

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

This factsheet covers the following topics:

- Mining and Petroleum Regulation; and
- Land Access for Mining and Coal Seam Gas.

MINING AND PETROLEUM REGULATION

In NSW mining and petroleum regulation is controlled by a number of Acts, regulations and government departments from exploration application to rehabilitation at the end of mine life.

Below are the principal Acts, the agency administering those Acts and the area regulated by that Act.

Act	Government Agency Responsible	Area of regulation
<i>Mining Act 1992</i> (NSW) (“Mining Act”)	Department of Planning and Environment	Licensing, Land Access, operations offences for minerals including coal.
<i>Petroleum (Onshore) Act 1991</i> (NSW) (“Petroleum Act”)	Department of Planning and Environment	Licensing, Land Access, operations offences for petroleum including CSG.
<i>Environmental Planning and Assessment Act 1979</i> (NSW)	Department of Planning and Environment	Planning processes and approvals at both the production and occasionally at exploration stages.
<i>Protection of the Environment Operations Act 1997</i> (NSW)	Environmental Protection Authority	Environmental licensing and enforcement

In October 2015, the NSW Parliament passed legislative amendments affecting each of these Acts to a greater or lesser degree.¹ Further amendments were made in 2017. All changes have commenced.²

LICENSING

Under the *Mining Act* and the *Petroleum Act* all resource activity must be licensed³ other than small scale fossicking under certain conditions.⁴

Licences are issued by application.⁵ For coal and petroleum exploration they are granted under the ‘Strategic Release Framework’.⁶ Exploration licences are generally granted for a term of six years. Some historic licences have five year terms while an exploration (mineral owner) licence expires after two years.⁷

An explorer must hold an exploration licence before undertaking explorative activity.⁸ Note that even minerals that have been reserved under the property title require a licence.⁹

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

STRATEGIC REGIONAL LAND USE POLICY

The Strategic Regional Land Use Policy is a raft of measures aimed at improving planning outcomes for resource projects in rural areas. These measures include:

- The identification and mapping of the state's most valuable agricultural land, which is known as **Strategic Agricultural Land**;¹⁰
- A requirement that certain types of mining and petroleum developments proposed on Strategic Agricultural Land be subject to additional independent scientific assessment through the **Mining and Petroleum Gateway Process** before a Development Application can be lodged for the proposal;¹¹
- The implementation of **Coal Seam Gas Exclusion Zones**;¹²
- The appointment of a **Land and Water Commissioner** to build community confidence in the processes governing mineral and petroleum exploration activities in the state, and to oversee Land Access Arrangements between landholders and miners;
- The introduction of an **Aquifer Interference Policy** to assess the impacts of mining and petroleum activities on water and to account for the water used by the mining and petroleum industries in the state's water licensing scheme;¹³
- The requirement that an **Agricultural Impact Statement** be prepared as part of the assessment process for certain mineral and petroleum exploration and production proposals;¹⁴ and
- The implementation of new **Codes of Practice** for the coal seam gas industry.

DEVELOPMENT APPLICATION

As part of the process for developing a mine, a Development Application must be lodged with the Department of Planning and Environment.¹⁵ Where the project has a capital investment in excess of \$30 million or is a coal or petroleum production project, it will be deemed a state significant project.¹⁶ This will mean that the application must be placed on public display for at least 28 days¹⁷ and must be accompanied by a detailed Environmental Impact Statement (EIS).¹⁸ Requirements for the EIS are found in the *Environmental Planning and Assessment Act 1979* (NSW) and *Environmental Planning and Assessment Regulation 2000* (NSW).

LAND ACCESS

The rights granted to holders of mineral and petroleum exploration licences include the right to seek access to a property for the purposes of exploration.¹⁹ There is no explicit right of landholder refusal for land access in any of the operating Acts,²⁰ however a landholder can place reasonable restrictions on explorers through the land access arrangement process.

