



Landholders' rights, access arrangements and compensation under the Mining Act 1992



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The following information is designed to provide information to landholders, mineral explorers and miners regarding landholders' rights in relation to exploration, mining titles and applications for titles under the *Mining Act 1992*.

This material provides a general insight to the legislative provisions and must be read in conjunction with the relevant sections of the *Mining Act 1992*, which are provided throughout the document. The *Mining Act 1992* can be accessed under Acts and M at the following website:<http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0> .

It should be noted that this material does not constitute legal advice.

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Definition of Land, Landholder and Significant Improvements

The meaning of the terms “landholder” and “significant improvement” which are referred to in this document are as defined in the dictionary within the *Mining Act 1992*. The definition of “landholder” may also refer to a category of secondary landholder. A secondary landholder is essentially a person who has a registered interest in the land but does not have an exclusive right to possession of the land, for example mortgagees not in possession or easement holders.

A “significant improvement” means any substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure.

General Immunity of Landholders

The *Mining Act 1992* provides landholders with general immunity against actions arising as a consequence of the actions of title holders on their land. This is provided through section 383C which states:

383C General immunity of landholders

1. The landholder of land within which any person (other than the landholder) is authorised to exercise any power or right:
 - by or under this Act, or
 - by any authority, mineral claim, opal prospecting licence or permit under this Act,is not subject to any action, liability, claim or demand arising as a consequence of that person's acts or omissions in the exercise, or purported exercise, of any such power or right.
2. In this section, **landholder** includes a secondary landholder.

Part 1: Exploration Licences and Assessment Leases

Exploration licences and assessment leases are referred to collectively in this document and some sections of the *Mining Act 1992* as "prospecting titles".

1.1. Access Arrangements

The holder of a prospecting title may not carry out any prospecting operations other than in accordance with an access arrangement with the landholder or landholders of the land (section 140). This requirement does not apply to secondary landholders. Access arrangements must be agreed in writing with each landholder and can be entered into before or after the grant of the title. An access arrangement may make provision for or with respect to the following matters (section 141):

- the periods during which the holder of the prospecting title is to be permitted access to the land,
- the parts of the land in or on which the holder of the prospecting title may prospect and the means by which the holder may gain access to those parts of the land,
- the kinds of prospecting operations that may be carried out in or on the land,
- the conditions to be observed by the holder of the prospecting title when prospecting in or on the land,
- the compensation to be paid to any landholder of the land as a consequence of the holder of the prospecting title carrying out 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,
- the notification to the holder of the prospecting title of particulars of any person who becomes an additional landholder, for example, where the land owner leases out part of the land subject to the access arrangement, they are required to inform the prospecting title holder.

Note: Compensation can be agreed to under the access arrangement or determined separately. The issue of compensation is dealt with in Section 1.2 of this document.

In order to ensure the relevant landholders are identified, prospecting title holders wishing to enter into access arrangements will require the results of a property title search of the records of the NSW Land and Property Management Authority. Searches will be required for every parcel of land for which an access arrangement is being sought. These searches can be obtained through mining title agents, approved information brokers, or [online \(www.lands.nsw.gov.au\)](http://www.lands.nsw.gov.au).

Holders of prospecting titles who wish to enter into access arrangements may serve written notice on each landholder in order to notify them of their intention to seek an access arrangement. In addition to informing the landholder of their intention to seek an arrangement, the notice must contain a plan and description of the area of land over which access is sought and a description of the prospecting methods intended to be used (section 142).

Recent amendments to the *Mining Act 1992* provide greater flexibility with respect to access arrangements. Access arrangements are now only required for the parcels of land on which the prospecting title holder wishes to carry out prospecting activities and do not have to cover all the landholder's land. Single, or separate access arrangements can be made with different landholders of the same land, for example the owner and any registered lessees of the land. Separate access arrangements can also be made for different areas of the same landholding, or for different matters. Separate access arrangements may also be made to preserve confidentially of provisions in the arrangements and to deal with persons becoming landholders at different times e.g. a land owner leasing out some of the land after the arrangement has been entered into (section 140).

The *Mining Act 1992* also requires prospecting title holders to serve notice of the making of an access arrangement on any registered mortgagees, within 14 days of making the arrangement (section 142A). (This provision does not apply to access arrangements entered into prior to the 9 June 2010.) If a notice is required to be served on a mortgagee, the access arrangement does not come into force until 14 days after the notice is served, unless the prospecting title holder has a reasonable cause to believe that the mortgagee is not a mortgagee in possession. If as a consequence of this notice, a mortgagee is found to be a mortgagee in possession, an access arrangement will be required with them. If the holder of a prospecting title contravenes an access arrangement, a landholder may deny the title holder access to the land until:

1. the title holder ceases the contravention, or
2. the contravention is remedied to the reasonable satisfaction of, or in the manner directed by, an arbitrator appointed by the Director General.

