

**RESEARCH NOTE**  
**A COMPARATIVE STUDY INTO THE RIGHTS OF LANDHOLDERS TO  
PREVENT ACCESS TO LAND BY MINING COMPANIES**

PRODUCED FOR THE QUEENSLAND COUNCIL FOR CIVIL LIBERTIES (QCCL)

Authored by:

Julian Bodenmann, Matthew Cameron, Kathryn O'Hare and Emma-Rose Solomon under the supervision of Dr Justine Bell

T.C. Beirne School of Law, University of Queensland

## CONTENTS

<b>EXECUTIVE SUMMARY .....</b>	<b>4</b>
<b>LAND ACCESS REGIMES COMPARED .....</b>	<b>6</b>
<b>1 INTRODUCTION .....</b>	<b>7</b>
<b>2 THE QUEENSLAND APPROACH.....</b>	<b>8</b>
<b>2.1 Overview of Queensland land access laws.....</b>	<b>8</b>
<b>2.2 Legislative framework.....</b>	<b>8</b>
<b>2.3 Impact on landholder rights .....</b>	<b>11</b>
<b>3 OTHER APPROACHES .....</b>	<b>14</b>
<b>3.1 Western Australia.....</b>	<b>14</b>
3.1.1 Legislative framework.....	14
3.1.2 Proceedings before the Warden’s Court.....	14
3.1.3 Relevant definitions.....	15
3.1.4 Permit to enter private land .....	15
3.1.4.1 Application for permit to enter.....	15
3.1.4.2 Notice of permit to enter .....	16
3.1.4.3 Rights conferred by a permit to enter .....	16
3.1.5 Application to bring private land under the <i>Mining Act</i> .....	17
3.1.6 Application for a mining tenement by a permit holder .....	17
3.1.6.1 A permit to enter is a prerequisite.....	17
3.1.6.2 Notice .....	18
3.1.6.3 Consent.....	18
3.1.6.4 Sub-surface rights .....	19
3.1.6.5 Appeals and costs.....	20
3.1.7 Application for a mining tenement by an owner .....	20
3.1.8 Compensation.....	21
3.1.8.1 Entitlement .....	21
3.1.8.2 When compensation is not payable.....	21
3.1.8.3 Grounds for compensation.....	21
3.1.8.4 Agreement or determination .....	22
3.1.8.5 Relevant factors for consideration.....	23
3.1.9 Impact on landholder rights.....	23
<b>3.2 New South Wales .....</b>	<b>25</b>
3.2.1 Overview of NSW land access laws.....	25
3.2.2 Legislative framework.....	25
3.2.2.1 Land access agreements.....	27
3.2.3 Provision for compensation.....	29
3.2.3.1 Compensation under the <i>Mining Act 1992</i> .....	29
3.2.3.2 Compensation under the <i>Petroleum (Onshore) Act 1991</i> .....	29
3.2.3.3 Compensation under the <i>Mine Subsidence Compensation Act 1961</i> .....	30
3.2.3.4 Procedure for assessing compensation.....	30
3.2.4 Impact on landholder rights.....	30
<b>3.3 South Australia .....</b>	<b>32</b>
3.3.1 Legislative framework.....	32
3.3.2 Impact on landholder rights.....	33
<b>3.4 Victoria .....</b>	<b>34</b>
<b>3.5 Alberta (Canada) .....</b>	<b>35</b>
3.5.1 Overview .....	35

3.5.2	Legislative framework.....	35
3.5.2.1	<i>Right of entry for surveys</i> .....	35
3.5.2.2	<i>Right of entry for operations</i> .....	36
3.5.3	Impact on landholder rights.....	38
3.5.4	Provision for compensation.....	38
3.5.4.1	<i>Entry fees</i> .....	38
3.5.4.2	<i>Initial compensation orders</i> .....	39
3.5.4.3	<i>Appeals against compensation orders</i> .....	40
3.5.4.4	<i>Pre-payment</i> .....	40
3.5.4.5	<i>Review of compensation orders and surface leases</i> .....	40
3.5.4.6	<i>Non-payment of compensation</i> .....	41
3.5.4.7	<i>Compensation for additional damage and expense</i> .....	42
3.5.4.8	<i>Trespass</i> .....	42
3.5.5	Other aspects of mineral exploration regulation in Alberta .....	42
<b>4</b>	<b>COMPARISON OF APPROACHES.....</b>	<b>44</b>
<b>5</b>	<b>RECOMMENDATIONS .....</b>	<b>46</b>
<b>6</b>	<b>CONCLUSION.....</b>	<b>48</b>

## EXECUTIVE SUMMARY

This research note is a comparative analysis of land access rights under mining legislation in Queensland, Western Australia, New South Wales, South Australia, Victoria, and Alberta, Canada. The key finding from this analysis is that none of these jurisdictions grant landholders an absolute right to exclude mining companies access to their land. However, all regimes contain exceptions, as outlined in the table below. These generally relate to proximity to dwellings or structures, although the Western Australian legislation contains a much broader list of exemptions, which includes 'land under cultivation (ie. used for agricultural purposes including cropping or pasturing; whether cleared or uncleared, used for grazing stock in the ordinary course of management of the land)'.<sup>1</sup> This provision has become known as the 'private landowner's veto', and since its inception there have been several attempts at removing or modifying it. A provision which affords such a broad form of protection to the farming industry has had a strong impact on the mining application process in Western Australia and was successfully applied in the case of *Striker Resources NL v Benrama Pty Ltd (No 2)*.<sup>2</sup> Additionally, even where legislative exemptions do not exist, there may be informal policies regarding land access. For example, in Queensland, Santos (a major mining company) opted to effectively observe a right of veto by refusing to bring an action against property owners in the Land Court if negotiations are unsuccessful.<sup>3</sup>

This research note provides a comparative analysis of these legislative regimes, and concludes with recommendations for a future submission regarding land access laws.

**Recommendation 1:** Entry onto land should not be permitted until a negotiated or arbitrated agreement, with adequate provision for compensation, is in place.

**Recommendation 2:** Further detail on the compensation process should be included in the relevant Queensland legislation, to facilitate the making of adequate compensation awards in the Land Court and to form the basis of negotiations between landholders and tenement owners.

**Recommendation 3:** The "restricted land" regime under Queensland's *MRA* should be extended to all mineral and petroleum activities under both the *MRA* and the *PAG Act*.

**Recommendation 4:** The definition of "restricted land" should be broadened to reflect the position in Western Australia.

<sup>1</sup> *Mining Act 1978* (WA), s 29(2)(a).

<sup>2</sup> *Striker Resources NL v Benrama Pty Ltd (No 2)* [2001] WAMW 20. In that case an access track was held to be a substantial improvement to the land.

<sup>3</sup> V Edwards, 'Santos rules out use of legal force to gain access to land', *The Australian* (online) 20 August 2011, <<http://www.theaustralian.com.au/news/nation/santos-rules-out-use-of-legal-force-to-gain-access-to-land/story-e6frg6nf-1226118445158>>.

**Recommendation 5:** The protections afforded by Queensland's *Strategic Cropping Land Act* should be extended to grazing land.

**Recommendation 6:** A qualified landholder liaison officer should be appointed by the Queensland Government to facilitate positive relationships between landholders and tenement owners.

## LAND ACCESS REGIMES COMPARED

Jurisdiction	Right to refuse entry	Notice requirements	Compensation requirements	Additional protections
<b>Queensland</b>	No right to refuse entry if legislative requirements have been satisfied.	10 business days notice is required before commencing preliminary activities.	Compensation is required.	Power of veto over 'restricted land' (for mineral development): <ul style="list-style-type: none"> <li>• Within 100 metres of a permanent building; or</li> <li>• Within 50 metres of a principal stockyard, bore, artesian well, dam, etc.</li> </ul> Protection is granted at the tenement approval stage for land covered by the <i>Strategic Cropping Land Act</i> .
<b>New South Wales</b>	No right to refuse entry if legislative requirements have been satisfied.	Notice is required before beginning the negotiations for a land access agreement.	Yes, although non-invasive petroleum activities are not compensable.	Power of veto over land: <ul style="list-style-type: none"> <li>• Within 200 m of a dwelling house;</li> <li>• 50 m of a garden; or</li> <li>• over any significant improvements.</li> </ul>
<b>Western Australia</b>	No right to refuse entry if legislative requirements have been satisfied.	Generally speaking, notice is only required at the time of entry or a short time after entry.	Compensation is required.	Power of veto over land: <ul style="list-style-type: none"> <li>• used as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation or is land under cultivation;</li> <li>• which is the site of a cemetery or burial ground;</li> <li>• which is the site of a dam, bore, well or spring;</li> <li>• on which there is erected a substantial improvement;</li> <li>• which is situated within 100 m of any private land referred to in paragraph (a), (b), (c) or (d);</li> <li>• which is a separate parcel of land and has an area of 2 000 m<sup>2</sup> or less.</li> </ul>
<b>South Australia</b>	No right to refuse entry if legislative requirements have been satisfied.	21 days notice is required before activities can commence.	Compensation is required.	Power of veto over land: <ul style="list-style-type: none"> <li>• Within 400 metres of a building used as a place of residence;</li> <li>• Within 150 metres of a structure, etc, worth \$200.00 or more;</li> <li>• Within 150 metres of land being used as a yard, garden, field, <i>et al.</i></li> </ul>
<b>Alberta</b>	No right to refuse entry if legislative requirements have been satisfied.	A reasonable attempt to give notice is required before commencing preliminary activities.	Compensation is required.	Additional protections may be granted by the <i>Alberta Land Stewardship Act</i> .

## 1 INTRODUCTION

Queensland is currently experiencing a major resources boom through expansion of mining and coal seam gas activities. One of the effects of the resources boom is adverse impacts on landholders and farmers, as resource tenures are often granted over land previously used for farming purposes.

In Queensland this has been a particular problem because of the legislative regime regulating access to land. Under the *Mineral Resources Act 1989* (Qld) (*MRA*) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (*PAG Act*), there is no prima facie right for landholders to deny a mining or petroleum tenement holder access to their land. Although the legislation requires negotiation between the landholder and tenement holder, disputes may be determined by the Land Court, which will generally grant access. This has led to widespread protest from by agricultural lobby groups, with one referring to the ‘explosive growth’ of CSG as generating the “greatest ever State-sponsored invasion of private land”.<sup>4</sup> In light of similar concerns in New South Wales, lobbying organisation NSW Farmers recommended to the New South Wales Legislative Council that the relevant legislation be amended to allow landholders to refuse access to resource companies,<sup>5</sup> although this is yet to occur.

This research note will outline the Queensland approach in detail, and compare it to other approaches nationally and internationally, namely, Western Australia, New South Wales, South Australia, Victoria, and Alberta (Canada). It will compare and contrast these approaches, and isolate any features of them that may be applied successfully in Queensland. It will conclude by making recommendations that may be useful to the Queensland Council for Civil Liberties in preparing a future submission on this issue.

---

<sup>4</sup> G Houen, ‘Coal Seam Gas and the Landholder The Queensland Experience’, *NSW Farmers Association* (online) 18 August 2010

<[http://www.nswfarmers.org.au/\\_data/assets/pdf\\_file/0005/66407/Houen\\_Paper.pdf](http://www.nswfarmers.org.au/_data/assets/pdf_file/0005/66407/Houen_Paper.pdf)>

<sup>5</sup> NSW Farmers Association, ‘Submission to Legislative Council General Purpose Standing Committee No 5 Inquiry into Coal Seam Gas’ (2011), 21. This report dealt exclusively with CSG.

## **2 THE QUEENSLAND APPROACH**

### **2.1 Overview of Queensland land access laws**

Mineral and petroleum/gas resource development in Queensland is governed by the *Mineral Resources Act 1989* (Qld) (“*MRA*”) and the *Petroleum and Gas (Production and Safety) Act 2004* (Qld) (“*PAG Act*”), respectively.<sup>6</sup> The statutory regime in Queensland concerning landholder dealings is broadly analogous across both mining and petroleum projects, and therefore the conduct and compensation provisions of the *MRA* and *PAG Act* will be considered together. Furthermore, both the *MRA* and the *PAG Act* centre their conduct and compensation provisions on the *Land Access Code*.<sup>7</sup>

Before embarking on an examination of the legislative framework, particularly Queensland’s relatively new land access laws, it is prudent to note several key features of the regime:

- A landholder has no *prima facie* right to deny a mining or petroleum tenement holder access to their land.
- To conduct preliminary activities, a tenement holder only needs to issue the landholder with a notice of entry.
- To conduct advanced activities, the landholder has a right to compensation, and must negotiate a conduct and compensation agreement with the tenement holder.
- If negotiations are unsuccessful, the Land Court may make a final determination.
- Land access is ordinarily permitted by the Land Court. Ability to access or use land is usually not decided in the Land Court; the Land Court decides what level of compensation is appropriate to give the landholder in exchange for the access and use of the land.

### **2.2 Legislative framework**

Broadly speaking, the Queensland Government may grant one of two types of tenement: a tenement that permits the resource company to explore the land over which the tenement is granted (an “exploration tenement”),<sup>8</sup> and a tenement that allows the resource company to extract resources and conduct extraction operations (a “production tenement”).<sup>9</sup> The grant of either an exploration or production tenement requires the tenement holder to negotiate with key stakeholders, including the landholders and landowners of land that is included within the tenement.

Although landholders have no statutory right to repel resource tenement holders from accessing land, there is nevertheless an obligation on tenement holders to consult with each owner and occupier of public and private land in order to reach an agreement concerning access, the carrying out of authorised activities for the purpose of the resource tenement (whether this is a mining lease, a petroleum lease or an exploration permit), and the tenement holder’s compensation liability.<sup>10</sup>

---

<sup>6</sup> Thus, land access for CSG activities is governed by the *PAG Act*.

