised by a solicitor.
- 49 Over this time, I have had to engage agronomy experts. Attached and marked FP11 is a copy of an agronomist reports describing the pastures on the properties as improved pastures. I had to search for valuers. In the end, after being given the run around by one valuer, and my valuer was not available within the time frame demanded by the arbitrator, Mr Watson, we did not pursue getting a valuer's report of the properties to be able to submit expert reports that the properties are significantly improved and to argue compensable loss.
- 50 I have spent hundreds of hours over these last 2 years focused on Hume's activities on my properties rather than my own plans for the properties. I have sleepless nights before each arbitration hearing date and sleepless nights after each arbitration hearing date. I become very agitated when discussing Hume's proposed activities on my properties. I want to make this land better and all I imagine is Hume carving up my land with access tracks and drill sites. This agitation carries over into my family life. We are all uptight. I wake up every morning often at 4.30-5am worried about Hume and my properties. I talk about Hume and my properties every day. When I am sleepless, my wife is also sleepless. I have feelings of despair and anger. I am frustrated in not being able to make plans for the properties until this access dispute is resolved. I feel betrayed by law and government. I have lost my pride and enthusiasm for the properties.
- 51 I believe that the arbitrator Mr Watson, a panel arbitrator appointed under the Mining Act, had made up his mind about giving access to my properties even before he had heard the evidence because he said words to the effect "I will be granting access to this property" in the first telephone conference we had with him. I believe that the arbitrator ignored expert reports given to him. He gave verbal reasons for ignoring them and refused to put those reasons in writing. The verbal reasons given by Mr Watson were given so quickly that neither I nor my agents, Mr Alan Lindsay and Mr Peter Martin, were able to understand them, which is why I requested that those reasons be put in writing.

- 52 For 9 months Hume has had no approval to drill a hole and the arbitration has been stalled due to Hume having no approval to drill. I have vehemently objected to the arbitrator granting access to my property to Hume to undertake activities which it has no approval to undertake.
- 53 On 17 February 2015 I received Mr Watson's interim determination. I have not yet had the chance to read that determination. If that interim determination concludes Hume may access my properties over my improvements, I will request that a final arbitration hearing is heard. I will then receive a final determination from him as to whether or not he grants Hume access to my properties. If once again, he does grant access to Hume to my properties over my significant improvements, I will seek that the Land and Environment Court review his decision.
- 54 I imagine that that process of resisting access to protect my significant improvements will take at least a further year before it is concluded.
- 55 In the mean time, since January 2013, I have expended over \$65,000 in legal fees and more on expert reports. I imagine I will have to spend that much again and more in getting from the interim determination to the final determination to the Land and Environment Court.
- 56 I have found the process of access for exploration to be extremely stressful and costly. I have invested a lot of money in these properties. I will not make any further plans for these properties until I know that Hume is not proceeding with its plans. Already the property values have dropped substantially from 2011 to 2013, as show in the notices attached and marked PF12. I have invested \$350,000 in a slab for the main house. Conservatively I would be spending another \$2 million to build this house and employing people to construct it. However I will not continue with this construction if Hume is going to be mining under this house.
- 57 I currently pay others to spell my horses. I want to spell my horses on my property. I cannot do that until I change all the fencing, making smaller paddocks, build shelters in each paddock, construct a water reticulation system to each of the new paddocks, build a stable block, and other horse infrastructure. These plans would involve not only spelling my horses but others horses. I know that on Manix Park just around the corner from my properties they charge \$30/day per horse. They have 150 horses on less land than I have. I would need to employ 2 people full time to be on the

property 24 hours and day 7 days a week. These plans I will not execute until I know that the properties will not be impacted by Hume for 9 months or more undertaking its proposed drilling of 9 holes at a rate, it says, which I dispute, of 4 weeks per hole. I cannot proceed with these plans until this arbitration and access dispute is finally resolved in my favour.

58 I have received from the Valuer General notices showing that the average land value of the Fesen property has dropped by a total of \$920,000 from 2011 to 2013. Annexure FP12 contains a copy of the notice showing the average value of the Fesen property in 2011 as \$2,820,000, in 2012 as the same value, and in 2013 as \$1,900,000.

59 I am angry and frustrated at having to turn my attention almost every month since January 2013 to Hume's proposed activities on my land. My family is impacted and stressed and angry because what happens to me affects them.

60 The Pollicina and the Fesen Properties make up approximately 510 acres.

61 My original plan for the properties was to undertake a subdivision into 4 approximately 100 acre blocks for eventual sale, and a home block on the Pollicina property off Carters Lane of approximately 110 acres.

62 The subdivision has been approved but I have not moved forward with the sale of the 100 acre blocks due to the impact of the Hume Coal project on property prices in the area.

63 Initially I made significant investments in upgrading the properties, in fencing to facilitate the subdivision and fencing generally, in water reticulation and supply, troughs for stock watering, in weed control, fertiliser and trees for wind breaks and general ornamentation. However this investment has been scaled down in recent years due to the mining proposal.

64 I have been unable to put my subdivided land on the market under the present conditions as I am advised by the local real estate that once potential purchasers learn of Hume in the district they are no longer interested or only interested at a very substantial discount to prices that were available before 2011. I am incurring significant holding costs in the interim being a bank loan because I borrowed all the money to purchase the Fesen property and borrowed some money for the purchase of the

Pollicina property. I am still paying these loans off. Both properties are mortgaged.

#SWORN at

Signature of deponent _____

Name of witness _____

Address of witness _____

Capacity of witness [#Justice of the peace #Solicitor #Barrister
#Commissioner for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]
#I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.¹
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]
#I have confirmed the deponent's identity using the following identification document:

Identification document relied on (may be original or certified copy)²

Signature of witness _____

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

¹ The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

² "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see [Oaths Regulation 2011](#) or [JP Ruling 003 - Confirming identity for NSW statutory declarations and affidavits](#), footnote 3.]