

DEVELOPING LAND ACCESS AGREEMENTS

ISSUE

NSW FARMERS' ASSOCIATION (the 'Association') has prepared three documents to replace the outdated 1997 standard form titled "Rural Land Access Agreement for Mineral Exploration" and the related "Mineral Exploration – A Code of Conduct for Landholders and Mineral Explorers". These documents are as follows:

- *Overview of Mining Exploration Access*
- *Developing Land Access Agreements (this document)*
- *Clauses for Consideration in a Land Access Agreement*

PLEASE NOTE THE FOLLOWING BEFORE USING THESE GUIDELINES

- The Guidelines are intended for use in conjunction with the NSW Farmers' Association document titled *Clauses for Consideration in a Land Access Agreement*.
- The purpose of a Land Access Agreement is to ensure that the mineral explorer conducts activities with minimal possible disturbance and with due regard to risk.
- The Association encourages farmers to consider the Clauses for Consideration in a Land Access Agreement with a view to selecting sections and clauses that are relevant to the specific exploration proposal applying to their land.
- The Association suggests that farmers should specify required conduct in an access agreement itself and not rely on supplementary "codes of conduct".
- Factors to consider include the exploration technology being used, the intensity and duration of exploration, and the degree of risk (the vulnerability of the farming system, and land and water resources to disturbance).
- The Association recommends that farmers obtain independent legal advice prior to using any of the terms contained in the *Clauses for Consideration in a Land Access Agreement*. This is of particular relevance if the exploration activities are anticipated to be significant.
- Mineral explorers cannot commence exploration until the terms of access have been resolved. This is the only stage of the process where farmers have the legal right to negotiate terms of access. If terms cannot be agreed by negotiation the matter will be resolved by arbitration.
- The Association encourages farmers to seek only those terms that are reasonable given the nature of the exploration activity and the exploration site.
- There is no scope for farmers to claim royalties under Land Access Agreements. The limited compensation available is only to cover farmers' costs arising from the exploration process.
- The documents titled *Developing Land Access Guidelines* and *Clauses for Consideration in a Land Access Agreement* only cover the mineral exploration phase of mining and they do not cover opal prospecting licences.

BACKGROUND

The Mining Act 1992 (NSW) (the 'Act') regulates how mining companies can explore or mine your land. Although you may own your land, in most cases, the minerals under the surface of the land are considered to belong to the State. Generally, this means that the Government can grant licences to mining companies to explore and extract minerals from private land. However, some compensation is payable to landholders for damage to the land caused by, or likely to be caused by, prospecting and mining operations, as well as for loss of possession and use, and interference or disturbance to livestock.

An exploration licence gives a person the exclusive right to prospect for specific minerals on your land for a certain period (a maximum of five years) and under conditions set out in the licence. Prospecting is defined in the Act as "...to carry out works on, or to remove samples from, land for the purpose of testing the mineral bearing qualities of the land".

The granting of an exploration licence over your land will be advertised in a newspaper. However, there is no obligation to inform landholders specifically before an exploration licence is granted over their land.

Landholders do not have a right to veto a licence holders access to their property. However, anyone who holds an exploration licence must obtain the landholder's permission before they can legally begin their work. The terms of the landholder's permission are to be detailed in a Land Access Agreement. The Act states that Land Access Agreements can cover a wide variety of issues which may include:

- periods during which access may be permitted;
- parts of the land on which exploration may be undertaken;
- the paths of entry by which the prospectors team can travel across the land;
- kinds of prospecting that may be undertaken;
- conditions to be observed during prospecting;
- protection of the environment;
- compensation to be paid to the landholder;
- manner of resolving disputes;
- manner of varying the agreement; and
- any other matter either party wishes to include.

Land Access Agreements may be based on voluntary negotiations between the landholder and the licence holder but if agreement cannot be reached then a decision will be handed down through arbitration or it will be heard at the Land and Environment Court.

OPAL MINING

The Mining Act separates many aspects of opal exploration, prospecting and mining from that of other mining and exploratory activities. The Association is addressing opal mining as a separate issue and therefore it is not covered in the contents of this document.

What should I do when approached by an exploration licence holder?

Land Access Agreements allow a landholder to deal with any concerns regarding the exploration of their property through agreement and it is therefore essential that landholders understand how exploration licences can affect their property. Prior to entering into any negotiations with licence holders it is essential that landholders understand their rights and obligations under the Act and also detail all improvements, licences, assets and valuation of their land.

What notice is required?

The exploration licence holder must begin the negotiation by serving the landowner with written notice of their intention to obtain a Land Access Agreement in respect of the land. Service requires the notice to be delivered personally to the landowner; to a person apparently above the age of 16 at the landowner's place of residence or business; by posting it duly stamped and addressed to the landowner at the place last shown on the records of the Department of Primary Industries.

The Act states that this notice must also contain:

- A detailed plan and description of the area of land to which access is sought, (including the number and location of boreholes); and
- A full description of the prospecting methods to be used in that area.