<sup>7</sup> Queensland Government, ‘Land Access Code’ (2010) <[http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land\\_access\\_code\\_nov2010.pdf](http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land_access_code_nov2010.pdf)>.

<sup>8</sup> Exploration tenements for minerals may be either “Exploration Permits” or “Mineral Development Licences”. Exploration tenements for petroleum development are “Authorities to Prospect”.

<sup>9</sup> Production tenements for minerals are “Mining Leases”. Production tenements for petroleum are “Petroleum Leases”. A production tenement cannot be granted without an existing exploration tenement.

<sup>10</sup> Queensland Government, *Guide to Queensland’s new land access laws* (2010).

The land access regime in Queensland dichotomises the activities of tenement holders, labelling them either ‘preliminary’ or ‘advanced’.<sup>11</sup> The former category includes activities which are thought to have ‘nil or negligible’ impact on the landholder’s business or land use, and may include walking the area, taking soil samples or survey pegging.<sup>12</sup> By contrast, ‘advanced activities’ can have a large impact on the landholder’s land use, and may include drilling wells or disturbing livestock.<sup>13</sup>

Whether a resource activity is considered a ‘preliminary’ or ‘advanced’ activity will have an impact on a landholder’s rights. In order for a tenement holder to enter land to conduct preliminary activities, the tenement holder is required only to provide an entry notice at least 10 business days prior to entry.<sup>14</sup> The notice must include certain details, including specifics relating to the land proposed to be entered, the entry period and the activities proposed.<sup>15</sup> The tenement holder is then able to enter the land once the 10 business days have elapsed.

In order for a tenement holder to enter land for the purposes of conducting advanced activities, the landholder and tenement holder must negotiate a Conduct and Compensation Agreement (“CCA”).<sup>16</sup> A CCA is a highly flexible agreement and neither the *MRA* nor the *PAG Act* dictates its contents.<sup>17</sup> Compensation may be made in the form of financial compensation, but non-monetary compensation may also be available. For example, there may be a term in the CCA that directs the tenement holder to erect a fence or dig a well in lieu of (or in addition to) payment of a cash sum.

Negotiations between landholders and tenement holders must conform to the mandatory negotiation process set out in the legislation.<sup>18</sup> The tenement holder must issue a negotiation notice, after which a minimum negotiation period of 20 business days commences. If an agreement is not reached after this time, the Department of Employment, Economic Development and Innovation (“DEEDI”) can be called upon to settle the dispute at mediation,<sup>19</sup> or, if both parties agree, Alternative Dispute Resolution (“ADR”) may be commenced.<sup>20</sup> An additional 20 business days is allocated for either mediation or ADR. If an agreement is still not reached after this second set of 20 business days, a party (provided that party made attempts to participate in mediation or ADR) may apply to the Land Court for a compensation determination.<sup>21</sup>

The legislation provides that tenement holders are required to compensate landholders (and, where relevant, landowners) for any compensable effect including, inter alia, deprivation of possession of

---

<sup>11</sup> *Mineral Resources Act 1989* (Qld), Sch 1 (mining projects); *Petroleum and Gas (Production and Safety) Act 2004* (Qld), Sch 2 (petroleum projects).

<sup>12</sup> *Mineral Resources Act 1989* (Qld), s 2-3, Sch 1; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), Sch 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Mineral Resources Act 1989* (Qld), s 5, Sch 1; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 495.

<sup>15</sup> *Mineral Resources Act 1989* (Qld), Sch 1, s 6; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 496.

<sup>16</sup> *Mineral Resources Act 1989* (Qld), Sch 1, s 10; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 500.

<sup>17</sup> Note, however, that a CCA cannot be inconsistent with either Act, a condition of the tenement/authority, or a mandatory provision of the Land Access Code: *Mineral Resources Act 1989* (Qld), Sch 1, Part 19, s 14; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 533.

<sup>18</sup> *Mineral Resources Act 1989* (Qld), Sch 1, s 16-24; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), ss 535-537D.

<sup>19</sup> *Mineral Resources Act 1989* (Qld), Part 10, Div 1B; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), Chapter 10, Part 1AA.

<sup>20</sup> *Mineral Resources Act 1989* (Qld), s 355I; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 743E.

<sup>21</sup> *Mineral Resources Act 1989* (Qld), Sch 1, s 22; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 537B.

the surface of land, diminution in value of land, and diminution of the use made or that may be made of the land or any improvement on it.<sup>22</sup> The methods of valuing compensation to owners or occupiers in respect of a mining lease were set out in *Smith v Cameron*.<sup>23</sup> The Land Court in *Smith* held that the most appropriate means of assessing compensation was on a ‘before and after’ basis, “[quantifying] losses arising due to the loss of the surface area, together with losses due to severance and injurious affection to the balance lands of the owner”.<sup>24</sup> The ‘before and after’ approach for assessing compensation was confirmed by the Land Court in the later case of *Wills v Minerva Coal Pty Ltd [No 2]*.<sup>25</sup>

Tenement holders are unable to enter the land to conduct advanced activities either during the mandatory negotiation process (the first 20 business days) or during mediation or ADR (the second 20 business days). However, a crucial point is that if the matter is brought before the Land Court, the tenement holder is authorised to enter the land and conduct advanced activities even if they have not negotiated a CCA.<sup>26</sup>

The *MRA* has added a layer of protection for landholders in respect of ‘restricted land’. Restricted land is defined in the Act as “land within 100 metres laterally of a permanent building used mainly as accommodation or for business purposes; or for community, sporting or recreational purposes or as a place of worship”, or “land within 50 metres laterally of [*inter alia*], a principal stockyard, a bore or artesian well, [or] a dam”.<sup>27</sup> Exploration tenement holders need the landowner’s permission to enter restricted land,<sup>28</sup> and mining lease applicants require the consent of the landowner before a lease is granted.<sup>29</sup> Landholders should be wary of the fact that consent, once given, cannot be withdrawn.<sup>30</sup> The *PAG Act* has no equivalent provision exempting ‘restricted land’. This represents a significant difference between the *PAG Act* and the *MRA* in terms of landholder rights.

Under the *MRA*, the landholder may also prevent mining leaseholders from accessing ‘reserve land’. Reserves may include roads, State forests or rail corridor land.<sup>31</sup> This power of veto only exists in relation to mining leases (as opposed to exploration tenements). However, this veto can be overridden by the Governor-in-Council.<sup>32</sup> In practice, this does not apply to private landholders, as reserve land is generally held by the State or a local government authority.

Throughout the course of their dealings with landholders, the tenement holder must comply with the Land Access Code.<sup>33</sup> The Land Access Code<sup>34</sup> sets out ‘best practice guidelines’ that must be

---

<sup>22</sup> *Mineral Resources Act 1989* (Qld), Sch 1, s 13; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 532.

<sup>23</sup> *Smith v Cameron* (1986) 11 QLCR 64. Although *Smith* applied the predecessor legislation to the *MRA*, it is considered good law for the purposes of the ‘heads of compensation’ under the current Act: K Richardson & J Compton, ‘An examination of the heads of compensation available under the *Mineral Resources Act 1989*’ (2010) 30 *Queensland Lawyer* 71, 74-76. The heads of compensation are set out in *Mineral Resources Act 1989* (Qld), s 281.

<sup>24</sup> *Smith v Cameron* (1986) 11 QLCR 64, 73 (Member White).

<sup>25</sup> *Wills v Minerva Coal Pty Ltd [No 2]* (1998) 19 QLCR 297, 318-319 (Member Scott).

<sup>26</sup> *Mineral Resources Act 1989* (Qld), Sch 1, s 11; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 500A.

<sup>27</sup> *Mineral Resources Act 1989* (Qld), Sch 2.

<sup>28</sup> *Ibid*, ss 129(3), 181(8).

<sup>29</sup> *Ibid*, s 238(2).

<sup>30</sup> *Ibid*, ss 129(4), 181(9).

<sup>31</sup> *Ibid*, Sch 2.

<sup>32</sup> *Ibid*, s 238(1).

<sup>33</sup> *Ibid*, ss 141(1)(aa), 194(i)(aa); *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 24A.

<sup>34</sup> Queensland Government, ‘Land Access Code’ (2010) <[http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land\\_access\\_code\\_nov2010.pdf](http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land_access_code_nov2010.pdf)>.

observed whilst a tenement holder is negotiating and conducting operations on the land. However, the Land Access Code provides landholders with no rights per se, as it merely sets out the guidelines pursuant to which landholders and tenement holders must negotiate access. Should these guidelines be breached, the landholder may seek redress by referring the matter to DEEDI or the Land Court.<sup>35</sup> ‘Compliance action’ may be brought against the tenement holder if any of the mandatory provisions of the Land Access Code are breached, and this may include reducing the area of the tenement, imposing a new condition on the tenement, or a fine.<sup>36</sup>

### 2.3 Impact on landholder rights

The rationale for denying landholders a power of veto stems from the traditional common law notion that mineral rights are reposed in the Crown.<sup>37</sup> This principle has been acknowledged by the legislature in Queensland.<sup>38</sup> Disallowing a right of veto has long been supported by the Queensland Government on the basis that the Government, as owner of the resource, should decide the circumstances under which the resources are to be removed.<sup>39</sup> In Western Australia, concerns were held that a right of veto would have the effect of limiting mining operations.<sup>40</sup>

However, this position clearly produces a level of uncertainty for the landholder, given that the landholder’s land may be subject at any time to an exploration or development permit. It also creates an inequity in the bargaining powers of the landholder and the tenement holder, given that the former has a limited right of protest in respect of the grant of a tenement.<sup>41</sup> This effect of the Queensland legislative regime appears to impose a greater burden on the landholder to negotiate in good faith. At first glance, there is no compelling incentive on the tenement holder to be serious about negotiations if the legislation ultimately allows them to enter the land irrespective of the outcome of CCA negotiations. Furthermore, if the matter is not resolved at mediation or ADR, the tenement holder may enter the land in the absence of a CCA. It should be noted that landholders do have a right to object to the issue of a mining lease,<sup>42</sup> however the usual outcome of these objections is that the landholder is granted compensation and the tenement holder is permitted to retain its licence.

The *MRA* and *PAG Act* therefore have a potentially serious impact on landholder rights. This impact has led the Land Court to compare the use of land for resources operations to compulsory acquisition, albeit for a limited period.<sup>43</sup> There have been even stronger critiques of the regime made by AgForce, a Queensland agricultural lobby group, which has sought to “introduce equity into the interaction between landholders and miners”.<sup>44</sup> This statement by AgForce highlights the prima facie inequity that exists between the two stakeholders: a resources company that has obtained a mining or petroleum lease, and can pay whatever compensation the landholder or Land Court demands, is virtually guaranteed of developing their project.

---

<sup>35</sup> Queensland Government, *Guide to Queensland’s new land access laws* (2010), 4-5.

<sup>36</sup> *Ibid*, 5.

<sup>37</sup> *Woolley v Attorney-General (Vic)* (1877) LR 2 App Cas 163.

<sup>38</sup> For the relevant Queensland provisions, see: *Mineral Resources Act 1989* (Qld), s 8; *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 26.

<sup>39</sup> M Hunt, ‘Government policy and legislation regarding mineral and petroleum resources’ (1988) 62(11) *Australian Law Journal* 841, 848.

<sup>40</sup> *Ibid*.

<sup>41</sup> A landholder may object to the grant of a mining lease, and this objection will be heard before the Land Court: *Mineral Resources Act 1989* (Qld), s 269.

<sup>42</sup> *Ibid*, s 260.

<sup>43</sup> *Smith v Cameron* (1986) 11 QLCR 64, 73 (Member White).

<sup>44</sup> AgForce, ‘Mining Strategy’, (online) <[http://www.agforceqld.org.au/index.php?tgtPage=policies&page\\_id=32](http://www.agforceqld.org.au/index.php?tgtPage=policies&page_id=32)>.

However this argument belies the fact that, generally speaking, mining and petroleum companies place a premium on good landholder and community relations.<sup>45</sup> Although the immediate incentive to negotiate is imposed on the landholder, it is firmly in the tenement holder's interest to obtain a negotiated outcome and sustain a satisfactory working relationship with the people upon whose land the tenement holder will commence a project, potentially with a view to the long term.<sup>46</sup> An added safety net for landholders, particularly if the matter were to reach the Land Court, is the requirement on tenement holders to make reasonable attempts to negotiate.<sup>47</sup> This reflects the spirit of the legislation; that is, that a good working relationship between landholders and tenement holders is not just desirable, but essential.<sup>48</sup> If a tenement holder takes an unsatisfactory approach to negotiations, this may be reflected in the Land Court's compensation determination. It also bears noting that the existing framework for landholder relations sets out minimum guidelines, and some companies, in the interest of maintaining valuable community relations, hold themselves to a more stringent standard. An example of this is the policy of Santos, a major petroleum company, which has, to date, opted to effectively observe a right of veto by refusing to bring an action against property owners in the Land Court if negotiations are unsuccessful.<sup>49</sup>

A potential development in landholder and tenement holder relations, specifically in respect of coal seam gas projects (it is unclear whether the innovation will be applied to the resources sector generally), is the development of the Gasfields Commission in Queensland. This Commission seeks to strike 'the right balance to meet the interests of landholders, local community groups and the environment'.<sup>50</sup> The Gasfields Commission is still in its formative stages, and whether it assists in ameliorating landholder and petroleum tenement holder tensions, or whether it provides the landholder with a stronger voice in negotiations, remains to be seen.

