

FACT SHEET

Exploring on land with ‘significant improvements’

December 2016

The NSW Government has made changes to the definition of significant improvement in the Mining Act and in the Petroleum Act in line with recommendations from the Walker review of the land access arbitration framework in NSW.

The *Mining Act 1992* (Mining Act) and the *Petroleum (Onshore) Act 1991* (Petroleum Act) do not allow exploration licence holders to exercise their rights under licences on land on which there is a ‘dwelling house’, a ‘garden’ or a ‘significant improvement’ unless they have the written consent of the owner¹. This fact sheet has been developed to assist parties to identify works and structures that may be considered to be significant improvements under the new definition that came into effect on 1 December 2016.

The information in this fact sheet is not intended to:

- be limited, in its application, to land access arrangements, or
- provide legal advice or pre-empt a court determination.

Rather, it is intended to set out some of the reasons why the definition of significant improvement has been revised, and to provide stakeholders with some guidance on its application.

¹ The provision in the Petroleum Act is extended to include vineyards and orchards. A dwelling house must be the principal place of residence of the person occupying it for the provisions to apply and, in that case, the consent of the occupant is also required. The provisions for dwelling houses, gardens, vineyards and orchards extend to land with a prescribed distance of these features (200 metres for dwelling houses and 50 metres for gardens, vineyards and orchards).

Recent change to the definition of significant improvement

Changes have been made to the definition of significant improvement in the Mining Act and in the Petroleum Act as part of the government’s implementation of recommendations made by Bret Walker SC in his review of the land access arbitration framework in NSW².

As a result of those recommendations, the government has replaced the previous definition with principle-based, non-prescriptive criteria for significant improvements, and has prepared this guide.

New definition of significant improvement

The new definition of significant improvement is set out in section 72(6) of the Petroleum Act, and in the dictionary of the Mining Act:

“Significant improvement on land, in relation to an authorisation [or petroleum title, as relevant] or an access arrangement, means a work or structure that:

(a) is a substantial and valuable improvement to the land, and

² Bret Walker SC, *Examination of the Land Access Arbitration Framework in NSW*, 20 June 2014. A copy of this report is available from the department’s website: www.resourcesandenergy.nsw.gov.au

(b) is reasonably necessary to the operation of the landholder's lawful business or use of the land, and

(c) is fit for its purpose (immediately or with minimal repair), and

(d) cannot reasonably co-exist with the exercise of rights under the authorisation [or petroleum title, as relevant] or the access arrangement without hindrance to the full and unencumbered operation or functionality of the work or structure, and

(e) cannot reasonably be relocated or substituted without material detriment to the landholder,

and includes any work or structure prescribed by the regulations for the purposes of this definition, but does not include any work or structure excluded from this definition by the regulations."

Applying the significant improvement criteria

A work or structure must meet all of the criteria in the definition in order to be a significant improvement.

In practical terms, a work or structure must be a significant improvement at the time that the access arrangement is being negotiated. Among other things, this means that it must be in existence and meet all of the criteria at that time. After an access arrangement is in place, the exploration licence holder will have access to all land for which permission to access is given under that arrangement and on the terms of that arrangement.

The new definition of significant improvement does not affect the protection given to dwelling-houses, gardens and other features under the legislation.

The criteria are explained in more detail below.

(a) Substantial and valuable

A work or structure may satisfy this criterion if:

- it is a substantial work or structure, that is, with regard to its amount, quantity, size or its character or quality
- it has more than nominal or token value
- it has value to a reasonable landholder of the land, and not just to the person who is actually a landholder of the land.

(b) Reasonably necessary to the operation of the landholder's lawful business or use of land

The need for the work or structure should be clearly and demonstrably linked to the landholder's business or use of the land. Note that the business or use of

the land must be lawful. For example, all relevant and necessary approvals for the business or use must have been obtained and be current.

The need could be for existing or future operations, as long as the link can be demonstrated. For example, a work or structure might be necessary for a future expansion or augmentation of an existing business on the land, as long as that expansion or augmentation is not vague, speculative or unviable.

This may capture improvements that have been made to the land which are not used to their full capacity but for which the landholder has clearly made provision in the foreseeable future.

(c) Fit for purpose

The work or structure should be maintained on an ongoing basis and continue to be functional, so that it is able to perform the role or achieve the purpose it was intended to do either immediately or with minimal repair.

(d) Co-existence with the proposed access

This criterion should be read in conjunction with criterion (e) below that requires an assessment of whether the work or structure could be relocated or substituted.

Determining this criterion requires consideration of how much the work or structure, or its use, may need to change in order for access to be granted – and any costs, implications, hindrances and issues relating to that change. For example, the implications of moving, replacing, or otherwise physically modifying the work or structure.

The concept of reasonableness is an objective one that depends on the circumstances of each particular case. The proposed access arrangement should be sufficient to meet the exploration licence holder's requirements but must seek to avoid unreasonable interference with (in the sense of unreasonably burdening, impeding, stopping or preventing) the bona fide and reasonable operation of the landholder's lawful business or use of the land.

(e) Relocation or substitution

Two key questions that must be addressed in considering whether or not a work or structure can be relocated or substituted under this criterion are:

- Is it reasonable in all the circumstances for the work or structure to be relocated or substituted?
- Can a relocation or substitution can be done without material detriment (whether financial or other detriment) to the landholder?

For something to be a significant improvement, the answer to these questions should be no.

Frequently asked questions

How should stakeholders decide what is a significant improvement during access negotiations?

Ideally, parties will themselves come to an agreement on areas that are identified as dwelling houses, gardens and significant improvements, and whether exploration activities or access should be allowed for any particular significant improvement.

However, if a dispute about whether something is a significant improvement arises, the question of what is and what is not a significant improvement should be decided according to the definition in the legislation.

How will significant improvements be treated in land access arbitrations?

In making a land access arrangement, an arbitrator may need to make a determination as to whether or not something is a significant improvement. In determining whether a work or structure is a significant improvement, an arbitrator will look to evidence from each party in relation to the five criteria set out above. The arbitrator may look to examples of when courts determined that certain works or structures were or were not significant improvements and in which case, would need to carefully consider whether the nature and extent of the work or structure in question is the same as the one discussed by the court, and how any differences may be relevant.

As part of the arbitration, the arbitrator would need to ensure that access or land use under the access agreement is not allowed on any land on which a significant improvement is located unless the owner of the significant improvement agrees.

When does a determination as to what is a significant improvement become binding?

Any party may ask the Land and Environment Court to determine whether something is a significant improvement. Determinations by the court are binding.

Will the things listed in the previous definition still be considered as significant improvements?

Not necessarily.

However, existing access arrangements will not be impacted by the change in definition.

The new definition does not restrict its application to particular features or improvements on the land. It provides principles-based criteria that any feature or improvement must satisfy before it can be treated as a significant improvement.

This means that some features or improvements that were significant improvements under the previous definition will be significant improvements under the new definition, and some will not.

How do the commencement provisions (savings and transitional provisions) work?

The new definition of significant improvement does not apply in relation to:

- existing access arrangements, since the terms of access are already in place
- arbitrations commenced but not completed before 1 December 2016 when the definition changed
- proceedings in the Land and Environment Court began before 1 December 2016
- negotiations for access arrangements, if a notice seeking the access arrangement was sent to the landholder before 1 December 2016.

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