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Mr John Shewan
President
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By email: wag@bluemaxx.com.au

Dear John,

Ridglands Coal Exploration Area

We refer to our recent correspondence and discussions in this matter. Thank you for your request to advise you in relation to this issue.

We understand that on 10th November 2008, the New South Wales Department of Primary Industries published a notice seeking expressions of interest for the grant of an Exploration Licence in the Ridglands area.

You have sought advice on possible responses to the granting of such a license and the effect on your rights and obligations as a landowner, particularly with respect to access obligations. We have set out below some general information that may assist.

1. Process for granting an Exploration Licence

Mining in New South Wales is regulated by the *Mining Act 1992 (Mining Act)*, the *Petroleum (Submerged Lands) Act 1982* and the *Petroleum (Onshore) Act 1991*. An exploration licence allows the licence holder to prospect in a defined 'exploration area' for particular minerals. Prospecting is defined to include carrying out works or removing samples from land to test any minerals present. These licences are valid for a maximum of five years, and the Minister has general control over the size of the land covered by an exploration licence as well as any conditions which may be imposed on the exploration licence (ss. 25 and 26 of the *Mining Act*). Although there is no provision in the legislation for formal objections to the grant of an exploration licence, you should write to the Department of Primary Industries (the Department) declaring your objections.

We note that before exploratory drilling or any other activity may be conducted an exploration licence must be granted by the Minister, and the proper procedure and protocols must be followed. Until an exploration licence is granted you have no obligation to allow prospective licence holders to access your property, unless by way of mutual agreement. The Minister's powers to issue an exploration licence are set out in sections 22 and 23 of the *Mining Act*. The Minister may grant an exploration licence 'after considering an application for an exploration licence' (under s. 22(1)(a)) or after considering a tender in respect of land (under s. 23(1)(a) or s. 23(2)(a)).



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While exploration and mining licences can be granted over private land without the consent of a landholder, if the land contains a dwelling-house, a garden or other improvement (such as a building or other structure), or is within 200 metres of a dwelling house, then the written consent of the owner of the house, garden or improvement is required before rights under an exploration licence can be exercised (s31). Improvements are not defined in s31 but schedule 1, cl 23A defines significant improvements as “being a substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure) other than an improvement constructed or used for mining purposes and for no other purposes”. Disputes over what is an improvement can be determined by the Mining Warden’s Court.

Prospecting under an exploration licence does not usually require development consent. Section 381 of the *Mining Act* effectively exempts prospecting from the need for development consent. This provision would appear to override any Local Environmental Plan that requires development consent for exploratory activities and the provisions of the *Environmental Planning and Assessment Act 1979* (EP & A Act) that require an EIS particularly where there is a significant impact on threatened species. A decision of the Land and Environment Court in *Williams v Barrick Australia Ltd* [2005] NSWLEC 218 confirmed that the requirements of Part 5 of the EP & A Act (such as s112 which implies a general duty to undertake an EIS if there is a significant affect on the environment) do not apply to exploration licences on the basis of the terms of s381 of the *Mining Act*.

Formal development consent and environmental assessments will usually be carried out once exploratory activities confirm the presence of viable mineral deposits and an application for a mining lease is made and subject to determination under the EP & A Act. However, in deciding whether or not to grant an authority or mineral claim, s. 237 of the *Mining Act* provides that the Minister or mining registrar must take into account the need to conserve and protect:

- (a) the flora, fauna, fish, fisheries and scenic attractions, and
 - (b) the features of Aboriginal, architectural, archaeological, historical or geological interest,
- in or on the land over which the authority or claim is sought.

Once an exploration licence is granted, the decision may be subject to review to determine whether the Minister’s powers were validly exercised. This might involve determining whether the Minister took the matters contained in s. 237 into account, or whether there has been a valid ‘invitation to tender’ pursuant to s. 14 of the *Mining Act*. Subject to this determination, a challenge to the validity of the licence could be brought in the Warden’s Court, which has jurisdiction to hear such matters under s. 296(p) of the *Mining Act*.

