

February 2024

## Fact sheet

# Land access framework: Explorer rights and obligations

The NSW Government has prepared this document to clearly outline an explorer's rights and obligations under the land access framework in the *Mining Act 1992* (the Act).

## Explorers

In this fact sheet, an explorer is a party holding an exploration licence or an assessment lease, granted under Part 3 of the Act. An exploration licence or assessment lease provides exclusive rights to explore for specific minerals within a specified area of land. Before exercising the rights granted by the licence or lease, an explorer is required to enter into a land access arrangement with the relevant landholder. An exploration licence or assessment lease does not permit mining.

## Landholders

Under the Act, the term landholder includes:

- the owner of the land, or
- the native title holder of the land (in some circumstances<sup>1</sup>), or
- the holder of a lease, licence, continued tenure or permissive occupancy issued under the *Crown Land Management Act 2016*, or
- in the case of reserved land, the controller of that land, or
- a person whose interest in the land is identified in any register or record kept by the Registrar General.

## Land access framework

The state of NSW and its regional economies derive great benefit from the successful coexistence of agriculture and mining industries. Landholders own or control a significant amount of the arable and mineable land across NSW. However, the State owns most of the sub-surface minerals in NSW and may authorise exploration for these minerals.

The land access framework has been designed to strike a balance between a landholder's proprietary rights and the rights conferred on explorers. Once an explorer has obtained an exploration licence or assessment lease and the necessary planning and environmental approvals

<sup>1</sup> A native title holder is a landholder for the purposes of low impact exploration licences on land where native title exists. A native title holder is also a landholder for some categories of Crown Land. A native title holder is not considered to be a landholder in exempted areas as defined in the *Mining Act 1992*, and will generally not be considered a landholder over freehold land.

(including activity approvals), they can only access land for exploration after entering into an access arrangement with the relevant landholders.

The Act outlines an explorer's legal rights and obligations, as well as protections for landholders.

## Access arrangements

A land access arrangement is a written agreement between an explorer and a landholder confirming the terms and conditions for conducting exploration activities on a particular area of land. The purpose of a land access arrangement is to provide that an explorer accesses the land on terms acceptable to the landholder. All access arrangements should be based on the understanding that explorers are visitors to and on the land.

While each situation is unique, the Act sets out matters which may be addressed in an access arrangement. They include:

- periods during which the holder of the prospecting title is permitted access to the land
- parts of the land in or on which the holder of the prospecting title can prospect and the means by which the holder can gain access to those parts of the land
- types of prospecting operations that can be carried out in or on the land
- conditions to be observed by the holder of the prospecting title when prospecting in or on the land
- compensation to be paid to any landholder as a consequence of prospecting operations in or on the land
- the manner of resolving any dispute arising in connection with the arrangement
- the manner of varying the arrangement, and
- notification to the holder of the prospecting title of particulars of any person who becomes an additional landholder.

In accordance with the Act, Mining, Exploration and Geoscience (MEG) developed the land access arrangement template for mineral exploration in consultation with the NSW Farmer's Association and the NSW Minerals Council. While it is a resource outlining what should be included in an access arrangement, it is not mandatory.

## Compensation obligations

An explorer is required to compensate a landholder for any 'compensable loss' a landholder suffers, or is likely to suffer, from the exercise of the rights conferred on the explorer or as part of an access arrangement negotiated in respect of the licence or lease. Compensation terms must be negotiated and agreed to as part of finalising the access arrangement. Anything outside of pecuniary compensation is a private matter between the landholder and the explorer.

Under the Act, 'compensable loss' refers to loss caused or likely to be caused by:

- damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables), buildings, structures or works, or
- deprivation of the possession or the use of the surface of land or any part of the surface, or

- severance of land from other land of the landholder, or
- surface rights of way and easements, or
- destruction or loss of, or injury to, disturbance of or interference with, stock, or
- damage consequential on any matter referred to in (a)–(e).

## Entering into an access arrangement

If the explorer wants to access land for exploration then the explorer must first negotiate a land access arrangement with the landholder. If an access arrangement is agreed, exploration can commence as long as the terms of the access arrangement are met.

If an access arrangement cannot be agreed, and the explorer chooses to pursue land access, then the law provides for a process of mediation and potentially arbitration.

