

October 2024

## Fact sheet

### Service of notices

#### Background:

The correct service of notices is an essential element in an application for the appointment of an arbitrator. The failure by any party to serve notices correctly may affect the capacity of the Secretary to appoint an arbitrator under the land access framework (LAF) of the *Mining Act 1992*<sup>1</sup>.

Notices are required under the LAF at various points, for example, when the titleholder seeks a LAF with a landholder or seeks their agreement on the appointment of an arbitrator. Section 383 of the Mining Act makes provision for the service of notices under the Mining Act. The requirement to serve notices correctly applies to titleholders, landholders and arbitrators at various stages of the LAF process.

Note: NSW Resources has no role in serving notices under the LAF, but we must ensure that relevant notices have been correctly served before undertaking an action that relies on these notices, such as the appointment of an arbitrator.

An essential first step for titleholders seeking to initiate the LAF is to correctly identify the landholder(s). To do this reference should be made to the definition of landholders in the dictionary of the Mining Act. The next steps are the selection of the most appropriate and effective means of service of the notice and, thirdly, compliance with the timeframes mandated in the LAF.

#### Step 1 – Identification of landholder

Note: This step focuses on the service of notifications by titleholders under the LAF process. For landholders, the process is simplified as the titleholder is readily identified either by communications from them or an examination of NSW Resources' publicly available MTR portal [here](#). In addition, information about the Explorers place of business is publicly available.

The meaning of landholder under the Mining Act<sup>2</sup> differs from the ordinary meaning of the term and includes:

- i. If the land is an 'exempted area'<sup>3</sup> the controlling body of that land;  
For other land:

<sup>1</sup> Sections 138-158B, Part 8 Division 2, Mining Act

<sup>2</sup> See definition of landholder in Mining Act Dictionary (Sch. 7 Mining Act)

<sup>3</sup> See definition of exempted area in Mining Act Dictionary (Sch. 7 Mining Act)

- ii. The owner of an estate in fee simple in the land (freehold owners or perpetual Western Lands lessees)
- iii. A native title holder in the land  
 For standard exploration licences (exploration licences with a native title condition) a native title holder will generally be considered a Landholder where:
  - a. The land is Crown land that is not an exempted area (e.g. vacant Crown land and other Crown land that does not meet the definition of exempted area), and there is not clear evidence that native title is extinguished, and
  - b. Land vested in an Aboriginal Land Council or a local council where either:
    - A. Native title has been determined to exist by the Federal Court; or
    - B. The second schedule of the CT for that land indicates that it is vested subject to native title rights under either s42 of the *Aboriginal Land Rights Act 1983*, or under Division 4 of the *Crown Land Management Act 2016* (CLMA).
- iv. The holder of a lease or licence under the CLMA, a continued tenure within the meaning of Schedule 1 of the CLMA, or a permissive occupancy
- v. A person identified in any register or record kept by the Registrar-General as a person having an interest:
  - a. a mortgagee in possession of the land;
  - b. a lessee of the land or other person entitled to an exclusive right of occupation on the land;
  - c. a Minister or public authority having the benefit of a covenant affecting the land imposed by a Minister on behalf of the Crown under the CLMA
  - d. a Minister or public authority having an interest in the land under a conservation, natural heritage or biobanking agreement;
  - e. a person prescribed in the regulations

It is important to note there may be more than one landholder for a parcel of land and titleholders should familiarise themselves with the extended definition of landholder found in the Mining Act.

## Step 2 - Means of service

The service requirements for notices vary depending on whether the recipient is a natural person or a body corporate. Section 383 provides guidance on what is satisfactory service.

| Service requirements                           |   |
|--|---|
| For a natural person, notices may be served    | <ul style="list-style-type: none"> <li>• By delivering it personally to the person; or</li> <li>• By delivering it to the place of residence, or a place of business of the person and leaving it there with a person apparently above the age of 16; or</li> <li>• By posting it addressed to the person.</li> </ul> |
| For a body corporate, notices may be served by | <ul style="list-style-type: none"> <li>• Leaving it with a person apparently above the age of 16 years at the registered office of the body corporate; or</li> <li>• Posting it to the address of the registered office of the body corporate.</li> </ul>   |

| Service requirements   |  |
|--|--|
| <p>Alternate methods of service may be nominated by the landholder for the service of documents including:</p> | <ul style="list-style-type: none"> <li>• By posting it addressed to the person at the place indicated as an address to which correspondence may be posted (e.g. a post office box)</li> <li>• Via email to a specified email address.</li> <li>• By leaving it addressed to the person at a document exchange or other place indicated where correspondence may be forwarded to the person.</li> </ul> <p style="margin-left: 40px;">Note: Alternate service methods may only be relied upon with the consent of the landholder.</p> <p style="margin-left: 40px;">Note: Where an alternate method of service is agreed, service may still be effected in the regular manner (e.g. by regular post).</p> |