2. Rights and obligations of landholders

While the Department processes applications for the exploration licence no activities can take place on your property. However, once a licence has been granted the licence holder is entitled under s142 to seek to obtain an access arrangement in respect of land covered by the licence. The holder of an exploration licence must notify each landholder in writing of their intention to obtain such an agreement, and must also include a plan and description of the area of land over which access is sought and a description of the methods to be used in the area (s142). An access arrangement may take the form of an oral or written agreement between the landholder and the holder of the exploration licence, or where no agreement can be reached between these parties, may be



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determined by an arbitrator according to section 140 of the *Mining Act*. Under s143, if you are unable to reach an agreement on access arrangements by the end of 28 days after service of a notice under s 142, the licence holder may request you agree to the appointment of an arbitrator under s143. If, after the expiry of a further 28 days both parties have been unable to agree on the appointment of an arbitrator, s 144 provides that either party may apply to the Director-General of the Department for the appointment of an arbitrator. An arbitrator's determination is final and will have the effect of imposing access arrangements on the parties, although it can be appealed to the Warden's Court. However such an appeal can only occur within 14 days of notification of the final arbitration (s155).

Negotiating a clear and detailed access agreement allows you to define and control the terms of any access to your property. In accordance with s 141 an access agreement may provide a detailed account of the circumstances and conditions of access, addressing matters such as:

- (a) *the periods during which the holder of the exploration licence is to be permitted access to the land,*
- (b) *the parts of the land in or on which the holder may prospect and the means by which they may gain access to those parts of the land,*
- (c) *the kinds of prospecting operations that may be carried out in or on the land,*
- (d) *the conditions to be observed by the holder of the prospecting title when prospecting in or on the land,*
- (e) *the things which the holder of the exploration licence needs to do in order to protect the environment while having access to the land and carrying out prospecting operations in or on the land,*
- (f) *the compensation to be paid to any landholder of the land as a consequence of proposed activities,*
- (g) *the manner of resolving any dispute arising in connection with the arrangement,*
- (h) *the manner of varying the arrangement.*

If the holder of the exploration licence contravenes any term of an access arrangement, you may deny them access until they have ceased the contravention or it is remedied to your satisfaction.

Additionally, you can ensure that the licence holder only engages in activities on land authorised by the exploration licence. An action in trespass for damage, or an injunction may be appropriate where unauthorised activities occur. The Warden's Court has jurisdiction under s 296 to hear and determine matters concerning 'trespass or encroachment on, or injury to, land subject to an authority or mineral claim' as well as 'any demand for debt or damages arising out of prospecting or mining' (ss. 296(d) and (e) of the *Mining Act*). Under s. 374A of the *Mining Act*, the holder of an exploration licence must not, without reasonable excuse, contravene or fail to comply with any conditions of the licence. Under s. 253(1) of the *Protection of the Environment Operations Act 1997*, any person may bring proceedings in the Land and Environment Court for an order to restrain a breach of any other Act if the breach is causing or is likely to cause harm to the environment.

Similarly, the *Mining Act* contains sections that provide any mining leaseholder with the ability to obtain a right of way (s.164). It also sets up a procedure for dealing with water resources and disputes about water, and provides the Mining Warden's Court with the basis for adjudicating these disputes (s.166).

Compensation may be available under the Mining Act 1992 where there has been 'compensable



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loss' suffered by the landowner. Section 262 defines this as:

loss caused, or likely to be caused, by:

(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.

The compensation available is subject to any existing agreement between the landholder and the mine operator. In the absence of any such agreement, the compensation is to be assessed by the Warden in accordance with s. 263.

Article for the newsletter

The summary of the advice you provided to landowners is broadly correct and is practical advice. However you should be aware of the provisions of the *Mining Act* that enable the mining company to seek to arbitrate a dispute over access and seek to bring the matter before the Warden's Court.

As you would be aware, other groups campaigning against coal operations have drafted detailed access agreements that you may wish to obtain to assist landowners in the Ridgeland area.

If you wish to seek further advice on any of the particular matters raised in this discussion of legal options, please contact us further.

Yours sincerely

Environmental Defender's Office Ltd



Kirsty Ruddock
Principal Solicitor



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