

ARBITRATION PROCESS:

for access to lands for exploration in NSW

Under New South Wales law, the holder of an exploration licence may not carry out exploration activities other than in accordance with an access arrangement agreed with the landholder or determined by an arbitrator.

An access arrangement is also required with native title holders, unless:

- the licence was granted or renewed after compliance with the 'Right to Negotiate' provisions of the Commonwealth *Native Title Act 1993*
- a registered indigenous land use agreement provides that an access arrangement is not required, or
- after diligent enquiry the native title holder cannot be found or identified.

It is the responsibility of an arbitrator to ensure that the arbitration process remains as informal as possible with some discussions conducted on-site, subject to the approval of the landholder.

These guidelines aim for a uniform approach to help both landholders and explorers.

Basic principles for arbitrators

The purpose of an exploration licence is to establish the potential of a resource within the licence area.

In order to achieve this, the licence holder must arrange reasonable access to lands whilst recognising the rights of landholders.

No landholder should suffer a loss resulting from interference to the operations of his or her enterprise without compensation. The normal rights and courtesies associated with private ownership of property are to be protected.

An access arrangement must provide compensation for loss or interference.

It may include provisions to minimise loss or interference (such as measures to prevent the introduction of disease or weeds) or which take into account periods of crop harvesting or animal breeding.

This should not preclude compensation agreed between the parties for damage to crops or the purchase of crops that are nearing harvest maturity.

Legislation relating to arbitration applies only to access for exploration.

Different arrangements apply to mining which give the landholder the right to decline entry to land determined to be agricultural land, within the meaning of the *Mining Act 1992*.

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Appointment of arbitrator

Arbitrators can be appointed in two ways:

- either by mutual agreement between the parties, or
- by the Secretary of the Trade & Investment.

In the first case the arbitrator may be a person agreed to by both parties. This person has the same rights, protection and obligation as an arbitrator appointed by the Secretary.

Alternately, an arbitrator is appointed by the Secretary from a panel of arbitrators appointed by the Minister for Resources and Energy after consultation with the Minister responsible for Agriculture and the Minister responsible for Aboriginal Affairs.

Duties of the arbitrator

■ Arrangement of the hearing

The arbitrator sets the time and place for a hearing however, wherever possible, this should be mutually agreed between all parties.

The arbitrator must serve a notice to all parties advising of the appointment details such as the time and place for the hearing.

The hearing should be conducted at a convenient location neutral to all parties. Part of the hearing should include an on-site inspection to observe local conditions.

All landholders (including native title holders) involved must be served a notice.

Procedures for serving notice are contained in the *Mining Act 1992* (section 145) and *Petroleum (Onshore) Act 1991* (section 69H).

The arbitrator may vary the time and place for the hearing but a further notice must be served.

■ Procedures of the hearing

The hearings are intended to be informal and consider issues on their merit. The arbitrator has the power to determine the form and procedures of the hearing.

The legislation specifically states that the hearings are to be conducted "*without regard to technicalities or legal forms.*"

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This is a particularly important power if the arbitrator has chosen to allow legal representation and considers that legal technicalities are being used to obscure the issues. An arbitrator has full power to redirect the way in which the case is being presented.

Whilst the hearing can proceed in the absence of a party, there is adequate provision for hearing dates to be altered or for representation by an agent.

Both parties can agree to withdraw from a hearing before the hearing concludes, but they must do so in writing, signed by all parties and served on the arbitrator.

■ **Who should appear at the hearing?**

A party to a hearing may be represented by either an agent who is not an Australian legal practitioner, or by agreement of all parties and leave of the arbitrator, by an Australian legal practitioner.

■ **A conciliated arrangement**

An arbitrator's first duty is to bring the parties to a conciliated arrangement.

If the parties reach an arrangement under the arbitrator's conciliation then the arbitrator is bound to make the conciliated arrangement the determination.

The arbitrator cannot add to or qualify the arrangement.

■ **If not, the arbitrator decides**

If the differences between the parties cannot be settled by conciliation the arbitrator is bound to make a decision on the arrangement for access.

This decision is known as an interim determination. As soon as possible after a hearing, the arbitrator must prepare a written determination and serve a copy of the determination together with a copy of any draft access arrangement, on the parties.

This decision is styled as an interim determination to allow for its review at the request of either party.

This gives an opportunity for further non-legalistic review to avoid the issue passing through to the next stage - a formal appeal to the Land and Environment Court.

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Matters to be determined by the arbitrator

The first matter to be determined is whether the holder should have access to the land concerned.

The arbitrator is able to deny access for exploration to all or part of the land if this is justified.

If access is to be permitted then the conditions of access must be determined.

The Act gives some guidance on matters to be included in an access arrangement.