Before a licence holder can access private property, they must have a 'land access arrangement' (also called a land access agreement) in place.²¹ This can be either negotiated by the parties or imposed by an arbitrator.²²

THE LAND ACCESS PROCESS: OVERVIEW

Under both the *Mining Act* and the *Petroleum Act*, the process for land access is very similar. The aim of the legislative framework is to facilitate land access by explorers.

The first formal step in land access (particularly where landowners are reluctant to engage) is the service of written notice of intention to obtain an access arrangement under s 142 of the *Mining Act*. That notice must contain a plan of the area over which exploration is to occur²³ as well as a description of the methods to be used (see *Exploration activities and access to land* below).²⁴

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

If, after 28 days of serving notice of intent to obtain access there is no agreement, the explorer can serve a further notice seeking agreement to appoint an arbitrator.²⁵

If, after a further 28 days, agreement as to an arbitrator cannot be reached, then either party can apply to the Secretary of the Department of Planning and Environment to appoint one.²⁶ Following this, an arbitration will be held.²⁷ Information about the current arbitration process is available on the Department of Planning and Environment's website.²⁸

Finally, after ultimate determination in arbitration, s 155 of the *Mining Act* provides for the ability to apply for review to a commissioner of the Land and Environment Court on full merits review.²⁹

The issue of what constitutes a "significant improvement" is a common avenue of appeal.

SIGNIFICANT IMPROVEMENT

Without the consent of the landholder, exploration cannot occur:

- on or within 200m of a **dwelling house** that is the principal place of residence;³⁰
- on or within 50m of any **garden**;³¹ or
- on any '**significant improvement**',³² which means any substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work, or other valuable work or structure.³³

If there is a dispute between the landholder and the explorer as to what constitutes "significant improvement" (in particular, **or "other valuable work or structure"**), the issue will be decided by the Land and Environment Court.³⁴

The courts have interpreted the term "significant improvement" broadly and have found fences, stock yards and dams could qualify.³⁵ See *Martin v Hume Coal Pty Ltd* [2016] NSWLEC 51 for the most recent judicial consideration of "significant improvement". Preston CJ held that each "improvement" should be assessed on its own merits as "a question of fact and degree" as to whether it is a "works" or "structure" that is "substantial" and "valuable".³⁶

THINGS TO CONSIDER INCLUDING IN A LAND ACCESS AGREEMENT

Practitioners should consider how the following might affect their client and how they should be dealt with in an access agreement.

Baseline assessments

Baseline assessments are studies that are done before exploration activity. These studies establish the conditions of the property and the environment prior to exploration. This is important so any impacts of the exploration activity on the land can be measured over time. This makes it easier to estimate any damage or compensation required.

The extent or type of baseline assessments will depend on the extent and type of exploration activity proposed.

Exploration activities can escalate or change over the period of access. The explorer should be asked what activities are anticipated.

It is important that these are assessed independently and to consider negotiating for the explorer to fund the engagement of independent experts.³⁷

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

Insurances and securities

Before an explorer can explore land, it must have public liability insurance. Landholders should also seek to be indemnified by the explorer for any and all loss or damage resulting from the explorer's activity.

Additionally, the explorer should guarantee that it will pay any compensation required to rectify any damage to the property or to fund rehabilitation works.

Exploration activities and access to land

An explorer which seeks access to private land must serve a written notice of its intention.³⁸ This notice should contain:

- a plan and description of the area of land over which the access is sought;³⁹ and
- a description of the prospecting methods that will be used.⁴⁰

The landholder should establish:

- detailed information on the exploration planned;
- what chemicals will be used;
- what equipment will be used;
- whether the explorer wants to clear vegetation;
- how much water will be used; and
- if there are temporary work-camps planned.

This information will help the landholder understand the extent of operations planned for the property and will put the landholder in a better place to negotiate protections.

As exploration activity may escalate or change over time, the agreement may need to be varied to accommodate new activities or protection measures.

Area of access

The landholder should identify any areas which they want to negotiate as off-limits to exploration activities in order to protect the use of the property.