Landholders should ensure the accuracy of any notices served on them by the licence holder and discuss any errors with an independent legal advisor.

Along with initial notice, licence holders usually serve landholders with a copy of their generic land access agreement. This should be carefully examined with a legal advisor to determine whether the agreement adequately covers any concerns that landholders may hold regarding access to their land. Landholders should note that they are under no obligation to agree to the terms of any such agreements.

The Association recommends that farmers provide their legal advisor the Association's '*Clauses for Consideration in a Land Access Agreement*'. This document should be used as a starting point for negotiations, rather than any draft agreement provided by the explorer.

Note:

An out-of-date (1997) standard form agreement co-badged by the Association and NSW Minerals Council may be presented to you even though the Association has taken all reasonable steps to withdraw it from circulation. This agreement is no longer endorsed by the Association.

What should you do as part of the pre-negotiations?

The Mining Act provides that Land Access Agreements can be either verbal or in writing and can be agreed to either before or after the exploration licence has been granted. Therefore you should be cautious of any discussions you have with the licence holder which may be construed as a term of the Land Access Agreement. Accordingly, landholders should insist on a written agreement in order to avoid any doubt. The landholder should also keep accurate diary notes of every contact made by the mining company detailing the nature of such contact and the persons involved. Any written correspondence between the landholder and the licence holder should also be kept. The negotiating process can be a time consuming and frustrating process. If the landholder desires, the mining company can be directed to contact them only through their solicitor or legal advisor.

What should you do during the negotiations?

After landholders have examined the characteristics of their land and any concerns they may have regarding the exploration of their land, negotiations should be entered into with the exploration licence holders. Many exploration companies have a record of dealing fairly with landholders however landholders should note that the experience and negotiating ability of the licence holder can place the landholder at a distinct disadvantage. Accordingly, any negotiations should be conducted with an independent legal advisor, or experienced negotiator present and take place at a neutral location, that is, not at the landholder's property. In some cases it may be useful to join with other affected landholders and negotiate collectively. You should contact other landholders to obtain their view and concerns regarding land access agreements and exploration proposals.

QUESTIONS AND ANSWERS

What should the exploration access agreement include?

As stated above, the Act provides that a Land Access Agreement should contain the following provisions:

- periods during which access may be permitted;
- parts of the land on which exploration may be undertaken;
- the paths of entry by which the prospectors team can travel across the land;
- kinds of prospecting that may be undertaken;
- conditions to be observed during prospecting;
- protection of the environment;
- compensation to be paid to the landholder;
- manner of resolving disputes;
- manner of varying the agreement; and
- any other matter either party wishes to include.

What is the period during which access may be permitted?

Landholders should consider times and days when exploration of their property should not be permitted. This may include busy farming periods (such as harvest, sowing, picking seasons, etc), work times, nights and/or weekends. Landholders should also deal with notice of access in this provision.

Refer to clause 3 in Clauses for Consideration in a Land Access Agreement.

What parts of the land can exploration and paths of entry be undertaken?

Landholders should set out locations on their property where exploration can take place. A detailed map should be prepared to set out where exploration can occur along with paths of entry which licence holders must use. Under the Mining Act, mining companies must not explore within a certain range of residential dwellings, improvements (such as fences, dams, etc), and gardens so it is important to ensure that this section is complied with and it should be detailed in the land access agreement.

Refer to clause 5 in Clauses for Consideration in a Land Access Agreement.

What types of prospecting may be undertaken?

The licence holder must specify the methods of prospecting that they are undertaking. Detail is required in these specifications to allow the landholder to determine the type of damage that may occur on their land and to allow for adequate compensation.

See model clause 6 in Clauses for Consideration in a Land Access Agreement.

What conditions must be observed during prospecting?

Landholders should note this is a broad provision that should include all relevant conditions that are to be placed on the licence holder. There should also be a condition requiring the licence holder to cause minimum damage and disturbance to your property.

Other conditions may include:

- Public liability insurance;
- Indemnity for any loss or damage arising from the activities of the licence holder;
- Use of paths of entry;
- Notification of entry;
- Exploration during unsuitable weather conditions;
- Restoration/repair of any damage;
- Purpose of access;
- Camping on property;
- Fire protection;
- Dogs and other animals on property;
- Use of water;
- Speed limits on property;
- Use of fences and gates;
- Qualifications of drillers; and
- Appointment of supervisor.

Refer to clause 8 in Clauses for Consideration in a Land Access Agreement.

What environmental provisions should be included in a Land Access Agreement?

Landholders should detail any environmental concerns they have in these provisions.

Refer to clause 6 in Clauses for Consideration in a Land Access Agreement.

QUESTIONS AND ANSWERS

What compensation can be paid to the landholder during exploration?

This is an important provision that should be detailed in the land access agreement. The Mining Act provides that a landholder becomes entitled to compensation for any compensable loss suffered as a result of exploration on their property. Compensable loss is defined 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) destructions or loss of, or injury to, disturbance of or interference with, stock; or
- (f) damage consequential on any matter referred to in the above paragraphs".