Another development that seeks to protect parcels of land that are considered prime agricultural land is new legislation that imposes restrictions on development in respect of such land.<sup>51</sup> Note, however, that the *Strategic Cropping Land Act 2011* (Qld) does not confer new rights onto landholders; rather, the tenement applicant bears a higher onus of proof in showing the Minister that the land will not be "permanently alienated".<sup>52</sup>

---

<sup>45</sup> See the comments by petroleum lobby group Australian Petroleum Production and Exploration Association in S Elks & R Barrett, 'Room for better publicity on CSG', *The Australian* (online) 21 February 2012, <<http://www.theaustralian.com.au/national-affairs/elections/room-for-better-publicity-on-csg/story-fnbsqt8f-1226276392794>>. Cf comments by agricultural lobby groups about 'mean and dismissive' CSG companies in G Houen, 'Coal Seam Gas and the Landholder The Queensland Experience', *NSW Farmers Association* (online) 18 August 2010

<[http://www.nswfarmers.org.au/data/assets/pdf\\_file/0005/66407/Houen\\_Paper.pdf](http://www.nswfarmers.org.au/data/assets/pdf_file/0005/66407/Houen_Paper.pdf)>.

<sup>46</sup> Note Part 2 of Queensland's *Land Access Code*, which provides for the establishment of "good relations" between parties: Queensland Government, 'Land Access Code' (2010) <[http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land\\_access\\_code\\_nov2010.pdf](http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land_access_code_nov2010.pdf)>.

<sup>47</sup> Queensland Government, 'Tips for landholders negotiating agreements with resource companies' (2010) <[http://mines.industry.qld.gov.au/assets/land-tenure-pdf/tips\\_landholders\\_negotiations.pdf](http://mines.industry.qld.gov.au/assets/land-tenure-pdf/tips_landholders_negotiations.pdf)>.

<sup>48</sup> Queensland Government, 'Land Access Code' (2010) <[http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land\\_access\\_code\\_nov2010.pdf](http://mines.industry.qld.gov.au/assets/land-tenure-pdf/land_access_code_nov2010.pdf)>, Part 2.

<sup>49</sup> V Edwards, 'Santos rules out use of legal force to gain access to land', *The Australian* (Sydney), 20 August 2011, <<http://www.theaustralian.com.au/news/nation/santos-rules-out-use-of-legal-force-to-gain-access-to-land/story-e6frg6nf-1226118445158>> (accessed 15 May 2012).

<sup>50</sup> Queensland Government, Ministerial Media Statement, 'New commission to restore CSG confidence' (2012) <<http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=79011>>.

<sup>51</sup> Queensland Government, 'Strategic cropping land – Policy and planning framework – Discussion paper' (2010) <<http://www.dlqp.qld.gov.au/resources/planning/planning/strategic-cropping-land-discussion-paper.pdf>>.

<sup>52</sup> *Ibid*, 6.

In conclusion, although there can be little doubt that on the face of the legislation landholders are placed in a position of inequity compared with the resource tenement holder, business sense should dictate that a tenement holder obtain a negotiated outcome between their company and the landholder on whose land they wish to commence development. However, the fact remains that if a tenement is granted, and if tenement holders engage in good faith negotiations, and if tenement holders are able to pay compensation, entry to land is virtually assured.

### **3 OTHER APPROACHES**

#### **3.1 Western Australia**

With the mining industry crucial to the Western Australian economy, access to private land is fast becoming a contentious issue among private landholders, the government and mining companies. There are different processes in place for access to private and public land, and, like the Queensland approach, in Western Australia the consent of the owner and/or occupier of the land is required before the commencement of any mining operations in certain “restricted” areas, although the scope is much broader. Section 29(2) of the *Mining Act 1978* (WA) (“*Mining Act*”) provides that the consent of the landholder is required for land ‘under cultivation’, being land used for agricultural purposes including cropping or pasturing; whether cleared or uncleared, and land used for grazing stock in the ordinary course of management of the land.

##### **3.1.1 Legislative framework**

The following section provides an overview of Western Australia’s mineral exploitation and land access system. The *Mining Act* establishes a process for the application and grant of access to land and a mining tenement in respect of any private land, which is not already subject to a mining tenement.<sup>53</sup> In brief, a permit to enter is a prerequisite for the grant of a mining tenement and the holder of the permit must give notice to the landholder and occupier of the application for a mining tenement. The consent of the landholder or occupier must be obtained before entering onto private land for the purpose of marking out a tenement. This permit will usually require the permit holder to pay compensation for damage to the landholder before it is granted,<sup>54</sup> and if a dispute arises the matter will be settled by the Warden’s Court.<sup>55</sup>

##### **3.1.2 Proceedings before the Warden’s Court**

The powers of the Warden’s Court are set out in section 134(1) of the *Mining Act*. It can make orders on all matters within its jurisdiction, including:

- The awarding of damages or compensation;<sup>56</sup>
- The determination of the area, extent, dimensions or boundaries of any mining tenement or as to the respective rights of the owner of the primary tenement and the special prospecting licence or mining lease for gold granted in relation to that tenement pursuant to section 56A, 70 or 85B;<sup>57</sup>
- The partition, sale, disposal, division, or proceeds of any mining property held by two or more persons having conflicting interests;<sup>58</sup>
- The cessation or suspension by any party of any mining operations or works causing or likely to cause, injury to any other party,<sup>59</sup>
- The determination and settlement of all actions, claims, questions and disputes properly brought before the warden’s court.<sup>60</sup>

---

<sup>53</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 61.

<sup>54</sup> Environmental Defenders Office of Western Australia, *Mining Law: Fact Sheet 36* (2011), 2.

<sup>55</sup> *Mining Act 1978* (WA), s 134(1).

<sup>56</sup> *Ibid* s 134(1)(b).

<sup>57</sup> *Ibid*, s 134(1)(e).

<sup>58</sup> *Ibid*, s 134(1)(i).

<sup>59</sup> *Ibid*, s 134(1)(j).

<sup>60</sup> *Ibid*, s 134(1).

### 3.1.3 Relevant definitions

There are two main classes of parties referred to in the *Mining Act*. An “owner” is defined as:

- the registered proprietor, or, in relation to land not being land under the *Transfer of Land Act 1893*, the owner in fee simple or the person entitled to the equity of redemption;<sup>61</sup>
- the lessee or licensee from the Crown;<sup>62</sup>
- the person who for the time being, has the lawful control and management thereof whether on trust or otherwise;<sup>63</sup> or
- the person who is entitled to receive the rent.<sup>64</sup>

An “occupier” is defined as any person in actual occupation of the land under any lawful title granted by or derived from the owner of the land’.<sup>65</sup>

Other terms relevant to the understanding of land access rights in Western Australia are defined as follows:

- “minerals” is defined as ‘naturally occurring substances obtained or obtainable from any land by mining operations carried out on or under the surface of the land’;<sup>66</sup>
- “mining tenement” is defined as ‘a prospecting licence, exploration licence, retention licence, mining lease, general purpose lease or a miscellaneous licence granted or acquired under this Act or by virtue of the repealed Act; and includes the specified piece of land in respect of which the mining tenement is so granted or acquired’;<sup>67</sup> and
- “private land” is defined as ‘any land that has been or may hereafter be alienated from the Crown for any estate of freehold, or is or may hereafter be the subject of any conditional purchase agreement, or of any lease or concession with or without a right of acquiring the fee simple thereof (not being a pastoral lease within the meaning of the *Land Administration Act 1997* or a lease or concession otherwise granted by or on behalf of the Crown for grazing purposes only or for timber purposes or a lease of Crown land for the use and benefit of the Aboriginal inhabitants’.<sup>68</sup>

### 3.1.4 Permit to enter private land

The *Mining Act* states that a person who wishes to enter onto any private land to search for any mineral or to mark out a mining tenement may apply for a permit to enter onto the private land.<sup>69</sup> Section 28 also states that a person may not enter or remain upon the surface of any private land for any mining purpose, including prospecting, or for the purpose of marking out a mining tenement unless they are the owner in occupation of that private land or are authorised to do so by a permit issued under section 30. This permit is known as a ‘permit to enter’.<sup>70</sup>

#### 3.1.4.1 Application for permit to enter

---

<sup>61</sup> Ibid, s8.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, s 30(1).

<sup>70</sup> Ibid, s 28; M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009).

In order to be granted a permit to enter onto private land, the *Mining Act* states that an application, in accordance with the prescribed form, must be lodged at the office of any mining registrar and is to be accompanied by the prescribed fee and a map and description upon which the private land is clearly defined.<sup>71</sup> The *Mining Act* provides that if the warden or prescribed official is satisfied that the application, under section 30(1), is in good faith then the permit may be granted<sup>72</sup> and will last for a period of not more than thirty days.<sup>73</sup> The permit will also be subject to certain conditions that the warden or prescribed officers thinks fit in the circumstances.<sup>74</sup> The *Mining Act* further states that the permit to enter continues in force for the purpose of repairing or maintaining marks and notices until the application for the mining tenement is determined, and that these marks and notices are not subject to the abovementioned conditions.<sup>75</sup>

#### **3.1.4.2 Notice of permit to enter**

The *Mining Act* stipulates that the holder of the permit to enter must give notice to the owner and occupier of the private land. How this notice is to be given differs between the occupier, the owner and occupier and the owner of the private land.

On the first occasion that the holder of the permit to enter, or his or her authorised employee or agent, enters that land after the permit has been issued, a copy of the permit to enter must be handed from the permit holder, or his or her authorised employee or agent, to the occupier of the private land.<sup>76</sup> If the occupier is not present on the private land at this time then the holder of the permit, or his or her employee or agent, must, upon entering the land, place a copy of the permit in a prominent position on the occupier's dwelling or in a prominent position at the main entrance to the land if no such dwelling exists.<sup>77</sup> They must also, within 48 hours of entering the private land after the issue of the permit, cause a copy of the permit to be sent by prepaid registered post to the occupier at their last known place of abode or business.<sup>78</sup>

Where the occupier of the private land is also the owner or one of the owners of that private land, no further notice other than that ordinarily required by is required to be served on that owner or any of the other owners of that land.<sup>79</sup> Where none of the owners of any private land are also in occupation of that private land, the holder of a permit granted over that land shall, within 48 hours of first entering the land after the issue of the permit, cause a copy of the permit to be sent by prepaid registered post to one of those owners.<sup>80</sup> In the case of an owner which is a body corporate, the notice must be sent to the registered office of the body corporate<sup>81</sup> or in the case of an owner who is not a body corporate, the notice must be sent to his or her last known place of abode or business.<sup>82</sup>

#### **3.1.4.3 Rights conferred by a permit to enter**

A permit to enter onto private land confers many rights upon the holder.<sup>83</sup> A permit to enter authorises the holder to enter and remain upon the surface of the private land to which the permit relates. It

---

<sup>71</sup> *Mining Act 1978 (WA)*, s 30(2).

<sup>72</sup> *Ibid*, s 30(3).

<sup>73</sup> *Ibid*, s 30(3)(a).

<sup>74</sup> *Ibid*, s 30(3)(b).

<sup>75</sup> *Ibid*, s 30(3).

<sup>76</sup> *Ibid*, s 31(1).

<sup>77</sup> *Ibid*, s 31(1)(a).

<sup>78</sup> *Ibid*, s 31(1)(b).

<sup>79</sup> *Ibid*, s 31(2).

<sup>80</sup> *Ibid*, s 31(3).

<sup>81</sup> *Ibid*, s 31(3)(a).

<sup>82</sup> *Ibid*, s 31(3)(b).

<sup>83</sup> *Ibid*, s 32.

allows the permit holder to search thereon for any mineral and to mark out, and repair and maintain the marks set up and notices relating to the application for one or more mining tenement relating to that land or any part thereof.<sup>84</sup> The permit to enter also allows the holder to search for any mineral and detach surface samples, not exceeding 13 kg and any other samples agreed by the owner or, if the owner is not in occupation of the private land, the occupier<sup>85</sup> and remove them from the private land for the purpose of assaying or testing.<sup>86</sup> However, apart from the exceptions granted under section 32, the holder, or his or her authorised employee or agent, of a permit to enter must not carry out any other mining on or otherwise disturb the surface of the land.<sup>87</sup>

The *Mining Act* affords the holder of a permit to enter the right to appeal to the Minister, within the time and the manner prescribed, against a refusal, by a warden or prescribed official, to grant an application for a permit, the requirement of unreasonable conditions, or the fixing of an excessive amount of money.<sup>88</sup> The Minister may dismiss or uphold such an appeal and grant the permit.<sup>89</sup>

### **3.1.5 Application to bring private land under the *Mining Act***

Section 37(1) states that any person may, in the prescribed manner, apply to the Minister to have any private land alienated before 1 January 1899 brought within the operation Division 3 for the purpose of mining for minerals other than gold, silver and precious metals.<sup>90</sup> The Minister may authorise and instruct a geologist or any other professional officer in the Department to enter, inspect, report and do all things necessary upon the private land to which the application relates to ascertain whether there is a reasonable likelihood of that land containing any mineral in payable quantities.<sup>91</sup> If it is the geologist's opinion that there is a reasonable likelihood that the private land contains any mineral in payable quantities then, with the approval of the Governor, the Minister may declare, via the Government Gazette, that at the expiration of a specified period of not less than 6 months from the date of the notice is published, the private land will come within the operation of Division 3 of the *Mining Act*.<sup>92</sup> A copy of this published notice shall be served upon the owner of the private land as soon as practicable after it is so published.<sup>93</sup> The effect of this provision is that any land that escaped the 'Crown land' determination in 1899 is at risk of being considered as such land with the holder of the land no longer retaining ownership of the mineral and is then therefore capable of becoming the subject of mining operations.<sup>94</sup>

### **3.1.6 Application for a mining tenement by a permit holder**

#### ***3.1.6.1 A permit to enter is a prerequisite***

A permit to enter onto private land is a prerequisite to the granting of a mining tenement in Western Australia, and this has been confirmed in a number of cases. The decision in *Bromley v Muswellbrook Coal Company Pty Ltd*<sup>95</sup> demonstrated the importance of the permit to enter during the process of granting a mining tenement. Here, the High Court held that the failure to obtain a permit to enter was

---

<sup>84</sup> Ibid, s 32(1)(a).