The Director General of NSW Trade and Investment is to appoint an arbitrator within 48 hours after being requested to do so by the landholder and the arbitrator is to deal with the matter within five 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 (section 141).

1.1.1. Arbitration

If an access arrangement cannot be agreed to within 28 days after the service of the notice of intention to obtain an access arrangement, the holder of the prospecting title may, by notice in writing to the landholder or landholders concerned, request their agreement to the appointment of a mutually agreeable arbitrator. If after 28 days from the service of the notice seeking the appointment of a mutually agreeable arbitrator, the parties have been unable to agree on an appointment, either party can apply to the Director General to appoint an arbitrator from the Minister's panel of arbitrators.

The arbitration process is covered by sections 143 to 158. An access arrangement that is determined by an arbitrator must specify the compensation to which the landholder is entitled to under sections 263 or 264.

1.2. Compensation

On the granting of a prospecting title, landholders, including secondary landholders become entitled to compensation for any "compensable loss" suffered, or likely to be suffered, as a result of the exercising of rights conferred by the title (sections 263 and 264). This provision applies to landholders regardless of whether their land is within the area of the title or not.

Compensation provisions can be included in access arrangements. However, if situations arise which are not covered in access arrangements, landholders are entitled to seek further compensation.

"Compensable loss" is defined as loss caused, or likely to be caused, by (Section 262):

- (a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or
- (b) deprivation of the possession or of the use of the surface of land or any part of the surface, or
- (c) severance of land from other land of the landholder, or
- (d) surface rights of way and easements, or
- (e) destruction or loss of, or injury to, disturbance of or interference with, stock, or
- (f) damage consequential on any matter referred to in paragraph (a)–(e),

but does not include loss that is compensable under the *Mine Subsidence Compensation Act 1961*.

In this section, "landholder" includes a secondary landholder.

The holder of a prospecting title may agree with a landholder as to the amount of compensation payable. Such an agreement must be in writing and be signed by both parties. If agreement cannot be reached, the landholder may seek a determination of the matter by the Land & Environment Court. Information on the operations of the Land & Environment Court can be found on the Department's [website \(www.resources.nsw.gov.au\)](http://www.resources.nsw.gov.au).

As mentioned above, compensation agreed to under an access arrangement is valid as compensation for the purposes of section 263 and 264. An access arrangement determined by an arbitrator must specify the compensation assessed by the arbitrator.

1.3 Protection of Houses, Gardens and Significant Improvements

The holder of a prospecting title may not exercise the rights conferred by that title (carry out prospecting activities) within:

- 200 metres of a dwelling house that is the principal place of residence of the person occupying it,
- 50 metres of a garden or
- over any significant improvements

unless with the written consent of the owner of the dwelling house, garden or significant improvement (and in the case of the dwelling house, the written consent of its occupant). Any dispute is referred to the Land & Environment Court for inquiry and determination on the matter. These provisions do not apply if the dwelling-house, garden or significant improvement is owned by the holder of the exploration licence, or if the holder is a corporation, by a related corporation (sections 31 & 49).

1.4 Environmental Assessment Permits

A person who proposes to carry out an assessment of likely environmental effects of activities to be carried out under a prospecting or mining title may apply to the Minister for an Environmental Assessment Permit (section 252).

Compensation is also payable to landholders under an Environmental Assessment Permit (section 270).

Part 2: Mining Leases

2.1 Exclusion of Houses, Gardens and Significant Improvements

A mining lease may not be granted over the surface of any land within:

- 200 metres of a dwelling house that is the principal place of residence of the person occupying it,
- 50 metres of a garden or
- over any significant improvements (see 2.5 below)

unless with the written consent of the owner of the dwelling house, garden or improvement (and in the case of the dwelling house, the written consent of its occupant) (section 62).

In order to be afforded the protection provided by section 62, houses, gardens and significant improvements must have been in existence prior to the relevant date, as defined in section 62(5).

For applications other than coal, the relevant date is the date on which the application for the mining lease is lodged. In the case of an application for a mining lease for coal, by the holder of a pre-existing exploration licence, the date on which the application for the exploration licence was made. Importantly, it should be noted that the value of any houses, gardens or significant improvements constructed or developed after the relevant date, still have to be taken into account when determining the property value, should a mining proponent wish to purchase the land.

This section does not apply with respect to a dwelling-house, garden or significant improvement owned by the applicant for the mining lease, or, if the holder is a corporation, by a related corporation. A mining lease may not be granted below the surface of the lands described in 2.1 except at such depths and subject to such conditions, as the Minister considers sufficient to minimise damage to the surface.

2.2 Access to the Surface of a Mining Lease or the Surface above a Mining Lease

Once a mining lease is granted, the holder may not exercise any rights under the lease on the surface of any land without a valid compensation agreement (section 265). The issue of compensation is dealt with separately in Section 2.3 of this document.