These matters include the:

- (a) Periods during which the holder of the exploration licence is to be permitted access to the land;
- (b) Parts of the land in or on which the holder of the exploration licence may prospect and the means by which the holder may gain access to those parts of the land;
- (c) Kinds of exploration activities that may be carried out in or on the land;
- (d) Conditions to be observed by the holder of the exploration licence when prospecting in or on the land;
- (e) 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;
- (f) Manner of resolving any dispute arising in connection with the arrangement;
- (g) the manner of varying the arrangement; and
- (h) the notification to the holder of the prospecting title of particulars of any person who becomes an additional landholder.

Please note this is not an inclusive listing and not all of the matters have to be covered in an access arrangement.

The arbitrator is bound to assess compensation where a determination is made.

Compliance with arrangement

Any access arrangement may contain provisions to deny further access in the event of an explorer contravening an access arrangement.

A supervisor may be appointed by the explorer with responsibility for ensuring that all conditions of access be observed.

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The supervisor will normally be a senior representative of the explorer and will keep in close contact with the landholder.

In the event of any failure to observe the terms of the arrangement, the landholder shall:

- a) Notify the field supervisor or head office contact;
- b) Have the right to suspend further entry, with the matter then resolved either by mutual agreement or submitted to an arbitrator for determination. Arbitrators should note that there is no legislative basis for their involvement in dispute resolution although it would be in keeping with the spirit of the legislation. To do so would be a private matter at the discretion of the arbitrator and the rights and protections provided for in the legislation would not apply in these circumstances;
- c) Refer any outstanding dispute relating to the arrangement, including levels of compensation, to the Land and Environment Court. It should be noted that an access arrangement represents a contract between the parties and any breach may be remedied by appeal to the Land and Environment Court.

Note: Section 141(4) of the *Mining Act 1992* and Section 69D(4) of the *Petroleum (Onshore) Act 1991* specifies that access may be denied until the;

- a) Holder ceases such contravention; or
- b) Contravention is remedied to the reasonable satisfaction of, or in the manner directed by, an arbitrator appointed by the Director-General.

Compensation arrangements

Landholders are entitled to compensation when access arrangements are made. Compensation arrangements may be included in the access arrangement or in a conciliated arrangement.

Compensation must be addressed and provided for in any arrangement determined by an arbitrator.

Whilst it is possible to reach a compensation arrangement outside the access arrangement such options should be discouraged.

'Stand alone' compensation agreements must comply with certain provisions of the *Mining Act 1992* and *Petroleum (Onshore) Act 1991*, putting in question the validity of any compensation agreement which does not comply with those requirements.

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The arbitrator's costs

The costs of the arbitrator are to be borne by the explorer.

This includes travel, accommodation, meal and car allowances as well as remuneration including the cost of any support staff such as a typist or stenographer.

This is invoiced at the conclusion of the arbitration process, with other allowances which are determined by the Minister.

All other costs incurred by each of the parties are to be borne by those parties. If, for example, a party chose to be advised by an agricultural economist then that party would have to bear that cost.

The arbitrator is not empowered to consider any issue of costs.

Liability

The arbitrator is protected against legal action for any action directly authorised by the relevant Act as long as the arbitrator acts in good faith.

Review of the arbitrator's determination

Within 14 days of the interim determination being served, any party may approach the arbitrator seeking a reconsideration of the question of access or variation to the draft access arrangement.

If the parties do not approach the arbitrator within 14 days of being served the interim determination, the interim determination becomes the arbitrator's final determination. If a review is requested a new time and place is to be set by the arbitrator to continue the hearing.

The hearing may be continued via telephone rather than 'on-site' for minor problems. If a phone hearing is arranged all parties must be able to hear what is said by the other parties and be able to participate in the discussion.

A conference call for up to ten participants may be arranged through Telstra (telephone 011).

These costs are to be borne by the explorer. Major variations from the draft access arrangement may need to be discussed on-site or at a convenient neutral location.

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Once this process has been completed, the arbitrator serves the written decision as a final determination.

Following the arbitrator's final determination being served either party may apply for a review of the determination to the Land and Environment Court.

The aggrieved party is required to lodge a request for review of determination application, together with a copy of the arbitrated arrangement.

There should be no involvement of the arbitrator in this process.

Varying the arbitrated arrangements

An access arrangement determined by an arbitrator may be varied by the arbitrator with the consent of all parties to the arrangement.

Duration of access arrangements

An access arrangement is usually for the duration of the exploration licence. It may be varied or terminated in the following situations:

- in accordance with the terms of the access arrangement
- with the agreement of all parties
- by the arbitrator, with the consent of all parties
- on application by any of the parties, by order of the Land and Environment Court if the arrangement was determined by a court or an arbitrator.

Where there has been a change in the landholder/s, the access arrangement may be varied or the existing access arrangements may continue – refer to section 158 of the *Mining Act 1992* for further information in relation to this issue.