<sup>85</sup> Ibid, s 32(1)(b).

<sup>86</sup> Ibid, s 32(1)(c).

<sup>87</sup> Ibid, s 32(1).

<sup>88</sup> Ibid, s 32(2).

<sup>89</sup> Ibid, s 32(3).

<sup>90</sup> Ibid, s 37(1).

<sup>91</sup> Ibid, s 37(2).

<sup>92</sup> Ibid, s 37(3).

<sup>93</sup> Ibid, s 37(4).

<sup>94</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 36.

<sup>95</sup> *Bromley v Muswellbrook Coal Company Pty Ltd* (1973) 2 ALR 128.

a sufficient ground to refuse the grant of a mining lease.<sup>96</sup> This decision was followed in *Payne v Major*,<sup>97</sup> where an application for a mining tenement was rejected due to a failure to obtain a permit to enter. In *Sandercock v Beal and Lewis*<sup>98</sup> the decision in *Bromely*<sup>99</sup> was further qualified. In this instance an applicant for a grant used and took advantage of the previously surveyed boundaries in his marking out of the mining tenement. Here, the court ruled that no permit to enter was required as there was no entry onto the private land. *Feinler's Applications*<sup>100</sup> concerned an applicant for a mining lease that was not the registered owner of the land, but who had purchased the land from his uncle, and was the occupier. Here, it was held that it was not necessary for the applicant to obtain a permit to enter but that it was imperative that a copy of this application was served to the registered owner in due course.<sup>101</sup>

### 3.1.6.2 Notice

Where an application is made for a mining tenement that relates to private land, notice of that application is to be given in the prescribed manner by the applicant to the chief executive officer of the local government,<sup>102</sup> the owner and occupier of the private land,<sup>103</sup> and each mortgagee of the land under a mortgage endorsed or noted on the title or land register or record relating to that land.<sup>104</sup> However, if there is no occupier of the private land, or no such occupier can be found, the notice of the application will be positioned in some conspicuous manner on the land.<sup>105</sup>

It should be noted that where the application for a mining tenement relates only to that portion of the land that is not less than 30 meters below the lowest part of the natural surface of the private land, then it is not necessary to give notice of the application to the owner or occupier or to a mortgagee of the land. However, no application is to be made or otherwise in respect of that portion of that private land that is less than 30 meters below the lowest part of the natural surface unless notice is given as mentioned earlier, notwithstanding the prior grant of an application for a mining tenement over any portion of that private land.<sup>106</sup>

### 3.1.6.3 Consent

The *Mining Act* states that where the application relates to private land to which section 29(2) or (5) applies, the applicant is required to establish that both the owner and the occupier have consented in writing to the grant of the mining tenement.<sup>107</sup> Section 29(2) states that written consent is required in respect of private land, which is:

- In bona fide and regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation or is land under cultivation.<sup>108</sup> Section 8(1) defines the term 'land under cultivation' as land being used for agricultural purposes and it includes land used by a person for the grazing in the ordinary course of management of that person's land. 'Agricultural' is defined to include cropping or pasturing purposes;<sup>109</sup>

---

<sup>96</sup> Ibid, 133-137 (Mason J).

<sup>97</sup> *Payne v Major* (1987) 6 AMPLA Bull 54.

<sup>98</sup> *Sandercock v Beal and Lewis* (1987) 6 AMPLA Bull 73.

<sup>99</sup> *Bromley v Muswellbrook Coal Company Pty Ltd* (1973) 2 ALR 128

<sup>100</sup> *Feinler's Applications* (1989) 8 AMPLA Bull 43.

<sup>101</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 62.

<sup>102</sup> *Mining Act 1978* (WA), s 33(1)(a).

<sup>103</sup> Ibid, s 33(1)(b).

<sup>104</sup> Ibid, s 33(1)(c).

<sup>105</sup> Ibid, s 33(1).

<sup>106</sup> Ibid, ss 29(5), 33(1a).

<sup>107</sup> Ibid, s 33(1b).

<sup>108</sup> Ibid, s 29(2)(a).

<sup>109</sup> Ibid, s 8(1).

- The site of a cemetery or burial ground.<sup>110</sup>
- The site of a dam, bore, well or spring;<sup>111</sup>
- The site of a substantial improvement.<sup>112</sup> Section 29(4) states that the warden is the sole judge of whether any improvement is ‘substantial’ and that his or her decision is final and cannot be appealed;<sup>113</sup>
- Situated within 100 m of any private land referred to in paragraph (a), (b), (c) or (d);<sup>114</sup> or
- A separate parcel of land and has an area of 2000 square meters or less.<sup>115</sup>

However, the *Mining Act* goes on to say that written consent is not required in respect of private land which is not less than 30 meters below the lowest part of the natural surface of that private land.<sup>116</sup> This is known as the grant of ‘sub-surface rights’<sup>117</sup> and shall be discussed in the following section.

Lastly, it must be noted that the *Mining Act* also stipulates that subject to the determination of the amount of any compensation payable in accordance with section 123, a mining tenement in respect of private land may be granted in accordance with this Act.<sup>118</sup>

Interestingly, the *Petroleum and Geothermal Energy Act 2000 1967* (WA) provides that owners also have a power to veto petroleum and gas development in limited circumstances. Section 16 of that Act states that consent is required for activities on ‘private land not exceeding 2000m<sup>2</sup> in extent’, land ‘used as a cemetery or burial place’ or ‘less than 150m in lateral distance from any cemetery or burial place, reservoir or any substantial improvement’.

#### **3.1.6.4 Sub-surface rights**

An application can be made for sub-surface rights in cases where the application for the grant of a mining tenement becomes a complex and logistical exercise in an area composing of many separate lots of private land because the applicant for surface rights must serve copies of the application to each owner, occupier and registered mortgagee in order to receive their consent. In this instance, where the rights to mine are limited to not less than 30 metres below the lowest part of the natural surface of the private land, the *Mining Act* states that an application for sub-surface rights does not require the applicant to serve such notice to the abovementioned interested parties.<sup>119</sup> Consequently, after the mining tenement is granted, surface rights can be negotiated in areas of interest by attaining the written consent of both owner and occupier of that private land.<sup>120</sup> After this has been achieved, the *Mining Act* provides that an application can be made to the Minister for the mining tenement to be amended by granting it in respect of the surface areas as well as over the sub-surface areas,<sup>121</sup> and the owner, occupier, mortgagee and the chief executive officer of the local government must be presented with notice of any such application.<sup>122</sup> If the Minister is satisfied that both the owner and the occupier

---

<sup>110</sup> Ibid, s 29(2)(b).

<sup>111</sup> Ibid, s 29(2)(c).

<sup>112</sup> Ibid, s 29(2)(d).

<sup>113</sup> Ibid, s 29(4).

<sup>114</sup> Ibid, s 29(2)(e).

<sup>115</sup> Ibid, s 29(2)(f).

<sup>116</sup> Ibid, s 29(2).

<sup>117</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 67.

<sup>118</sup> *Mining Act 1978* (WA), ss 123, 33(1b).

<sup>119</sup> Ibid, s 29(2).

<sup>120</sup> Ibid, s 33(1b); M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 68.

<sup>121</sup> *Mining Act 1978* (WA), s 29(5)

<sup>122</sup> Ibid, s 33(1).

of the private land have consented in writing to the grant of the mining tenement over the surface area then the Minister may grant such an application.<sup>123</sup>

With a sub-surface rights application it must be noted that it is not necessary for the applicant to demonstrate an ability to obtain access to the sub-surface from adjoining land as was the ruling in *Eucla Mining NL v Piacun*,<sup>124</sup> and although this process appears to be a fool-proof method of obtaining a mining tenement, the automatic grant of sub-surface rights is not necessarily so. Even though the warden ruled in *Western Titanium Ltd v Daisy Downs Pty Ltd*<sup>125</sup> that a private land holder is not entitled to object where an application for a mining lease is limited to sub-surface rights only, the land holder can make written submissions to the Minister as to why he or she should refused the tenement application.<sup>126</sup> However, the author has been unable to find any evidence as to the effectiveness of such recourse.

### **3.1.6.5 Appeals and Costs**

The owner, occupier, and any mortgagee referred to in the *Mining Act*<sup>127</sup> of the private land are entitled to be heard in relation to any application in respect of any portion of that private land. If the owner or occupier objects to the granting of the mining tenement then the warden may, if he or she considers it proper to do so in the circumstances, order that the applicant pay to the objector(s), such sum by way of costs as the warden orders.<sup>128</sup> If such an order is made then those costs are recoverable in accordance with the regulations.<sup>129</sup> Compensation shall be discussed further and in detail in section 3.1.8.

### **3.1.7. Application for a Mining Tenement by an Owner**

The *Mining Act* provides that the owner of private land may, at any time within the period referred to in section 37(3), apply for a mining tenement in respect of the private land.<sup>130</sup> If the owner of the private land fails to apply for a mining tenement within the period specified in subsection 1,<sup>131</sup> or if he or she applies but a tenement is not granted, then the land shall come within the operation of Division 3 and all rent and royalties received by the Crown for any minerals won from the land shall be paid to the owner of the land less one-tenth of the amount.<sup>132</sup> The Minister may also grant the person who made the application under the *Mining Act*<sup>133</sup> the prior right to the exclusion of all other persons to mark out the private land and/or apply for a mining tenement for such a period as he or she thinks fit.<sup>134</sup>

The *Mining Act* stipulates that where the owner of any private land is granted a mining tenement on an application made under section 38, he or she shall comply with the terms and conditions of the mining tenement, in particular, the expenditure conditions applied. However, no rent or royalties shall

---

<sup>123</sup> Ibid, s 29(6).

<sup>124</sup> *Eucla Mining NL v Piacun* (1988) 7 AMPLA Bull 154.

<sup>125</sup> *Western Titanium Ltd v Daisy Downs Pty Ltd* (1992) 12 AMPLA Bull 22.

<sup>126</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 68-69.

<sup>127</sup> *Mining Act 1978* (WA), s 33(1)(c).

<sup>128</sup> Ibid, s 33(2).

<sup>129</sup> Ibid, s 33(2a).

<sup>130</sup> Ibid, s 38(1).

<sup>131</sup> This is a period of no less than six months from the date the notice is published: Ibid, s 37(3).

<sup>132</sup> Ibid, s 38(2)(a).

<sup>133</sup> Ibid, s 37(1).

<sup>134</sup> Ibid, s 38(2)(b).

be payable by the owner with respect of the private land the mining tenement refers to or in respect of any mineral won.<sup>135</sup>

### **3.1.8 Compensation**

#### **3.1.8.1 Entitlement**

The *Mining Act* provides that the owner and occupier of any private land where mining occurs are entitled, according to their respective interest, to compensation for all loss and damage suffered or likely to be suffered by them as a consequence of the mining, whether or not lawfully carried out. The holder of a mining tenement mining on such private land must pay compensation for any such loss or damage or likely loss or damage resulting from any act or omission on his part or on the part of his or her agents, employees, subcontractors, or those otherwise occasioned with his or her authority.<sup>136</sup> The term 'mining' used in the Part VII Compensation provisions of the *Mining Act* extends to include the marking out of a mining tenement.<sup>137</sup>

The holder of a mining tenement may not commence any mining on the natural surface or within a depth of 30 meters from the lowest part of the natural surface of any private land unless he has paid or tendered to the owner and the occupier the amount of compensation which he or she is required to pay under the *Mining Act*, or he or she has made an agreement with the owner and occupier as to the amount, times and mode of the compensation, if any.<sup>138</sup>

#### **3.1.8.2 When compensation is not payable**

Under the *Mining Act*, compensation is not payable in any case and no claim lies for compensation in consideration for permitting entry onto any land for mining purposes<sup>139</sup> in respect of the value of any mineral known or supposed to be in or under the surface of any land,<sup>140</sup> by reference to any rent, royalty or other amount assessed in respect of mining the mineral<sup>141</sup> or in relation to any loss or damage for which compensation cannot be assessed according to common law principles in monetary terms.<sup>142</sup> This is due to the fact that the Crown owns any minerals obtained from that private land and so the owner is not entitled to any payment in respect of them.<sup>143</sup>

However, the owner of the private land may be paid in lump sums of money or royalties based upon the amount of minerals obtained from the land. This is not considered compensation by way of the *Mining Act*; it is, in fact, often the only way that a miner can obtain the land owner's consent to the grant of the mining tenement. As discussed earlier, the consent of the owner and occupier is imperative to the grant of a mining tenement in respect to surface mining rights over land under cultivation.<sup>144</sup> Any provision that provides such payment must be cautiously drafted so as not to offend section 123(1).<sup>145</sup>

#### **3.1.8.3 Grounds for compensation**

---

<sup>135</sup> Ibid, s 39.

<sup>136</sup> Ibid, s 123(2).

<sup>137</sup> Ibid, s 123(2a).

