

September 2024

## Fact sheet

# Land access framework: Landholder rights and obligations

The NSW Government has prepared this document to clearly outline landholder rights and obligations under the land access framework in the *Mining Act 1992*.

## 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.

## 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.

## Land access framework

The agriculture and mining industries each deliver great benefit to the state of NSW and its regional economies. Landholders own or control a significant amount of the arable and mineable land across NSW. While landholders do own or control this land, the state owns and authorises the exploration of most mineral resources underneath the surface.

The land access framework has been designed to strike a balance between the rights of landholders and explorers. Once an explorer has obtained an exploration licence or assessment lease and the

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<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 titleholder 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.

necessary planning and environmental approvals (including activity approvals), they can only access land for exploration after successfully negotiating an access arrangement with the relevant landholder. The Act outlines the framework of legal rights, protections and obligations for both landholders and explorers to promote a cooperative and successful negotiation of the access arrangement.

## Access arrangements

A land access arrangement is a written agreement between a landholder and licenced explorer confirming the terms and conditions for conducting exploration activities on a particular area of land. The purpose of a land access arrangement is to ensure 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 that may be addressed in an access arrangement, including:

- periods permitted by the landholder to access the land
- parts of the land that may be worked on
- the kinds of activities and operations permitted on the land
- the compensation payable to the landholder as a result of activities and operations permitted and occurring in or on the land
- dispute resolution arrangements
- arrangement variation terms
- notification requirements, and
- any other conditions agreed to by the landholder and explorer.

In accordance with the Act, NSW Resources 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 rights

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 as set out in an access arrangement in respect of the licence or lease.

Under the Act, 'compensable loss' means 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).

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.

## 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 upon, exploration can commence as long as the terms of the access arrangement are met. If an access arrangement cannot be agreed upon, and the explorer chooses to pursue land access, then the law provides for a process of mediation and potential arbitration.

The explorer may give the landholder valid written notice of intent to enter into an access arrangement. The notice of intent must include:

- a plan and description of the area of land over which the access is sought, 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 and 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 developments' and \$2,500 for 'assessable prospecting operations'. For further detail relating to 'exempt developments' and 'assessable prospecting operations' refer to the fact sheet [Land access framework: Explorer rights and obligations](#).

If the parties cannot successfully negotiate an arrangement within 28 days of the landholder receiving the notice of intent<sup>2</sup>, the Act provides for an arbitration process to assist with the finalisation of the arrangement. For further detail relating to the arbitration process, including the explorer's obligations to pay for the costs of the 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:

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<sup>2</sup> If a notice of intent is served through the 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 starts from the day after the date of receipt. For other methods of delivery, refer to the [Land access arbitration procedure](#).

- 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.

Disputes around significant improvements may be determined in the NSW Land and Environment Court (LEC). The explorer is required to pay the landholder's 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.

## Summary of safeguards available to landholders

The land access framework ensures that landholders have:

- the right to negotiate an access arrangement that establishes the terms and conditions for an explorer's access to the land, including the right to be compensated by the explorer
- their reasonable costs of negotiating an access arrangement met by the explorer
- access to an independent arbitration process if they are unable to successfully negotiate an access arrangement with an explorer, with the costs of that process to be met by the explorer

- confidence that land on which a dwelling-house or garden is located, or in close proximity to, or land on which significant improvements are situated are protected from any form of exploration works, and
- general immunity to any action liability, claim or demand arising from an explorer's acts or omissions of any powers or rights granted to the explorer.

## Frequently asked questions

### **Do I have to engage in an access arrangement if I do not want to?**

Yes. A 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.

### **How long does my access arrangement last?**

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

### **What do I do if the explorer has contravened the terms of the access arrangement?**

A landholder is entitled to deny access to the land if the explorer breaches or contravenes the land access arrangement until the explorer ceases the contravention, or the contravention is remedied by a departmental-appointed arbitrator. Either the landholder or the explorer can make such a request to the department's Assessments and Systems Team. NSW Resources must appoint an arbitrator within 48 hours of receiving a request and the arbitrator is to deal with the matter within 5 business days of the appointment. If the arbitrator does not deal with the matter within that time, the landholder may deny the holder of the prospecting title access to the land until such time as the matter is determined by the arbitrator.

### **Am I liable if something happens to the explorer on my land?**

The Act provides a landholder with general immunity to any action liability, claim or demand arising from an explorer's acts or omissions of any powers or rights granted to the explorer.

### **How do I 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 do I renew my access arrangement with an explorer?**

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* for further information).

## How do I negotiate compensation with an explorer?

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.

## More information

Further information on land access and the mediation and arbitration processes can be found at [nsw.gov.au/nswresources](https://nsw.gov.au/nswresources)

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