To do this, the landholder should create a property plan and mark the following on it:

- dwelling houses;
- farm buildings, houses, sheds;
- farm infrastructure (roads, paths, tracks, fences, dams, irrigation infrastructure, powerlines);
- natural features such as water sources, topography, native vegetation;
- areas of high production;
- areas where operation of farm equipment or machinery is necessary;
- soil types;

- areas used for recreation and enjoyment;
- views from the house; and
- planned future development areas.

The landholder should use the map to decide to which areas to allow access and which areas the landholder wishes to be off-limits to the explorer.

The restrictions on, for example, how close an explorer can come to your house while exploring, can be waived. This must be written into the Land Access Arrangement.⁴¹

When the property will be accessed

Consider the impacts the exploration activity will have on day-to-day business operations. Also consider the impacts the exploration activity will have on personal enjoyment of the property. Taking into account these factors, you may need to decide what times will be off-limits to exploration activities.

Take into account the potential loss of privacy and potential noise pollution from exploration operations. Work out times that exploration activity may need to be restricted or adapted to the farm's work schedule.

Time restrictions may include:

- daily times and days of entry (e.g. 9am to 5pm, Monday to Friday);
- total period of access (e.g. start date to finish date);
- any days or times the explorer may not enter the property (e.g. public holidays, special family events);
- times of the year when exploration activity is restricted (e.g. lambing, harvest); and
- safety of children around school bus pick-up and drop-off times where road access is shared.

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

Access routes

Consider how the explorer will access the areas on the property that the company can explore. Some matters to consider include:

- which routes are appropriate to gain access to exploration sites;
- whether the proposed access routes create more traffic near the house or will distress livestock;
- whether the proposed access routes pose a safety risk for children;
- whether increased vehicle movements will create more dust, noise or impact pastures;
- whether the proposed access route will cut across paths used by stock for water, or irrigation infrastructure;
- whether access routes will interrupt utility supply lines (such as for power, water or communication);
- what entry points to the property the explorer can use;
- whether there should be alternate roads for wet weather access;
- requirements for the explorer to contact you for permission prior to using certain access routes in wet weather;
- whether the explorer is able to build new roads or upgrade old ones to accommodate the number of vehicles needed.

In relation to access routes, you might also wish to consider including further detail in the Land Access Arrangement about:

- the maximum number of vehicles to be used;
- the maximum number of vehicle movements a day;
- asking the explorer to leave all gates as it finds them;
- setting speed limits for vehicles;
- how the explorer will keep roads and tracks in repair;
- how the explorer will monitor workers' access, equipment, vehicles, chemicals and materials brought onto the property;
- the number of workers that will be accessing the property;
- how explorer personnel and vehicles are identified;
- whether smoking or drinking will be permitted on site; and
- whether the explorer will bring dogs or firearms onto the property.

Protecting property and farming operations

Exploration activities on private land may cause disruption to any farming schedules or damage to the property. You should think about what terms are required in the Land Access Arrangement to minimise these impacts.

Landholders could consider:

- impacts on the surface of the land and soils in the exploration area;
- impacts on access roads and tracks;
- impacts on crops, trees, pastures, grasses and native vegetation;
- impacts on buildings and farm structures;
- impacts on stock;
- biosecurity protections; and
- having an Emergency Management Plan in place for events such as bushfires, floods and exploration activity incidents.

It is recommended requiring the explorer to:

- leave all gates as it finds them;
- fence drill holes or rigs to an agreed standard;
- promptly repair fences, roads or tracks;
- report incidents with stock immediately;
- clean vehicles, equipment and boots of all dirt and vegetable matter before accessing your property to prevent spread of diseases and weeds;
- provide a copy of its Hazard Reduction Plan and any plans to prevent the spread of weeds and diseases;
- keep a log to record all chemicals and materials brought onto the property;
- drive slowly and carefully around stock and in pastures on access routes;
- give farm machinery right of way;
- minimise attraction of pests by not leaving food scraps and wastes on site; and
- develop an Emergency Management Plan with the landholder.

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

Protecting the environment

A good starting point in opening negotiations is to ask the explorer for a copy of its current Exploration Licence and the environmental assessment it produced to obtain the licence.