<sup>138</sup> Ibid, s 35(1).

<sup>139</sup> Ibid, s 123(1)(a).

<sup>140</sup> Ibid, s 123(1)(b).

<sup>141</sup> Ibid, s 123(1)(c).

<sup>142</sup> Ibid, s 123(1)(d).

<sup>143</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 297.

<sup>144</sup> *Mining Act 1978* (WA), s 29(2).

<sup>145</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 297.

Compensation is payable to an owner or occupier that are found, on various grounds, to be entitled to such recompense for mining occurring on private land.<sup>146</sup> This includes being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;<sup>147</sup> damage to the land or any part of the land;<sup>148</sup> and severance of the land or any part of the land from other land of, or used by, that person;<sup>149</sup> and any loss or restriction of a right of way or other easement or right;<sup>150</sup> and the loss of, or damage to, improvements;<sup>151</sup> and social disruption;<sup>152</sup> and in the case of private land that is land under cultivation, any substantial loss of earnings, delay, loss of time, reasonable legal or other costs of negotiation, disruption to agricultural activities, disturbance of the balance of the agricultural holding, the failure on the part of a person concerned in the mining to observe the same laws or requirements in relation to that land as regards the spread of weeds, pests, disease, fire or erosion, or as to soil conservation practices, as are observed by the owner or occupier of that land;<sup>153</sup> and any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining.<sup>154</sup> Furthermore, the *Mining Act* stipulates that where the use for mining purposes of aircraft over or in the vicinity of any land (whether or not private land) occasions damage that damage shall be deemed to have been occasioned by an entry on the land and is compensable.<sup>155</sup>

The *Mining Act* provides that if any private land or improvement upon that land adjoining or in the vicinity of land where mining takes place is injured or depreciated in value by the mining or by reason of the occupation of any portion of the surface or enjoyment by the holder of a mining tenement or of any right of way, the owner and occupier of the private land or improvements upon that land are entitled severally to compensation for all loss or damage thereby sustained.<sup>156</sup>

Under the *Mining Act* where mining operations are carried out on or under any land the subject of a mining tenement and damage is thereby caused to the surface or part of the surface of any private land comprised within the boundaries of the land the subject of the mining tenement belonging to the same or another owner, or to any improvement on any such private land, not being damage already determined under this Part, the owner and occupier of the private land or improvement are entitled severally to compensation for all loss or damage thereby sustained.<sup>157</sup>

#### **3.1.8.4 Agreement or determination**

The amount payable to the owner or occupier of private land is usually determined by an agreement between the holder of the mining tenement and the owner and/or occupier of the private land, which is then recorded in a written compensation agreement. If this does not occur, such a decision rests with the warden's court through informal proceedings if both parties consent.<sup>158</sup> However, if consent is not

---

<sup>146</sup> Ibid, s 123(4).

<sup>147</sup> Ibid, s 123(4)(a).

<sup>148</sup> Ibid, s 123(4)(b).

<sup>149</sup> Ibid, s 123(4)(c).

<sup>150</sup> Ibid, s 123(4)(d).

<sup>151</sup> Ibid, s 123(4)(e).

<sup>152</sup> Ibid, s 123(4)(f).

<sup>153</sup> Ibid, s 123(4)(g).

<sup>154</sup> Ibid, s 123(4)(h).

<sup>155</sup> Ibid, s 123(4).

<sup>156</sup> Ibid, s 123(5).

<sup>157</sup> Ibid, s 123(6).

<sup>158</sup> Ibid, s 123(3)(a).

given, compensation is determined by the warden's court in formal proceedings upon an application of the owner, occupier or the person liable to pay compensation.<sup>159</sup>

Under the *Mining Act* during an action in the warden's court for compensation, if the court considers it impracticable or inexpedient to determine the amount of compensation to be paid in full satisfaction the court may, on the application of a party to the claim for compensation or of its own motion, pass judgement or make a determination as to the compensation payable in respect of any specified period and in respect of the whole or part of the total claim for compensation.<sup>160</sup> Such a determination by the warden's court under subsection (3) is final and cannot be appealed.<sup>161</sup>

### **3.1.8.5 Relevant factors for consideration**

When determining compensation under the *Mining Act*, the warden's court is bound to take into consideration certain factors. This includes any work that the person has carried out or undertakes to carry out to make good injury to the surface of the land or injury to anything on the surface of the land,<sup>162</sup> and the amount of any compensation that the owner and occupier or either of them have or has already received in respect of the loss or damage for which compensation is being assessed, and shall deduct the amount already so received from the amount that they would otherwise be entitled to for such loss or damage.<sup>163</sup>

The *Mining Act* stipulates that upon the hearing of a claim for compensation, an order may be made requiring the person by or on whose behalf the mining was authorised to restore, so far as is reasonably practicable, the surface of the land that was damaged.<sup>164</sup> However, before such an order is made, consideration shall be given to the geographical location of the land to which the claim for compensation relates and its environment;<sup>165</sup> the purpose for which such land was used before the mining operations commenced and the purpose for which such land is likely to be used after the mining operations have ceased;<sup>166</sup> the cost to restore the surface of the land relative to the whole of the cost of and in relation to such mining operations and the profitability thereof;<sup>167</sup> and the practicability of restoring the surface of the land after such mining operations have ceased.<sup>168</sup>

### **3.1.9 Impact on landholder rights**

The general rule is understood to be that the Crown owns all minerals within the land. Since 1 January 1899, all new grants of freehold titles in Western Australia have provided that all minerals are reserved to the Crown.<sup>169</sup> This has had a devastating affect on landholder rights in Western Australia, primarily in that private landholders no longer control the minerals found within their sub-surface soil even though they continue to own the land itself. The Crown is legally entitled to grant exploratory or mining tenements to mining companies, seeming to erode all private landholder rights.<sup>170</sup>

---

<sup>159</sup> Ibid, s 123(3)(b).

<sup>160</sup> Ibid, s123(8).

<sup>161</sup> Ibid, s123(9).

<sup>162</sup> Ibid, s124(1)(a).

<sup>163</sup> Ibid, s124(1)(b).

<sup>164</sup> Ibid, s124(2).

<sup>165</sup> Ibid, s124(3)(a).

<sup>166</sup> Ibid, s124(b).

<sup>167</sup> Ibid, s124(c).

<sup>168</sup> Ibid, s124(d).

<sup>169</sup> *Land Act 1898 (WA)*, s 15 (repealed).

<sup>170</sup> M Hunt, 'Government Policy and Legislation Regarding Mineral and Petroleum Resources' (1988) 62(11) *Australian Law Journal* 841, 843-5; S Hepburn, 'Not quite The Castle: why miners have a right to what's under your land', *The Conversation* (online) 15 November 2011, <<http://theconversation.edu.au/not-quite-the-castle-why-miners-have-a-right-to-whats-under-your-land-4176>>.

However, Western Australian legislation has provided a statutory right to landholders to deny access to mining companies for the exploration on their properties. As discussed earlier, the *Mining Act* states that mining tenements cannot be granted without the written consent of the owner and occupier of the private land where upon, amongst other exceptions, agricultural activities are being carried out.<sup>171</sup> These provisions were implemented to protect a farmer's wishes to continue farming undisturbed by mining. Nevertheless, as the *Mining Act* stipulates that compensation for mining on private land is not permitted to take into account any value of minerals on the land,<sup>172</sup> these provisions have provided an avenue for landholders and mining companies to negotiate substantial payments. So essentially a landholder has been granted a statutory power of veto that can be used to acquire compensation, far exceeding the entitlements under the *Mining Act*, based upon the value of minerals which the landholder does not own.<sup>173</sup>

It could be argued that this attempt to limit mining operations on private land in Western Australia has inadvertently increased such mining operations with mining companies offering private landholders excessive amounts of money that prove irresistible to most and can create a level of uncertainty for other landholder's facing the same decision.

---

<sup>171</sup> *Mining Act 1978* (WA), s 29(2); WA Farmers, 'Western Australian Farming Land Better Protected On Mining Issues' (10 October 2011) <<https://wafarmers.org.au/media-release/84-western-australian-farming-land-better-protected-on-mining-issues>>.

<sup>172</sup> *Mining Act 1978* (WA), s 123(1).

<sup>173</sup> M Hunt, *Mining Law in Western Australia* (Federation Press, 4<sup>th</sup> ed, 2009), 67.

## 3.2 New South Wales

This portion of the report will detail the laws governing exploration and land access in New South Wales. New South Wales adopts a similar approach to Queensland in regard to landholder and licence holder rights, the requirement of access agreements and the likelihood that land access will be granted.

### 3.2.1 Overview of New South Wales land access laws

The *Mining Act 1992* (NSW) (*'Mining Act'*) and the *Petroleum (Onshore) Act 1991* (NSW) (*'Petroleum Act'*) regulate the exploration and development processes of mineral and petroleum resource sectors in New South Wales. Like Queensland, the statutory scheme sets out equivalent rules regarding the rights of access to land for mining and petroleum purposes. Although these rights to land access for exploration were originally stipulated by the *Mining* and *Petroleum Acts*, some portions of this have been altered or clarified under the *Mining and Petroleum Legislation Amendment (Land Access) Act 2010* (*'Land Access Act'*). Prior to examining the legislation in detail, the following is a summary of the major components and consequences of the framework:

- On application, the New South Wales Government may grant exploration licences, assessment leases or mining and production leases, which confer on licence holders a statutory right to explore for the specified mineral or resource on the property of a landholder;
- The licence or lease holders' right to access is circumscribed in the Act by the requirement to give notice and negotiate a Land Access Agreement with the landholder;
- If negotiations for are unsuccessful, an arbitrator will be appointed;
- If the negotiations are still unsuccessful, either party may appoint a member of the Arbitration Panel as arbitrator;
- If the parties are still unable to agree, a Land Access Agreement will be imposed by the arbitrator;
- This Land Access Agreement may be appealed firstly to the same arbitrator, and then further to the Land and Environment Court; and
- It is likely that access to land will ultimately be granted. The sum of compensation will become the major issue for the Land Court to determine if there are still disagreements between landholders and licence holders.

This process and the implication upon landholder rights will be discussed in more detail below.

### 3.2.2 Legislative framework

The New South Wales Government adopts a similar approach to Queensland, in that a resource company or individual may be granted a licence or lease permitting exploration, mining and extraction over a specified property. This process can be broken down three-fold:<sup>174</sup>

1. **Stage one - Exploration licence:** The *Mining Act*<sup>175</sup> confers a right of entry for exploration for minerals on a licence holder, where 'the holder of an exploration licence may, in

---

<sup>174</sup> Environmental Defender's Office, *Mining Law in New South Wales Discussion Paper* (2011) <[http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf)>.

<sup>175</sup> *Mining Act 1992* (NSW), s 29(1).

accordance with the conditions of the licence, prospect<sup>176</sup> on the land specified in the licence for the group or groups of minerals so specified.’ Similarly, the *Petroleum Act*<sup>177</sup> confer rights on the licence holder to Coal Seam Gas (CSG) exploration, where ‘the holder of an exploration licence has the exclusive right, in accordance with the conditions of the licence, to prospect for petroleum on the land comprised in the licence.’

2. **Stage two (optional) - Assessment lease:** An assessment lease is intended to preserve rights over land where a substantial mineral or petroleum deposit has been discovered, but may not be commercially viable yet.<sup>178</sup> Under the *Mining Act*,<sup>179</sup> ‘the holder of an assessment lease may, in accordance with the conditions of the lease, prospect on the land specified in the lease for the mineral or minerals so specified’. The *Petroleum Act*<sup>180</sup> provides a similar provision whereby ‘the holder of an assessment lease has the exclusive right to prospect for petroleum and to assess any petroleum deposit on the land comprised in the lease.’
3. **Stage three - Mining or production lease:** Under the *Mining Act*<sup>181</sup> ‘the holder of a mining lease granted in respect of a mineral or minerals, may in accordance with the conditions of the lease: (a) prospect on the land specified in the lease for, and mine on that land, the mineral or minerals so specified, and (b) carry out on the land such primary treatment operations (such as crushing, sizing, grading, washing and leaching) as are necessary to separate the mineral or minerals from the material from which they are recovered, and (c) carry out on that land any mining purpose.’ Likewise, *Petroleum Act*<sup>182</sup> provides that ‘the holder of a production lease has the exclusive right to conduct petroleum mining operations in and on the land included in the lease together with the right to construct and maintain on the land such works, buildings, plant, waterways, roads, pipelines, dams, reservoirs, tanks, pumping stations, tramways, railways, telephone lines, electric powerlines and other structures and equipment as are necessary for the full enjoyment of the lease or to fulfill the lessee’s obligations under it.’

Initially, both the *Mining Act*<sup>183</sup> and the *Petroleum Act* do not require licence applicants to expressly notify landholders or other stakeholders who potentially may be impacted by an application for mineral or petroleum exploration. A publication<sup>184</sup> of proposed exploration intentions in a local newspaper will satisfy the notice required.<sup>185</sup> It has been argued that this low threshold for notification

---

<sup>176</sup> ‘Prospect’ is defined in the dictionary to the *Mining Act 1992* (NSW) as to ‘carry out works on, or to remove samples from, land for the purpose of testing the mineral bearing qualities of the land, but does not include any activity declared not to be prospecting by a regulation under section 11A or by a declaration made under such a regulation’.

<sup>177</sup> *Petroleum (Onshore) Act 1991* (NSW), s 29.