Form AD1 Application for appointment of an arbitrator requires an applicant to provide evidence of service of notices. The following is provided as a guide to assist applicants:

| Type service  | Evidence   |
|---|--|
| Personal service  | Statutory declaration or affidavit by the person who identified and served the landholder. The evidence would ordinarily record the exchange of conversation with the serving party asking the landholder ‘are you landholder X’ and the response in reply was ‘yes’ or words to that effect.  |
| Landholder nominated service requirements                           | Copy of email or other written correspondence from the landholder confirming that they request communications be sent to a specified email address, or other form of service, and it is clear in the confirmation it relates to access to the land by the titleholder. Note, the landholder may specify that notices are sent in an email or as an attachment to an email. |
| Delivery or mail to the registered office of a corporate landholder | ASIC search to confirm the address of the registered office together with evidence of delivery to the office.  |
| Certified mail  | Certified mail dockets/receipts/tracking statements(note that some online tracking records expiry after 30 days).  |
| Ordinary postage  | Photo of stamped addressed envelope.   |

### Step 3 – Time periods

Under the LAF, some actions cannot be commenced until such time as relevant notices have been served and a prescribed time period has elapsed. It must be noted that the time periods commence the day after receipt of the notice and not, for example, the date of receipt of the notice (or deemed date of receipt as the case may be).

Compliance with the Mining Act mandated time periods is critical to the submission of a complying application seeking the appointment of an arbitrator.

| Action   | Timeframe   |
|--|---|
| Service of a s143 notice                                 | Must not occur until at least 28 days after service of a s142 notice      |
| Application to appoint an arbitrator pursuant to s144    | Must not occur until at least 28 days after the service of a s143 notice  |
| Application to appoint an arbitrator pursuant to s157(4) | Must not occur until at least 28 days after the service of s157(2) notice |

All days are counted towards the 28 day period including weekends and any public holidays. The table below is a ready reckoner for the 28 day requirement for differing methods of service.

| Method of service                                      | Commencement of 28 day period under s143, s144 and 157(4)  |
|--|--|
| Delivery at residence/place business/nominated address | The day after confirmed delivery date  |
| Email or other landholder nominated electronic means   | The day following despatch recorded on the email (etc) sent  |
| Personal service                                       | The day following confirmed service date   |
| Certified mail   | The day following service, with service being the earlier of: <ul style="list-style-type: none"> <li>• The actual day of receipt as evidenced by certified mail receipt, or</li> <li>• 7 working days commencing the day following posting.</li> </ul>   |
| Ordinary mail  | The day following service, with service being the earlier of: <ul style="list-style-type: none"> <li>• The actual day of receipt as evidenced by material such as letter/email in reply referring to the notice, or</li> <li>• 7 working days commencing the day following posting.</li> </ul> |

## Service by post

Where notices are sent via post, a notice is deemed to be served on the seventh working day after it was posted, but an earlier date can be taken as the service date if there is clear evidence showing that service was effected on a different date<sup>4</sup>.

Note, the seven-day postal service period:

1. Commences the day immediately following the day of posting and ends on the seventh working day, and
2. Working days exclude public holidays and weekends so care should be taken to exclude them from the seven-day count.

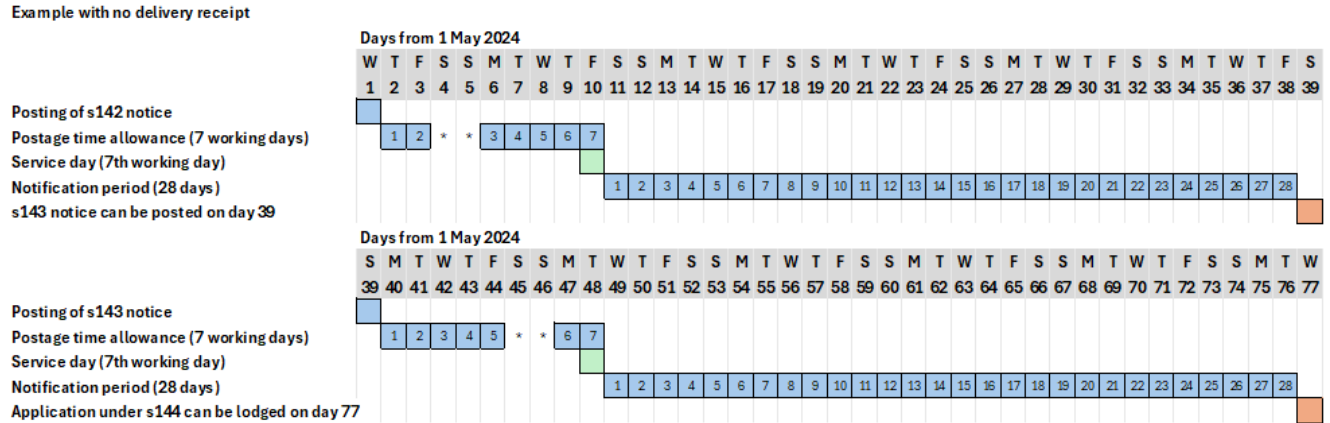
<sup>4</sup> Interpretation Act 1987 s76(1)(b)

In order to assess whether the appropriate service and notification period has passed, the titleholder must provide evidence (e.g. registered post receipts) demonstrating the date on which a notice was posted.

Evidence of earlier delivery may be a certified mail receipt docket<sup>5</sup>. The 7 working days commence the day following posting and ends on the seventh day.

The table below is an example of the application of the time period for notice under s143 where the s142 notice is served is by post and there is no delivery receipt to alter the seven day presumption.

Figure 1: An example of correctly counting days in the notice period



(Note: \* denotes non-working days)

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<sup>5</sup> Another example is where the recipient emails the sender making reference to receipt of the notice.