The Exploration Licence will contain conditions relating to environment protection.⁴² This will provide more information on the potential environmental impacts of exploration activity and on the environmental protection measures included in the licence.

It is recommended that the explorer be required to:

- prevent contamination of the environment including water, soils, vegetation and air;
- ask permission before using or taking water from any source;
- ask permission before felling trees, strip barking or cutting timber;
- agree to limits on dust pollution;
- immediately report spills and contamination;
- complete regular testing of water, soil and air quality and to make these results available;
- place wastes in suitable containers and remove them from the property as soon as possible;
- inform what chemicals will be used on the property and how they will be stored;
- manage garbage, hydrocarbons, waste and refuse in accordance with the terms of its Exploration Licence; and
- agree not to use carcinogenic chemicals on the property.

In relation to drilling activity, it is recommended that the explorer be required to:

- drill in a manner to prevent erosion and collapse of the surrounding surface area;
- manage drilling sumps or pits that are left open or unattended to limit access by livestock and native fauna;
- minimise risks associated with gases or liquids within the earth including contamination and cross-contamination of aquifers;
- conduct venting or flaring of gases in a way that minimises pollution and fire hazard;
- construct groundwater monitoring bores which comply with minimum construction requirements;
- case and fit drill holes in an accessible condition with a removable cap to prevent collapse and ensure safety of people and animals; and
- seal each drill hole to applicable standards before they are abandoned.

Communications and records

Establish a point of contact for the explorer and agree to a method of communication.

Ask the explorer to keep records of all equipment, vehicles, chemicals and material brought onto the property, and each person accessing the property (daily).

Ensure that these records are available on request.

Rehabilitation

Once the extent of and potential impacts of the activities proposed by the explorer on the land are understood and the exploration activity has finished, the next consideration is the rehabilitation of land.

Rehabilitation requirements are set out in the conditions to the explorer's licence,⁴³ so a copy of the explorer's licence, including the conditions, should be requested.

It is recommended that landholders negotiate for the explorer to:

- carry out any rehabilitation in accordance with the Exploration Licence conditions;
- commence rehabilitation as soon as possible after it has completed exploring on your land;
- remove all equipment, buildings or other infrastructure once exploration is complete;
- leave the exploration area in a tidy, clean and stable state;
- repair all damage to the exploration area as soon as possible;
- repair any damage to access routes, roads and tracks;
- ensure excavated base material, subsoil and topsoil are replaced in the order they were removed;
- reshape all surface disturbance to be consistent with pre-existing landforms;
- prepare the land surface for re-vegetation;
- rehabilitate any crops or pastures by reseeded; and
- rehabilitate with native species where native vegetation has been cleared.

To ensure rehabilitation work is undertaken in a reasonable timeframe, include a term in the Land Access Arrangement which would allow the landholder to undertake rehabilitation works at the explorer's expense if it has not completed rehabilitation works within a reasonable time of them asking for the work to be done.

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

DISPUTE RESOLUTION, VARIATION AND BREACH OF THE LAND ACCESS ARRANGEMENT DISPUTE RESOLUTION

The parties should decide on the appropriate method for settling disputes arising out of the Land Access Arrangement or exploration activity.⁴⁴

Variation of the terms of a Land Access Arrangement

It is important to agree on a procedure for varying the Land Access Arrangement.⁴⁵ As exploration activities may change from what was contemplated during negotiation, it is important that Land Access Arrangements are flexible in relation to negotiating changes.

Breach of the Land Access Arrangement

If the explorer breaches the Land Access Arrangement, you can exclude the explorer from entering your land until it remedies the breach.⁴⁶

COSTS AND COMPENSATION COSTS

The explorer must pay the reasonable costs of the landholder concerned in negotiating the access arrangement.⁴⁷

COMPENSATION

Land Access Arrangements must specify the compensation payable to the landholder for the exploration occurring on the land.⁴⁸ Sometimes an explorer will offer to undertake work, such as building or replacing roads and fences, instead of or as well as monetary compensation.