<sup>178</sup> The note under section 33 of the *Petroleum (Onshore) Act 1991* (NSW) is analogous to section 47 of the *Mining Act 1992* (NSW) where ‘an assessment lease is designed to allow retention of rights over an area in which a significant petroleum deposit has been identified, if mining the deposit is not commercially viable in the short term but there is a reasonable prospect that it will be in the longer term. The holder is allowed to continue prospecting operations and to recover petroleum in the course of assessing the viability of commercial mining.’

<sup>179</sup> *Mining Act 1992* (NSW), s 47.

<sup>180</sup> *Petroleum (Onshore) Act 1991* (NSW), s 33.

<sup>181</sup> *Mining Act 1992* (NSW), s 73(1).

<sup>182</sup> *Petroleum (Onshore) Act 1991* (NSW), s 41.

<sup>183</sup> *Mining Act 1992* (NSW), Part VIII, Div 2; *Petroleum (Onshore) Act* (NSW), Part IVA.

<sup>184</sup> The notice must be included as an advertisement in *The Land* as well as an additional newspaper, which serves the wider community base of the area covered by the application for exploration.

<sup>185</sup> David Agnew, *Guideline for the Publication of Notice of an application for a Mining Lease* (State of New South Wales through the Department of Trade and Investment, Regional Infrastructure and Services (DTIRS), 11 May 2011) <[http://www.dpi.nsw.gov.au/data/assets/pdf\\_file/0011/363548/Newspaper-advertisement-guidelines-MLAsMay-2011.pdf](http://www.dpi.nsw.gov.au/data/assets/pdf_file/0011/363548/Newspaper-advertisement-guidelines-MLAsMay-2011.pdf)>

should become more stringent, in a bid to increase awareness amongst landholders with regard to potential mining and petroleum operations in their area.<sup>186</sup>

### 3.2.2.1 Land access agreements

Similar to Queensland, the New South Wales statutory regime, although conferring a right of access, does not confer an *automatic* right to access the land stipulated under the licence or lease.<sup>187</sup> This means that, despite the right to explore conferred by both the *Mining Act* and the *Petroleum Act*,<sup>188</sup> the holder of such a licence or lease must obtain an access arrangement detailing the consent of the landholder<sup>189</sup> to gain access to the property. Note however that in New South Wales, notice *and* an access agreement is required for *all* exploration activities, not just ones which would be considered to have a large impact on the landholder's land use. This is an important distinction between the New South Wales and Queensland approaches to land access. Under the New South Wales jurisdiction, even if the licence obtained is one of 'low-impact', which is similar to the 'preliminary activities' described under the Queensland Land Access Law, a higher threshold of *both* notice and an access agreement is required,<sup>190</sup> rather than merely a 10 day notice period prior to access.

To begin the process of obtaining a land access agreement in New South Wales, the licence holder must serve notice to the landholder.<sup>191</sup> Both Acts state that 'the notice of the holder's intention to obtain an access arrangement must, in addition to stating the holder's intention, contain:

- a) A plan and description of the area of land over which the access is sought sufficient to enable the ready identification of that area, and
- b) A description of the prospecting methods intended to be used in that area'<sup>192</sup>

Next, the landholder will usually be presented a generic access agreement from the licence holder.<sup>193</sup> The landholder however, is under no obligation at this point to assent to the terms stipulated in the agreement. It is important from the landholder's perspective that the access arrangement is tailored to the specific characteristics of their property.<sup>194</sup> Hence, the standard contract should provide a platform from which negotiations may commence. Pursuant to section 141 of the *Mining Act*<sup>195</sup> and section

---

<sup>186</sup> Ibid.

<sup>187</sup> NSW Farmers Association, *Negotiating Access Agreements* (2011)

<[http://www.nswfarmers.org.au/\\_data/assets/pdf\\_file/0020/68042/NSWFA\\_Mining\\_Flyersml.pdf](http://www.nswfarmers.org.au/_data/assets/pdf_file/0020/68042/NSWFA_Mining_Flyersml.pdf)>.

<sup>188</sup> *Mining Act 1992* (NSW), s 29(1); *Petroleum (Onshore) Act 1991* (NSW), s 29.

<sup>189</sup> The definition of 'landholder' under the *Mining Act 1992* (NSW) has caused some controversy and was considered in *Brown v Coal Mines Australia Pty Ltd* [2010] NSWSC 143. Schmidt J held that an exploration licence holder must serve notice to each landholder of its intention to obtain an access arrangement for a property proposed for prospecting. This meant that the term 'landholder' was construed widely to include mortgagees and that licence holders were obliged to form a land access agreement with each of these individuals. Although *Brown* concerned the *Mining Act 1992* (NSW), equivalent provisions are found in the *Petroleum (Onshore) Act 1991* (NSW). As a result of this decision a large number of access arrangements could have been rendered void. However, the NSW Government subsequently introduced the Mining and Petroleum Legislation Amendment (Land Access) Bill 2010 (NSW), validating the effected access agreements.

<sup>190</sup> *Mining Act 1992* (NSW), Part VIII, Div 2; *Petroleum (Onshore) Act 1991* (NSW), Part IVA.

<sup>191</sup> *Mining Act 1992* (NSW), s 141; *Petroleum (Onshore) Act 1991* (NSW), s 69E.

<sup>192</sup> Ibid.

<sup>193</sup> NSW Farmers Association, *Negotiating Access Agreements* (2011)

<[http://www.nswfarmers.org.au/\\_data/assets/pdf\\_file/0020/68042/NSWFA\\_Mining\\_Flyersml.pdf](http://www.nswfarmers.org.au/_data/assets/pdf_file/0020/68042/NSWFA_Mining_Flyersml.pdf)>.

<sup>194</sup> Ibid.

<sup>195</sup> *Mining Act 1992* (NSW).

69D(1) of the *Petroleum Act*,<sup>196</sup> ‘an access arrangement may make provision for or with respect to the following matters:

- a) The periods during which the holder of the prospecting title is to be permitted access to the land
- b) 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,
- 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 prospecting title 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 as a consequence of the holder of the prospecting title carrying out prospecting operations in or on the land,
- g) The manner of resolving any dispute arising in connection with the arrangement,
- h) The manner of varying the arrangement,
- i) The notification to the holder of the prospecting title of particulars of any person who becomes an additional landholder.’<sup>197</sup>

In circumstances where the licence holder and landholder cannot reach a consensus regarding the access arrangements, the *Mining Act* and *Petroleum Act* provide licence holders with the opportunity to determine the access agreement via arbitration.<sup>198</sup> Specifically, these circumstances are where:

‘If, by the end of 28 days, after the holder of a prospecting title serves notice in writing on each landholder of the holder’s intention to obtain an access arrangement, the holder and each landholder have been unable to agree on such an arrangement, the holder may, by further notice in writing served on each landholder, request them to agree to the appointment of an arbitrator.’<sup>199</sup>

If a further 28 days passes from the appointment of an arbitrator and an agreement as to the terms of land access still haven’t been reached, either party may apply to the Director-General for the appointment of a member of the Arbitration Panel as an arbitrator.<sup>200</sup> The arbitrator is required to conduct a hearing,<sup>201</sup> and must ‘use his or her best endeavours to bring the parties to a settlement acceptable to all of them’,<sup>202</sup> and provide an interim determination as to ‘whether or not the holder of the prospecting title should have a right of access to the land concerned.’<sup>203</sup> At this stage a draft access agreement will also be prepared.<sup>204</sup> If either party does not apply for reconsideration within a 14-day period,<sup>205</sup> the draft access agreement becomes the final determination.<sup>206</sup> The Act provides an avenue

---

<sup>196</sup> *Petroleum (Onshore) Act 1991* (NSW).

<sup>197</sup> *Mining Act 1992* (NSW), s 141; *Petroleum (Onshore) Act 1991* (NSW), s 69D(1).

<sup>198</sup> *Mining Act 1992* (NSW), Part VIII, Div 2; *Petroleum (Onshore) Act* (NSW), Part IVA.

<sup>199</sup> *Mining Act 1992* (NSW), s 143(1).

<sup>200</sup> *Ibid*, s 144(1).

<sup>201</sup> *Ibid*, s 145(1).

<sup>202</sup> *Ibid* s 147(1).

<sup>203</sup> *Ibid*, s 149(1)(a).

<sup>204</sup> *Ibid*, s 149(1)(b).

<sup>205</sup> *Ibid*, s 150(1).

for review, where ‘a party to a hearing who is aggrieved by an arbitrator’s final determination may apply to the Land and Environment Court for a review of the determination.’<sup>207</sup>

### 3.2.3 Provision for compensation

The New South Wales legislation, namely the *Mining Act*, *Petroleum Act* and the *Mine Subsidence Compensation Act 1961* (NSW) (“*MSC Act*”) set out similar provisions to Queensland in respect to compensation.<sup>208</sup>

#### 3.2.3.1 Compensation under the *Mining Act 1992*

Under the *Mining Act*, ‘on the granting of an exploration licence, a landholder of any land (whether or not subject to the licence) becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by’ a licence, lease or access agreement in respect of the lease or licence.’<sup>209</sup> Under the *Mining Act* ‘compensable loss’<sup>210</sup> means ‘loss caused, or likely to be caused by:

- a) Damage to the surface of land, to crops, tress, 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, 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)’<sup>211</sup>

Parties can negotiate the compensation amount, but it will only be valid if ‘it is in writing, signed by or on behalf of the parties to the agreement.’<sup>212</sup> If parties fail to reach an agreement, the Land and Environment Court will be employed to determine the compensation payable.<sup>213</sup>

#### 3.2.3.2 Compensation under the *Petroleum (Onshore) Act 1991*

The *Petroleum Act* adopts a similar approach to the *Mining Act* in compensating landowners. Section 107(1) states that ‘the holder of a petroleum title, or a person to whom an easement or right of way has been granted under this Act, is liable to compensate every person having any estate or interest in any land injuriously affected, or likely to be so affected, by reason of any operations conducted or other action taken in pursuance of this Act or the regulations or the title, easement or right of way concerned.’<sup>214</sup> Compensation under the *Petroleum Act* is limited, however as ‘compensation is not payable under this Act ... where the operations of the holder or person do not affect, and are not likely to affect, any portion of the surface of any land.’<sup>215</sup>

---

<sup>206</sup> Ibid, s 151(1).

<sup>207</sup> Ibid, s 155.

<sup>208</sup> Ibid, Part XIII; *Petroleum (Onshore) Act 1991* (NSW), Part 11.

<sup>209</sup> *Mining Act 1992* (NSW), s 263(1).

<sup>210</sup> Note that compensable loss does not include loss that is compensable under the *Mine Subsidence Compensation Act 1961* (NSW).

<sup>211</sup> *Mining Act 1992* (NSW), s 262.

<sup>212</sup> Ibid, Part XIII, Div 1.

<sup>213</sup> Ibid.

<sup>214</sup> *Petroleum (Onshore) Act 1991* (NSW), s 107(1).

<sup>215</sup> Ibid, s 107(3).

### 3.2.3.3 Compensation under the *Mine Subsidence Compensation Act 1961*

The *MSC Act* can assist landholders seeking compensation as a result of subsidence (damage from land that collapses or sinks) due to underground mining operations. The *MSC Act* compensates ‘subsidence due to’:

- a) the extraction of coal or shale, or
- b) the prospecting for coal or shale carried out within a colliery holding by the proprietor of the holding, and includes all vibrations or other movements of the ground related to any such extraction or prospecting (whether or not the movements result in actual subsidence), but does not include vibrations or other movements of the ground that are due to blasting operations in an open cut mine and that do not result in actual subsidence.<sup>216</sup>

### 3.2.3.4 Procedure for assessing compensation

The general procedure for assessing compensation is outlined under section 271 of the *Mining Act*, and section 74 of the *Mining Regulation Act*. The prescribed manner of assessing compensation is by ‘making an assessment that has regard to the following factors:

- a) the nature, quality, area and particular characteristics of the land concerned,
- b) the proximity of the land to any building, structure, road, track or other facility,
- c) the purpose for which the land is normally used,
- d) the use of the land that is approved under any development consent that is in force in respect of the land.<sup>217</sup>

### 3.2.4 Impact on landholder rights

Like Queensland, the New South Wales Government adopts an *enabling* approach with regard to the access of licence or lease holders to the property of landholders for exploration or excavation purposes. From the statutory framework laid out above, it is evident that landholders have no standing to prevent licence holders from accessing their land at the outset. This is also due to the Crown’s prerogative right to all minerals underneath the surface of land.<sup>218</sup> The rights conferred on landholders by the *Mining* and *Petroleum Acts* relate to their ability to negotiate the *when*, *where* and *how* of land access, rather than a power to decide whether land access should be permitted at all. Although the National Farmers Federation has petitioned for more stringent standards and increased power for landholders upon the control of land access, and the Australian Greens Party presented a Bill conferring rights upon farmers to refuse access, no legislation has yet been enacted to achieve this purpose.<sup>219</sup>

As stated above, New South Wales appears to have a higher threshold than Queensland regarding land access with regard to ‘nil or negligible’ exploration activities (Low-Impact licences). Despite this initial ability to negotiate the terms for *all* exploration activities, and stipulate conditions for access upon the licence holder, the legislation in New South Wales provides for an arbitration process.<sup>220</sup> Whilst this arbitration process may allow for the landholder to more strictly assert conditions for access, this process may be abused. It can be abused in circumstances where, if the licence holder

---

<sup>216</sup> *Mine Subsidence Compensation Act 1961* (NSW), s 4.

<sup>217</sup> *Mining Regulation 2010* (NSW), cl 74.

<sup>218</sup> *Cadia Holdings Pty Ltd v New South Wales* (2010) 269 ALR 204.