To commence the mediation process, the explorer may give the landholder valid written notice of intent to enter into an access arrangement (in line with section 142 of the Act). The notice of intent must include:

- a plan and description of the area of land over which the access is sought sufficient to enable the ready identification of that area, and
- a description of the prospecting methods intended to be used in that area.

The landholder cannot ignore or dismiss a valid written notice of intent. Both parties are legally obliged to negotiate in good faith to try to reach an agreement.

The Act provides that the explorer must pay the reasonable costs of the landholder to participate in the negotiations, up to a maximum amount determined by the Minister. Reasonable costs include:

- time spent participating in negotiating the access arrangement,
- legal costs of negotiating the access arrangement, and
- costs of engaging experts as part of the negotiation process.

The maximum amount of reasonable costs for negotiation is currently set at \$1,500 for ‘exempt development’, and \$2,500 for ‘assessable prospecting’ operations.

The State Environmental Planning Policy 2021 identifies certain exploration activities as ‘exempt development’ due to their minimal environmental impact. Examples include aerial surveying and coring using hand-held equipment. ‘Assessable prospecting’ operations cover all other types of activities which are not ‘exempt development’.

If the parties cannot successfully negotiate an arrangement within 28 days of receipt of the notice of intent, the Act provides for an arbitration process to assist with the finalisation of the arrangement. If a notice of intent is sent by mail, the date of receipt is 7 working days after the notice was posted, unless there is evidence that the notice was delivered earlier. The 28 days referred to in section 142 of the Act starts from the day after notice is received. For other methods of delivery, refer to the [Land access arbitration procedure](#).

As is the case for negotiations, the explorer is responsible for paying the reasonable costs of the landholder participating in a mediation or arbitration. Unlike negotiation, there is no maximum amount payable during mediation and arbitration. For further information on the arbitration process, refer to the fact sheet [Land access framework: Mediation and arbitration](#).

## Dwellings, houses and significant improvements

An explorer may not, without consent from the landholder, undertake works on the following areas of land:

- land on which a dwelling-house is situated that is the principal place of residence of the person occupying the land, or land within 200 metres of the dwelling-house, or
- land on which a garden is situated, or land within 50 metres of the garden.

Works can also not, without consent from the landholder, be undertaken on land on which any 'significant improvements' are situated. The Act defines a 'significant improvement' as a work or structure that meets all of the following criteria:

- is a substantial and valuable improvement to the land
- is reasonably necessary for the operation of the landholder's lawful business or use of the land,
- is fit for its purpose (immediately or with minimal repair)
- cannot reasonably co-exist with the exercise of rights under the authorisation or the access arrangement without hindrance to the full and unencumbered operation or functionality of the work or structure
- 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.

In circumstances where the landholder has provided consent for an explorer to undertake works on these areas, consent cannot be revoked.

The NSW Land and Environment Court (LEC) may hear disputes around significant improvements. The explorer is required to pay the landholder's reasonable costs in LEC proceedings.

## Exempted areas

An explorer also may not undertake works or exercise any rights conferred by the licence/lease on land in a state conservation area within an exempted area unless prior consent from the Minister is obtained. Other exempted areas do not require Minister's consent. All land requires an access arrangement. An exempted area is defined as land:

- reserved, dedicated, appropriated, resumed or acquired for public persons, vested in the Crown or in any person as trustee for public purposes, or
- held under a lease for water supply by virtue of a special lease or otherwise, or
- transferred, granted or vested in trust by the Crown for the purpose of a racecourse, cricket-ground, recreation reserve, park or permanent common or for any other public purpose.

## Rights and duties

Summary of rights and duties under an exploration licence or assessment lease

Explorers have:

- the right to prospect on the land for the groups of minerals specified in the licence or lease

- the right to see their exploration licence or assessment lease continue to have effect if an application for the renewal of their licence or lease is not dealt with before the licence or lease end date
- a duty not to exercise rights conferred by the licence or lease on land in an exempted area, except with prior consent by the Minister
- the duty not to exercise rights conferred by the licence or lease over the surface of the land on which or in proximity to a dwelling-house or garden (unless owned by the licence or lease holder) are located, and
- the duty not to exercise rights conferred by the licence or lease over land on which a significant improvement is situated.