The holder of a mining lease that does not include the surface (an underground mining lease) may carry out prospecting operations and construct drill holes or shafts to allow certain activities required for the operations of the mine, without a mining title over the surface. Consent of the landholder is however required in these circumstances (section 81).

2.3 Compensation

On the granting of a mining lease, landholders, including secondary landholders, become entitled to compensation for any "compensable loss" suffered, or likely to be suffered, as a result of the exercising of rights conferred by the title

(sections 265). This provision applies to landholders regardless of whether their land is within the area of the mining lease or not.

“Compensable loss” is defined as loss caused, or likely to be caused, by (section 262):

- (a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or
- (b) deprivation of the possession or of the use of the surface of land or any part of the surface, or
- (c) severance of land from other land of the landholder, or
- (d) surface rights of way and easements, or
- (e) destruction or loss of, or injury to, disturbance of or interference with, stock, or
- (f) damage consequential on any matter referred to in paragraph (a)–(e),

but does not include loss that is compensable under the Mine Subsidence Compensation Act 1961.

In this section, “landholder” includes a secondary landholder

The holder of a mining lease may agree with a landholder as to the amount of compensation payable. Such an agreement must be in writing and be signed by both parties. If agreement can not be reached, the landholder may seek a determination of the matter by the Land & Environment Court. Information on the operations of the Land & Environment Court can be found on the Department’s [website \(www.resources.nsw.gov.au\)](http://www.resources.nsw.gov.au).

2.4 Objections to the Grant of Mining Leases on the Basis that the Affected Area is Agricultural Land

Within 21 days of lodging an application for a mining lease which includes the surface of the land, the applicant is required to serve notice of the application on all landholders affected by the application, (Schedule 1, clauses 20 & 21). The notice must provide details of the application including a plan and state that objections can be made on the grounds that the land is agricultural land. Notices are not required to be served on secondary landholders.

Based on these notices, land holders may object to the grant of a mining lease on the basis that all or some of the land is agricultural land (Schedule 1, clause 22). The definition of “agricultural land” is contained in Schedule, 2 clause 1 of the *Mining Act 1992*.

Objections must be made in writing to the Minister for Resources and Energy within 28 days of the date on which the notice was served by the applicant. Objections on the basis of agricultural land are referred to the Primary Industries Division within NSW Trade and Investment for determination. The landholder will be contacted and requested to provide details of the agricultural land (Schedule 1, clause 23 and Schedule 2).

For land to be determined agricultural land in relation to mining lease applications, the land needs to have been agricultural land on the “relevant date” [section 62(5)]. For applications other than coal, the relevant date is the date on which the application for the mining lease is lodged. In the case of an application for a mining lease for coal, by the holder of a pre-existing exploration licence, the relevant date is the date on which the application for the exploration

licence was made. Any agricultural improvements made to the land after the relevant date cannot be taken into account when determining whether the land is agricultural land.

If an area is determined to be agricultural land, a mining lease can not be granted over the surface of the area without the written consent of the landholder. The Minister may however grant a mining lease over part of any land determined to be agricultural land, if the Minister considers it necessary to provide access to other parts of the land to which the lease applies (Schedule 1, clause 2).

2.5 Claims of Significant Improvements

Within 21 days of lodging an application for a mining lease which includes the surface of the land, the applicant is required to serve notice of the application on all landholders affected by the application. The notice must provide details of the application including a plan and state that objections can be made on the grounds of significant improvements on their land, as defined by section 62 of the *Mining Act 1992* (Schedule 1, clauses 20 & 21). Notices are not required to be served on secondary landholders.

Claims of significant improvements may be made in writing to the Minister for Resources and Investment within 28 days of the date on which the notice was served by the applicant. Claimants of significant improvements need to provide details of the improvements being claimed.

All claims of significant improvements by landholders are referred to the mining lease applicant who is entitled to seek a determination from the Land and Environment Court as to the validity of the claim. If the Land and Environment Court determines that a significant improvement exists, a mining lease can not be granted over the significant improvement without the written consent of the landholder (Schedule 1, clause 23A).

2.6 Planning Approval

A mining lease can only be granted over land for which there is an appropriate development consent in place under the Environmental Planning and Assessment Act 1979 (section 65).

Development consent for mining projects of State significance is given by the Minister for Planning & Infrastructure, other development consents may be issued by Councils in accordance with Part 4 of the Environmental Planning and Assessment Act 1979. The development consent process includes an exhaustive environmental assessment.

When an application for development consent is lodged, advertisements are placed in newspapers circulating in the surrounding area. These advertisements provide details of where the development consent application can be obtained (websites, local Council offices etc) and invite submissions regarding the application. Submissions have to be taken into account when determining the application. If landholders have concerns regarding the proposed mining operation and its impacts, they should make submissions outlining their concerns to the consent authority, as prescribed in the advertisement. This is the correct and most appropriate means of raising concerns regarding any mining proposal.