<sup>219</sup> Environmental Defender’s Office, *Mining Law in New South Wales Discussion Paper* (2011) <[http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf)>.

<sup>220</sup> *Mining Act 1992* (NSW), Part VIII, Div 2; *Petroleum (Onshore) Act 1991* (NSW), Part IVA.

disagrees with the conditions put forward by landholders, but still complies with the requirements set out by the legislation in creating a land access agreement, it is possible that the licensee will take advantage of the arbitration process to reduce the extent to which landholders may vary the terms of the agreement. The NSW Environmental Defender's Office, voices this concern, asserting that the practical effect of the legislation is to create an inequality in bargaining power between the licence holder and the landholder.<sup>221</sup> This also occurs in the process of finalizing a land access agreement where, although landholders retain the right to disagree with the final determination of a land access agreement and appeal to the Land and Environment Court, the major issue to be considered by the Court will generally be one of compensation, rather than the terms for which access may be permitted or whether access may be granted at all. Thus, as the issue is one of compensation – where the proposed conditions of the licence holder will be assigned a high enough monetary value to force the landholder to conform – it is inevitable that land access will be granted.<sup>222</sup>

Once the access agreement has been determined, circumstances may arise whereby the landholder does possess the right to deny access. If the licence holder contravenes the access agreement, a landholder of the land concerned may deny the holder access to the land until:

- a) The holder ceases the contravention, or
- b) The contravention is remedied to the reasonable satisfaction of, or in the manner directed by, an arbitrator appointed by the Director General.<sup>223</sup>

While this confers a right to deny access, it is only for temporary period, and ultimately access will be re-granted. Circumstances whereby a licence holder may contravene an access agreement is also unlikely, as generally, licence holders place a large important on maintaining licence holder/landholder relations.<sup>224</sup>

---

<sup>221</sup> Environmental Defender's Office, *Mining Law in New South Wales Discussion Paper* (2011) <[http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf)>.

<sup>222</sup> Ibid.

<sup>223</sup> *Petroleum (Onshore) Act 1991* (NSW), s 69D(4)

<sup>224</sup> Environmental Defender's Office, *Mining Law in New South Wales Discussion Paper* (2011) <[http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining\\_law\\_discussion\\_paper.pdf](http://www.edo.org.au/edonsw/site/pdf/pubs/110628mining_law_discussion_paper.pdf)>.

### 3.3 South Australia

Mineral resource development in South Australia is governed by the *Mining Act 1971 (SA)* (“*Mining Act*”). This legislation was amended in July 2011 to clarify and consolidate the position of landholders.<sup>225</sup> The South Australian legislation differs from the Queensland regime in at least one significant respect: in South Australia, the *Mining Act* distinguishes between freehold landowners and other landowners (such as pastoral landowners), and, in some limited circumstances, the legislation confers a right of veto upon freehold landowners. Because CSG is a marginal issue in South Australia, this section of the paper will discuss mineral resource development.<sup>226</sup>

#### 3.3.1 Legislative framework

A person seeking to enter land must obtain either written authorisation by the landholder, or, if written authorisation is not received, the person must serve a Notice of Entry on Land 21 days prior to entry.<sup>227</sup> Freehold landowners have a right to object to the entry by lodging an application with the Warden’s Court.<sup>228</sup> A different form must be served if ‘declared equipment’ is being used, and if the tenement holder is holding an exploration tenement.<sup>229</sup> Both freehold landowners and pastoral lessees have a right to object to the use of ‘declared equipment’, and this right can be exercised by lodging the objection with the Warden’s Court.<sup>230</sup> ‘Declared equipment’ includes a trench digger or excavator, drilling equipment within a class prescribed by the regulations, or mechanically driven equipment equipped with a blade or bucket of a width exceeding 750mm.<sup>231</sup>

Compensation rights are set out in s. 61 of the *Mining Act*. If an agreement with respect to compensation is unable to be reached, either the landholder or the tenement holder may bring the matter before a court. A unique feature of the South Australian compensation system is that the landowner may apply to the Land and Valuation Court for an order that the tenement holder acquire the land, if the activities of the mining operator “substantially impair the owner’s use of and enjoyment of the land”.<sup>232</sup> This is a useful device if a landowner feels that mere rehabilitation pursuant to a compensation agreement would be insufficient. Although the Queensland legislation is silent on this specific issue, purchase of the land could be accommodated in the terms of a conduct and compensation agreement.

The South Australian land access regime also sets out land that is exempt from resource development, including land that is within 400 metres of a building or structure used as a place of residence, land that is within 150 metres of a building or structure, or spring, well, reservoir or dam, worth \$200.00 or more, and land that is being used as a yard, garden, cultivated field, plantation, orchard, vineyard or airfield.<sup>233</sup> However, there are two important provisos to the exempt land provisions: exploration activities (such as survey pegging) can still take place on exempt land, and a tenement can still be

---

<sup>225</sup> Government of South Australia, ‘Guide for landowners: Amendments to the *Mining Act 1971* and *Mining Regulations 2011*’ (2011) <[http://www.pir.sa.gov.au/minerals/licensing\\_and\\_regulation/legislation/mining\\_act\\_amendments/guide\\_for\\_landowners](http://www.pir.sa.gov.au/minerals/licensing_and_regulation/legislation/mining_act_amendments/guide_for_landowners)>.

<sup>226</sup> Note the location of proposed, suspended and production wells: Australian Broadcasting Corporation, ‘Coal Seam Gas By the Numbers’ (2012) <<http://www.abc.net.au/news/specials/coal-seam-gas-by-the-numbers/>>.

<sup>227</sup> *Mining Act 1971 (SA)*, s 58A.

<sup>228</sup> The Warden’s Court is established by the *Mining Act 1971 (SA)*, Part 10.

<sup>229</sup> *Mining Act 1971 (SA)*, s 58A(3)(b).

<sup>230</sup> *Mining Act 1971 (SA)*, s 59.

<sup>231</sup> *Mining Act 1971 (SA)*, s 6.

<sup>232</sup> *Mining Act 1971 (SA)*, s 62A.

<sup>233</sup> *Mining Act 1971 (SA)*, s 9.

granted over exempt land, but operations cannot take place over them.<sup>234</sup> In addition to the exempt land provisions, landowners enjoy a right of veto over mining of extractive minerals (for example, sand, rock, gravel and clay).<sup>235</sup>

### 3.3.2 Impact on landholder rights

The South Australian legislation and departmental guidelines<sup>236</sup> place a heavy emphasis on the importance of maintaining stakeholder relations, including gaining local knowledge, identifying win-win outcomes and relationship building.<sup>237</sup> The South Australian guidelines include provisions that differ to the Queensland guidelines, and that may ameliorate landholder-tenement holder tensions: for example, the South Australian guidelines place a greater emphasis on community engagement, including a clause that encourages tenement holders to employ local contractors where possible.<sup>238</sup>

The guidelines also provide for the existence of a liaison officer, appointed by the tenement holder, to engage directly with the landholder, and the guidelines set out certain requirements that the liaison officer must meet.<sup>239</sup> It is recommended that the liaison officer has an “affinity for people on the land, and, if possible, a knowledge of farming and grazing practices”.<sup>240</sup> The role of the liaison officer is heavily emphasised in the relevant codes of conduct.<sup>241</sup> Although common sense practice may dictate that tenement holders in Queensland should appoint a liaison officer as a matter of course, the explicit mention of the existence and role of a liaison officer in the South Australian guidelines is likely to have some reassuring affect on landholders.

---

<sup>234</sup> *Mining Act 1971 (SA)*, s 57.

<sup>235</sup> *Mining Act 1971 (SA)*, s 75(1). ‘Extractive minerals’ is defined in section 6 of the *Mining Act 1971 (SA)*.

<sup>236</sup> The relevant department is the Department for Manufacturing, Innovation, Trade, Resources and Energy (DMITRE).

<sup>237</sup> Government of South Australia, ‘Guidelines for miners: mining approval processes in South Australia’ (2009) <<https://sarigbasis.pir.sa.gov.au/WebtopEw/ws/samref/sarig1/image/DDD/MRGMG1.pdf>>, 18-21.

<sup>238</sup> *Ibid.*, 18.

<sup>239</sup> South Australian Farmers Federation, ‘A Code of Conduct for Landholders and Mineral & Energy Explorers in South Australia’, <[http://www.saff.com.au/lib/pdf/\\_SET\\_ME/mf1507.pdf](http://www.saff.com.au/lib/pdf/_SET_ME/mf1507.pdf)>.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

### 3.4 Victoria

Mineral resource development in Victoria is governed by the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (*MRSD Act*). CSG development is marginal in Victoria, and therefore it will not be discussed in any depth.<sup>242</sup>

Landholder rights under the *MRSD Act* are broadly similar to those in Queensland. A compensation agreement must be registered before tenement holders are able to commence operations,<sup>243</sup> and, if negotiations for a compensation agreement are not successful, the Victorian Civil and Administrative Tribunal (VCAT) may determine compensation.<sup>244</sup> With regard to compensation, a difference between the Victorian and Queensland legislation is that specific reference is made to a ‘rehabilitation bond’ for the purposes of restoring the land to the position it was before mining operations commenced.<sup>245</sup> The distinction in practice is negligible, because the Queensland legislation intends for rehabilitation to be included in the conduct and compensation agreement. However, unlike the Queensland regime, the *MRSD Act* also provides for the cost of a landholder or landowner obtaining replacement land, and an uplift of up to 10% may be awarded.<sup>246</sup>

A provision peculiar to the Victorian legislation is the codification of ‘principles of sustainable development’, which must be taken into account in the administration of the *MRSD Act*.<sup>247</sup> Relevant to landholder rights is the sustainable development principle of ‘community well-being’, which the legislation says ought to be “enhanced by following a path of economic development that safeguards the welfare of future generations”.<sup>248</sup> This broad phrasing of this section may give the relevant bodies some latitude with respect to the application of the Act in a landholder’s favour. The Victorian Farmers Federation has taken a strong stand against the legislation, demanding that farmers enjoy a power of veto over mining activities, including CSG.<sup>249</sup>

---

<sup>242</sup> Note the location of proposed, suspended and production wells: Australian Broadcasting Commission (ABC), ‘Coal Seam Gas By the Numbers’ (2012) <<http://www.abc.net.au/news/specials/coal-seam-gas-by-the-numbers/>> (accessed 20 May 2012).

<sup>243</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s. 42(2)(c).

<sup>244</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s. 88. Victorian Government Department of Primary Industries, ‘Minerals exploration and mining in Victoria: Landholder information booklet’ (2010) *Department of Primary Industries* <[http://www.dpi.vic.gov.au/data/assets/pdf\\_file/0016/28051/New-Landholder-Information0410.pdf](http://www.dpi.vic.gov.au/data/assets/pdf_file/0016/28051/New-Landholder-Information0410.pdf)> (accessed 29 April 2012).

<sup>245</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), Part 7.

<sup>246</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s. 85(2).

<sup>247</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s. 2A(1).

<sup>248</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic), s. 2A(1)(a).

<sup>249</sup> Victorian Farmers Federation, ‘Farmers demand power of veto on mining’ (2012) *Victorian Farmers Federation* <[http://www.vff.org.au/media\\_centre/detail.php?id=1275](http://www.vff.org.au/media_centre/detail.php?id=1275)> (accessed 27 April 2012).

## 3.5 Alberta

### 3.5.1 Overview

Alberta's long-standing land access regime for mineral development, including CSG,<sup>250</sup> and the building of pipelines and other intrusions on land is contained in the *Surface Rights Act* ("SRA").<sup>251</sup> The SRA deals with disputes between "owners" and "occupants" with interests in the surface of the land<sup>252</sup> and "operators" who have rights to the relevant sub-surface minerals.<sup>253</sup> The SRA is administered by a quasi-judicial statutory authority, the Surface Rights Board ("SRB").<sup>254</sup> Although the SRA process allows access to land without the consent of the landholder, it contains detailed provisions on initial compensation for land access and also for the review of initial compensation orders and compensation for additional damage caused during operations.

### 3.5.2 Legislative framework

The SRA provides for two levels of land access. The first concerns initial right of entry for initial surveys subject only to a notice requirement. The second concerns rights of entry for final operations, which are conferred by consent of the owner or occupant pursuant to a "surface lease" or, where consent is not granted, by a "right of entry order" made by the SRB.

#### 3.5.2.1 Right of entry for surveys

Section 14 of the SRA provides for entry onto private land, without consent, for the purpose of identifying the relevant areas of the surface necessary for their operations. It allows the operator to enter land for the purpose of making surveys or examinations on the surface of the land, and setting out and ascertaining those portions of the surface of the land that are incidental to or necessary for the operation.<sup>255</sup>

The only restriction on this right of entry is the requirement to attempt to give notice to the person in possession. An operator seeking to enter land (except Crown land) shall make a reasonable attempt to give notice of it to the person in possession of the land before entering on it.<sup>256</sup> The SRA also states that the operator is liable to the owner or the occupant of the land for any damage caused by the operator.<sup>257</sup>

The SRA also clarifies that an application may be made to a Court to enforce the rights granted under section 14:

The Court of Queen's Bench may, on application by the operator, make any order that may be necessary to enable the operator or any person employed or engaged by the operator to exercise the operator's or other person's rights...<sup>258</sup>

---

<sup>250</sup> Alberta Energy, 'Coalbed Methane Development' (online) <<http://www.energy.alberta.ca/NaturalGas/753.asp#access>>; *Surface Rights Act*, RSA 2000, c S-24, s 1(e).

<sup>251</sup> *Surface Rights Act*, RSA 2000, c S-24.