## Frequently asked questions

### Does the landholder have to engage in negotiating an access arrangement?

Yes. The landholder is not permitted to dismiss a notice of intent. Both parties must negotiate in good faith and engage with one another honestly, fairly and with a legitimate interest in a constructive outcome. The explorer must cover the reasonable costs associated with negotiation, up to the capped amount.

### How do I know the landholder has received my notice of intent?

If a notice of intent is sent by mail, the date of receipt is 7 working days after the notice was posted, unless there is evidence that the notice was delivered earlier. The 28-day notice period starts from the day after a posted notice is received. For other methods of delivery, refer to the [Land access arbitration procedure](#).

It is important for the explorer to keep all records and evidence of postage and receipt.

### How do I finalise an access arrangement with the owner of the land under my title?

Negotiation between a landholder and explorer is the first step in creating a land access arrangement. If both parties are unable to reach an agreement, mediation is required. If both parties are unable to reach an agreement through mediation, an independent third-party arbitrator may determine the access arrangement and its terms.

If either party is not satisfied with the arbitrator's final determination, they may have the NSW LEC review the access arrangement. For further detail relating to the mediation, the arbitration process, or the appointment of an arbitrator, refer to the fact sheet [Land access framework: Mediation and arbitration](#).

### What costs am I required to pay to finalise a land access arrangement?

The explorer is required to pay the reasonable costs for the landholder to participate in reaching a final land access arrangement. Reasonable costs apply to negotiation, mediation, arbitration and the LEC hearings, and include:

- time spent participating in negotiating the access arrangement
- legal costs of negotiating the access arrangement, and
- costs of engaging experts as part of the negotiation process.

For negotiation, reasonable costs payable is capped at \$1,500 for ‘exempt developments’ and \$2,500 for ‘assessable prospecting’ operations. For mediation, arbitration and LEC proceedings, costs are not capped.

## Can I be denied access while the arrangement is still active?

A landholder is legally entitled to deny access to the land if the explorer breaches or contravenes the land access arrangement. The landholder must reinstate access if the explorer ceases the contravention or if the contravention is remedied to the reasonable satisfaction of, or in the manner directed by, the Secretary-appointed arbitrator. Either party can request that the Secretary of DRNSW appoint an arbitrator to resolve such disputes.

The Secretary of DRNSW is to appoint an arbitrator within 48 hours of receiving a request. If the arbitrator has not achieved resolution within 5 days of their appointment, the landholder may continue to deny access until there is resolution.

## Can a landholder withdraw from an active access arrangement?

Neither party can withdraw from an active arrangement unless otherwise specified in the terms and conditions of the access arrangement.

## How long does my access arrangement last?

The duration of access varies based on the terms and conditions agreed to originally by both parties in the access arrangement.

## How do I renew my access arrangement with a landholder?

Under the Act, existing access arrangements may be varied, and the arrangement renewed if:

- in accordance with the terms relating to variations in the existing access arrangement
- upon agreement between both parties of the existing arrangement, or
- upon application, by an arbitrator (in all situations) or the Land and Environment Court (if the existing arrangement was determined by an arbitrator or court).

If an exploration licence or assessment lease over the land is renewed, the access arrangement will continue in force, depending on the existing terms and conditions of that arrangement.

Where there has been a change of landholder, the arrangement can be varied, or the existing arrangement may continue (refer to Section 158 of the *Mining Act 1992* and Section 69 of the *Petroleum (Onshore) Act 1991* for further information).

## How do I negotiate compensation with the landholder?

A landholder is entitled to compensation for any 'compensable loss' suffered, or likely to be suffered as a result of an explorer exercising their rights, or by an access arrangement in respect of the licence or lease. Terms for compensation must be negotiated and agreed to as part of finalising the access arrangement.

The parties negotiating a land access arrangement are free to approach and structure compensation arrangements as they see fit. Anything outside of pecuniary compensation is a private matter between the landholder and the explorer.

## Do I need an access arrangement to mine from the land?

For mineral exploration, access arrangements only apply to exploration. To claim minerals for production, a separate process must be followed (refer to the *Mining Act 1992*). For petroleum exploration, access arrangements apply to both exploration and production, however, the explorer must also engage in a separate independent approvals process.

### More information

Further general information on land access and arbitration can be found at [www.regional.nsw.gov.au/meg](http://www.regional.nsw.gov.au/meg)

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