Types of damage or loss resulting from exploration activities that will be compensated include:

- damage to the surface of the land, crops, trees, grasses or other vegetation (including fruit and vegetables);
- damage to buildings, structures or works;
- deprivation of the possession or use of the surface of any part of the land;
- severance of land from another landholder;
- surface rights-of-way and easements;
- destruction, loss of, injury to or disturbance of stock; and
- any damage as a consequence of any of the above.⁴⁹

The type and amount of compensation paid will vary on a case-by-case basis, depending on the situation and the nature of the exploration activity. The Minerals Council has adopted a schedule which is widely used and practitioners should assess whether this is appropriate.

The Government commissioned IPART to deliver a report on compensation for landholders for gas development and production. The final report of IPART included a calculation spreadsheet that may assist landholders in determining appropriate compensation levels.⁵⁰

Template land access agreement

As per section 141(1A) of the *Mining Act* a template land access agreement has been created and is available on the NSW Government's Department of Planning and Environment website.⁵¹ The use of this template is commonplace.

LAND ACQUISITION

There is no compulsory acquisition legislation which says that a mine operator must purchase land, or that landholders have to sell their land to a miner.

However, it can be a condition of the development consent (planning approval) for a mine that the mine operator buys land if the land is affected by the mine operations, and if required by the owner. Land likely to be affected by mine operations is generally identified during the environmental assessment stage. This land might be affected by noise, dust, fugitive lighting, blasting, subsidence or access routes to a mine.

A mine operator might also be required to acquire land to secure a biodiversity offset to mitigate the environmental impacts of a mine.

Disclaimer: This publication provides general information of an introductory nature and is not intended and should not be relied upon as a substitute for legal or other professional advice. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted, warranted or implied by the authors or the Law Society of New South Wales and any liability is hereby expressly disclaimed.

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

ENDNOTES

- 1 *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015* (NSW); *Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Act 2015* (NSW); *Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015* (NSW); *Work Health and Safety (Mines and Petroleum) Legislation Amendment (Harmonisation) Act 2015* (NSW); *Petroleum (Onshore) Amendment (Beneficial Use of Gas) Regulation 2015* (NSW).
- 2 *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015* (NSW) see <https://legislation.nsw.gov.au/#/view/act/2015/41/historical2016-03-17/history>; *Mining and Petroleum Legislation Amendment Act 2017* (NSW) see <https://legislation.nsw.gov.au/#/view/act/2017/27/history>.
- 3 *Mining Act 1992* (NSW) Pt 3, Div 1; *Petroleum Act 1991* Pt 3, Div 2.
- 4 *Mining Act 1992* (NSW) s 12(1): fossicking is a lawful activity.
- 5 *Mining Act 1992* (NSW) s 13; *Petroleum Act 1991*(NSW) s 11.
- 6 NSW Government, 'NSW Strategic Release Framework for Coal and Petroleum Exploration' (2015), 6.
- 7 *Mining Act 1992* (NSW) s 27; *Petroleum Act 1991*(NSW) s 35.
- 8 Section 76 of the *Petroleum Act* empowers the Secretary to direct an individual without a licence to discontinue an activity that requires a licence.
- 9 *Mining Act 1992* (NSW) s 13(2).
- 10 Department of Planning & Environment, Government of NSW, Safeguarding our Agricultural Land <<https://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Safeguarding-our-Agricultural-Land>>.
- 11 Mining and Petroleum Gateway Panel, Government of NSW, Welcome to the Mining and Petroleum Gateway Panel website <<http://www.mpgp.nsw.gov.au/index.pl?action=home>>.
- 12 Department of Planning & Environment, Government of NSW, *Coal Seam Gas, CSG Exclusion Zones* <<http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Coal-Seam-Gas>>.
- 13 Department of Planning & Environment, Government of NSW, NSW Aquifer Interference Policy <<https://www.resourcesandgeoscience.nsw.gov.au/landholders-and-community/coal-seam-gas/codes-and-policies/aquifer-interference-policy>>.
- 14 Department of Planning & Environment, Government of NSW, Agricultural impact statements <<https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/rules-and-forms/pgf/environmental-guidelines/esg2-guideline-for-review-of-environmental-factors/agricultural-impact-statements>>.
- 15 NSW Department of Planning & Environment, State Significant Development <<http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/State-Significant-Development>>.
- 16 *Environmental Planning and Assessment Act 1979* (NSW) Pt 4 Div 4.7; *State Environmental Planning Policy (State and Regional Development) 2011* (NSW) sch 1, see also sch 2.
- 17 Department of Planning and Infrastructure, Government of NSW, Guideline on 'Call in' of State significant development under the Environmental Planning and Assessment Act 1979 <<http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/-/media/C0BAEFF2A24A471CB-D3B4017022A8BF5.ashx>>.
- 18 *Environmental Planning and Assessment Act 1979* (NSW) s 4.12(8).
- 19 *Petroleum (Onshore) Act 1991* s 69E.
- 20 Except in the case of the licence holder contravening the access arrangement. Here the landholder can deny access to the land until the contravention ceases, under s 69D(4) of the *Petroleum (Onshore) Act 1991* or s 141(4) of the *Mining Act 1992* (NSW).
- 21 *Mining Act 1992* (NSW) s 140.
- 22 *Ibid* s 143(1).
- 23 *Ibid* s 142(2)(a).
- 24 *Ibid* s 142(2)(b).
- 25 *Ibid* s 143.
- 26 *Ibid* s 144.
- 27 *Ibid* s 145. An arbitrator must, as soon as practicable after their appointment, fix a time and place for conducting the arbitration. The arbitration does not automatically occur.
- 28 Department of Planning & Environment, Government of NSW, Arbitration process for access to lands for exploration, <https://www.resourcesandgeoscience.nsw.gov.au/landholders-and-community/landholders-rights/arbitration_process>.
- 29 *Mining Act 1992* (NSW) s 155.
- 30 *Ibid* s 31(1)(a), (2)(a).