However, the Mining Warden* has held that claims can also be brought for any demand for debt or damages arising out of prospecting or mining or any trespass, encroachment or injury to land. This provides landholders with a broad right to compensation for any damage to their property including water rights, damage to roads and use and enjoyment of land.

How are disputes resolved?

The Land Access Agreement should make provision for any claims or disputes that may arise during the course of the licence. This should include initial non-court processes in order to resolve the dispute in good faith but should also state that if the matter cannot be resolved then the parties may refer the matter to the relevant courts.

Refer to clause 16 in Clauses for Consideration in a Land Access Agreement.

What if the exploration company breaches the exploration Land Access Agreement?

The Mining Act provides that if the licence holder contravenes the land access agreement, a landholder may deny the licence holder access to the land until the licence holder ceases the contravention or the contravention is remedied to the reasonable satisfaction of the landholder.

Landholders should also contact their legal advisor to determine any other rights they have for recourse or compensation under the Act. Any major disputes will usually entail the solicitor bringing a claim on behalf of the land holder against the licence holder in the Land and Environment Court.

How can a Land Access Agreement be varied?

The Land Access Agreement should specifically state that the agreement can only be varied or amended by mutual written consent by both parties to ensure that no unilateral changes take place.

Refer to clause 19 in Clauses for Consideration in a Land Access Agreement.

Note:

The Mining Warden has been replaced by the Land and Environment Court, however, it is thought that this precedent will remain.

Accordingly, landholders should detail expected and unexpected damages to property in this section. Expected damages include any disturbance to the surface of the land caused by exploration. This may be a daily amount or be set by the type of equipment and prospecting to be used by the licence holders. Unexpected damages are any damages that may be caused by exploration.

Landholders should note that to bring a claim for damage to property, they will need to prove that the damage was caused by the exploration activities. This will usually require the landholder to establish the condition of the land, water, improvements, etc prior to mining and then compare it to the post mining/exploration condition. The court will then examine on the balance of probabilities whether there is a compensable loss as well as an entitlement to common law damages.

Refer to clause 15 in Clauses for Consideration in a Land Access Agreement.

QUESTIONS AND ANSWERS

What other matters may either party wish to include?

Cooling-off Period

Landholders should include a cooling-off provision that allows them to rescind the agreement within a certain time-frame.

Refer to clause 25 in Clauses for Consideration in a Land Access Agreement.

What Occupational Health and Safety issue should be considered in Land Access Agreement?

Under the Code of Practice for Landowners and Mineral Explorers, licence holders are required to take a proactive approach to the safety of any persons in the licence area and must maintain and inform landholders of emergency response procedures.

Landholders should also consult with both employees and the mining company to adopt processes that ensure the health and safety of all people accessing the property. Landholders should provide careful consideration to these occupational health and safety requirements as they may be liable for any injury sustained by both employees and others on the property. However, landholders are not likely to be held liable if the mining company fails to undertake your lawful instructions regarding occupational health and safety.

Refer to clause 9 in Clauses for Consideration in a Land Access Agreement.

How should events of default be treated?

The Land Access Agreement should include provisions relating to certain events that would result in termination of the agreement. This may include non-payment of compensation or serious or gross negligence on the part of the licence holder.

Refer to clause 18 in Clauses for Consideration in a Land Access Agreement.

How should legal costs be treated?

The landholder should make a provision for the reimbursement of legal costs pertaining to the drafting of the agreement and advice regarding any negotiations relating to the exploration licence.

Refer to clause 23 in Clauses for Consideration in a Land Access Agreement.

What if an agreement cannot be reached?

If the mining company and the landholder cannot reach an agreement after 28 days of the initial notice either party may request that an arbitrator be appointed. The parties may agree to the appointment of any person as an arbitrator. If, after a further 28 days, the parties cannot agree on the appointment of an arbitrator, either party may apply to the Director General for the appointment of a member of the Arbitration Panel as an arbitrator.

Note:

In some cases the Arbitrator may not permit a practicing legal representative to act on your behalf, however, a retired legal representative is permitted to act on your behalf.

Under the Mining Act, the arbitrator must initially conciliate the claim by encouraging the parties to reach a settlement acceptable to all of them. If the parties are still unable to agree the arbitrator may impose a land access arrangement. The arbitrator will initially issue an interim decision which will be subject to further arguments by either party for a period of 14 days. If no objections are received then the interim decision will be finalised. If either party makes any objections, then the arbitrator will take these into account and make a final decision accordingly.

The final decision can be appealed to the Land and Environment Court if the parties are not satisfied with the arbitrator's decision.

Note:

It may be useful to visit the Law Society of NSW website to seek contact details of Arbitrators who have expertise in Resource and Primary Industry disputes: <http://www.lawsociety.com.au>

It may also be useful to search the Institute of Mediators and Arbitrators database for a list of Arbitrators listed who specialize in agricultural disputes: <http://165.228.123.249/search/>