FACTSHEET: MINING AND COAL SEAM GAS LAND ACCESS

ENDNOTES

- 31 Ibid s 31(1)(b), (2)(b).
- 32 Ibid s 31(1)(c).
- 33 *Mining Act 1992* (NSW) (definition of ‘Significant improvement’).
- 34 *Mining Act 1992* (NSW) s 188(5); *Petroleum (Onshore) Act 1991* (NSW) s 72(4).
- 35 See for example *Kayuga Coal Pty Ltd v John Earl Ducey & 4 Ors* [2000] NSWCA 54 [14].
- 36 *Martin v Hume Coal Pty Ltd* [2016] NSWLEC 51 [62].
- 37 See Bret Walker SC, ‘Examination of the Land Access Arbitration Framework Mining Act 1992 and Petroleum (Onshore) Act 1991’, 29.
- 38 *Mining Act 1992* (NSW) s 142.
- 39 Ibid s 142(2)(a).
- 40 Ibid s 142(2)(b).
- 41 Under *Mining Act 1992* (NSW) s 141(1)(d) conditions may be imposed in an access agreement.
- 42 *Mining Act 1992* (NSW) s 28(c).
- 43 Ibid s 28(c).
- 44 Ibid s 141(1)(g).
- 45 Ibid s 141(1)(h).
- 46 Ibid s 141(4); *Petroleum (Onshore) Act 1991* (NSW) s 69D(4).
- 47 *Mining Act 1992* (NSW) s 142(2A); *Petroleum (Onshore) Act 1991* (NSW) s 69E(2A).
- 48 *Mining Act 1992* (NSW) s 141(1)(f); *Petroleum (Onshore) Act 1991* (NSW) s 69D(2).
- 49 *Mining Act 1992* (NSW) s 262; *Petroleum (Onshore) Act 1991* (NSW) s 107A.
- 50 Independent Pricing and Regulatory Tribunal, *Landholder benchmark compensation rates* (November 2015) 108.
- 51 Template may currently be found at Department of Planning and Environment, Government of NSW <<http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/minerals-and-coal/template-for-land-access>>.