<sup>252</sup> *Ibid*, s 1(g), (i).

<sup>253</sup> *Ibid*, s 1(h)(i).

<sup>254</sup> *Ibid*, s 3(3). Proceedings before the SRB are relatively flexible, as it is not bound by the laws of evidence, may make decisions "on the papers", and can adopt settlements reached through ADR processes. See generally: Surface Rights Board, 'About Us' (online) <<http://www.surfacerights.gov.ab.ca/aboutus/default.aspx>>.

<sup>255</sup> *Surface Rights Act*, RSA 2000, c S-24, ss 14(1)(a)-(b).

<sup>256</sup> *Ibid*, s 14(2).

<sup>257</sup> *Ibid*, s 14(2).

<sup>258</sup> *Ibid*, s 14(3).

### 3.5.2.2 *Right of entry for operations*

Firstly, section 12 provides for land access as a result of the owner and/or occupant's consent. Secondly, section 15, read together with section 12, provides for land access where consent cannot be obtained as a result of the SRB's determination.

#### ***Section 12 – Land access by consent (Surface Lease)***

Section 12(1) of the *SRA* provides that, 'until the operator has obtained the consent of the owner and the occupant of the surface of the land',<sup>259</sup> operators do not have a right of entry for, *inter alia*, 'the removal of minerals contained in or underlying the surface of that land or for or incidental to any mining or drilling operations'<sup>260</sup> or 'the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures'.<sup>261</sup> Section 12(2) also provides that any access to land granted in an instrument 'pertaining to the acquisition of an interest in a mineral' is not effective unless the instrument 'provides a specific separate sum in consideration for the right of entry of the surface required for the operator's operations'.<sup>262</sup>

#### ***Section 12, 15 & 16 – Land access by right of entry order***

Section 15(1) of the *SRA* provides that, when 'the operator cannot acquire the consent of the owner and the occupant as required by section 12, the operator may apply to the Board for a right of entry in respect of the surface of the land that may be necessary for the performance of the operator's operations'.<sup>263</sup> Any application must include, *inter alia*, 'a copy of the most recent written offer made by the operator to the respondent and evidence satisfactory to the Board that the offer has been refused'.<sup>264</sup>

The SRB may make a right of entry order if it 'considers it appropriate to do so'. However, this conferral of discretion has been rendered largely irrelevant by several decisions of the Alberta Court of Queen's Bench. In *Windrift Ranches*,<sup>265</sup> it was held that decisions of the SRB to make right of entry orders were 'ancillary and in aid of the activities authorized by the ERCB',<sup>266</sup> which is the authority granting mineral exploration licenses. As McClung JA stated:

It would be an astonishing proposition indeed if the Surface Rights Board could, in the exercise of its jurisdiction, deny entry to a well site, and in so doing, effectively repeal an earlier Energy Resources Conservation Board well licence and thereby frustrate the jurisdiction of the Energy Resources Conservation Board. Nothing in the Act, let alone clear and permissive wording; supports the existence of that authority.<sup>267</sup>

More recently in *Mueller*,<sup>268</sup> Miller J stated:

In its role concerning Right of Entry Orders it is essentially a "rubber stamp". Following the issuance of a permit or licence by the Energy Resources Conservation Board or the ERCB

---

<sup>259</sup> *Ibid*, s 12(1).

<sup>260</sup> *Ibid*, s 12(1)(a).

<sup>261</sup> *Ibid*, s 12(1)(b).

<sup>262</sup> *Ibid*, s 12(2).

<sup>263</sup> *Ibid*, s 15(1).

<sup>264</sup> *Ibid*, s 15(2)(a).

<sup>265</sup> *Windrift Ranches Ltd v Alberta (Alberta Surface Rights Board)* [1986] ABCA 158, [18].

<sup>266</sup> *Ibid*.

<sup>267</sup> *Ibid*, [2].

<sup>268</sup> *Mueller v Montana Alberta Tie Line* [2011] ABQB 738.

within which the party has authorization to seek entry onto the land, the Surface Rights Board has no alternative but to issue a Right of Entry Order. It is important to keep this role of the Surface Rights Board separate from that of ordering compensation, where the standard of review and deference may in fact be different.<sup>269</sup>

The right of entry order is to be made when the operator files ‘a letter of consent in the prescribed form signed by the respondents’ to the application,<sup>270</sup> or, if no hearing is ordered,<sup>271</sup> ‘not less than 14 days after the date of service by or on behalf of the Board on the respondents [the owner or occupant of the land]’ of ‘a notice in the prescribed form’ and ‘a copy of the application.’<sup>272</sup> Thus, the SRB is likely to only hold a hearing if the owner or occupant of the land objects within 14 days of being served with a notice from the SRB. The SRB may then ‘hold a hearing with respect to the application and objection at a time and place that the Board considers advisable’.<sup>273</sup>

The right of entry order must ‘describe the portion of the surface of the land that is necessary for the performance of the operator’s operations’<sup>274</sup> and may be subject to any conditions that the SRB considers appropriate,<sup>275</sup> but cannot be inconsistent with any other regulatory approval ‘granted by the Alberta Utilities Commission or the Energy Resources Conservation Board’.<sup>276</sup> Section 12(3) relevantly clarifies that a right of entry order may be granted:

...in respect of the surface of

- (a) the land in which the operator or the operator’s principal has the right to a mineral or the right to work a mineral, and
- (b) any other land that is necessary
  - (i) for a road to connect the operator’s mining or drilling operations located on adjacent land and to permit the operations to be operated jointly, and for the tank, stations and structures to be used in the operations,
  - (ii) to give to the operator access to the operator’s mining or drilling operations from a public roadway or other public way, and egress from the operations to the public roadway or other public way.<sup>277</sup>

Section 16 of the *SRA* clarifies the legal effect of a right of entry order. Unless otherwise provided, the order vests in the operator ‘the exclusive right, title and interest in the surface of the land in respect of which the order is granted’,<sup>278</sup> and:

...to the extent necessary for the operator’s operations, the right to excavate or otherwise disturb any minerals within, on or under the land without permission from or compensation to the Crown or any other person with respect to those minerals.<sup>279</sup>

---

<sup>269</sup> Ibid, [34].

<sup>270</sup> *Surface Rights Act*, RSA 2000, c S-24, s 15(4)(a).

<sup>271</sup> Ibid, s 15(5).

<sup>272</sup> Ibid, ss 15(4)(b)(i)-(ii).

<sup>273</sup> Ibid, s 15(5).

<sup>274</sup> Ibid, s 15(6)(a).

<sup>275</sup> Ibid, s 15(6)(b).

<sup>276</sup> Ibid, s 15(6).

<sup>277</sup> Ibid, s 12(3).

<sup>278</sup> Ibid, s 16(1)(a).

<sup>279</sup> Ibid, s 16(1)(b).

However, it does not confer ‘the right to a certificate of title issued pursuant to the *Land Titles Act*’,<sup>280</sup> or ‘the right to carry away from the land any sand, gravel, clay or marl or any other substance forming part of the surface of the land’.<sup>281</sup>

### ***Termination of right of entry orders***

The SRB is able to terminate a right of entry order in particular circumstances, although any such termination is largely discretionary.<sup>282</sup> Of greatest relevance is the power to terminate an order when there is delay in commencing operations on the part of the operator. If, at least 2 months from the date of the order:

...the operator has not commenced to use or has ceased to use the surface of the land or any part of it, the operator, the owner or the occupant may request the Board for an order terminating the right of entry order as to that land or part of it.<sup>283</sup>

### **3.5.3 Impact on landholder rights**

The provisions of the *SRA* proceed on the assumption that agreements for land access will ordinarily be reached between land holders and operators, and require that attempts be made to achieve access through negotiation with land holders. Furthermore, the initial right of entry for surveys is only conditional on a reasonable attempt to give notice to the landholder, and a right of entry order for operations is to be made if the SRB considers it appropriate to do so. As has been mentioned above, Courts have held that there is little if any scope for the operation of this discretion in relation to mineral and oil and gas exploration. In light of these authorities, the inclusion of this discretion can be best explained as relevant to the other activities, such as the building of pipelines and power transmission lines, covered by the *SRA*.

Thus, although the grant of a right of entry order is not automatic, landholders have no “right” to refuse access, and an entry order will ordinarily be made. Similarly, although the Government of Alberta’s Farmers’ Advocate Office aims to provide some services to landholders in relation to land access, it does not provide legal advice and also aims to ‘maximize future economic opportunity as it relates to interaction with the energy industry’.<sup>284</sup> However, the involuntary aspects of Alberta’s land access scheme are ameliorated to some extent by its extensive provisions on compensation, considered in detail below.

### **3.5.4 Provision for compensation**

#### ***3.5.4.1 Entry fees***

Section 19 of the *SRA* provides for the payment of an “entry fee”, in addition to any compensation,<sup>285</sup> when exercising a right of entry for any of the purposes in section 12(1), which relate to the extraction of minerals and construction of incidental infrastructure. This entry fee is the lesser of \$5000<sup>286</sup> or ‘\$500 per acre granted to the operator, or a proportionate amount, not to be less than \$250, where the land granted to the operator is less than one acre’.<sup>287</sup> This fee is calculated in relation to each titled

---

<sup>280</sup> Ibid, s 16(1)(a)(i).

<sup>281</sup> Ibid, s 16(1)(a)(ii).

<sup>282</sup> Ibid, s 28(1)-(6).

<sup>283</sup> Ibid, s 28(1).

<sup>284</sup> Farmers’ Advocate Office, ‘The Farmers Advocate Office Mandate’ (3 April 2012) <[http://www1.agric.gov.ab.ca/\\$department/deptdocs.nsf/all/ofa2621](http://www1.agric.gov.ab.ca/$department/deptdocs.nsf/all/ofa2621)>.

<sup>285</sup> *Surface Rights Act*, RSA 2000, c S-24, s 19(5).

<sup>286</sup> Ibid, s 19(2)(a).

<sup>287</sup> Ibid, s 19(2)(b).

parcel of land, which ‘contains land that is granted to the operator’.<sup>288</sup> Apart from entry for the permitted purposes of surveys and preparatory work,<sup>289</sup> the right of entry is not to be exercised until the entry fee has been paid.<sup>290</sup>

#### **3.5.4.2 Initial compensation orders**

Section 23 provides that once a right of entry order has been made the SRB must ‘hold proceedings to determine the amount of compensation payable and the persons to whom it is payable’.<sup>291</sup> Section 25 governs the determination of compensation, which may be paid ‘in the manner and over the periods the Board decides’,<sup>292</sup> and include interest.<sup>293</sup> Section 25(1) identifies six relevant considerations:

- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,
- (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,
- (c) the loss of use by the owner or occupant of the area granted to the operator,
- (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,
- (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and
- (f) any other factors that the Board considers proper under the circumstances.<sup>294</sup>

The board is entitled to ‘ignore the residual and reversionary value to the owner or occupant of the land granted to the operator’ when considering right of entry orders made after 4 July 1983.<sup>295</sup> The SRB must also grant an additional amount of compensation for the relocation of the owner’s residence (if required by the right of entry order) to ‘accommodation that is at least equivalent to the accommodation on the land in respect of which the right of entry order is made’,<sup>296</sup> and must ‘include the increase in cost between the date on which the right of entry order was made and the time when the new accommodation can reasonably be obtained’.<sup>297</sup> Compensation can also be granted for:

- ‘damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator, if those operations were incidental to the operations of that operator on the area granted to the operator under the right of entry order’,<sup>298</sup>
- ‘the loss of or damage to livestock or other personal property of the owner or occupant

---

<sup>288</sup> Ibid, s 19(2).

<sup>289</sup> Ibid, s 14.

<sup>290</sup> Ibid, s 19(4).

<sup>291</sup> Ibid, s 23.

<sup>292</sup> Ibid, s 25(7).

<sup>293</sup> Ibid, s 25(9).

<sup>294</sup> Ibid, s 25(1).

<sup>295</sup> Ibid, s 25(2).

<sup>296</sup> Ibid, s 25(3).

<sup>297</sup> Ibid, s 25(4).

<sup>298</sup> Ibid, s 25(5)(a).

caused by or arising out of the operations of the operator’;<sup>299</sup> and,

- ‘time spent or expense incurred by the owner or occupant in recovering any of the owner’s or occupant’s livestock that have strayed due to an act or omission of the operator’.<sup>300</sup>

Despite the specification of these factors in the legislation, and partially because of the freedom of the SRB to consider any factors it ‘considers proper’, a global approach to compensation which does not seek to specifically apportion compensation under each heading appears to be dominant,<sup>301</sup> and it is also established that voluntary dealings are to be given significant weight.<sup>302</sup> However, it should be noted that the “global” approach to compensation has been described as ‘no more than an attempt to evade a methodological and reasoned consideration of the feature of the features of the individual case’.<sup>303</sup>

### **3.5.4.3 Appeals against compensation orders**

The *SRA* provides for appeals, by way of rehearing,<sup>304</sup> to the Alberta Court of Queen’s Bench ‘as to the amount of compensation payable or the person to whom the compensation is payable or both’,<sup>305</sup> in relation to a compensation order issued by the SRB.<sup>306</sup> The potential costs orders for such appeals are structured to discourage challenges by operators, but not by owners. Unless special circumstances are shown, the costs of an appeal brought by an operator are payable on an indemnity (‘lawyer’s charges to the client’) basis regardless of the result.<sup>307</sup> However, if an appeal brought by an owner or occupant is successful, their costs are paid on an indemnity basis,<sup>308</sup> and if unsuccessful their liability to pay the operator’s costs is assessed on the standard basis under the *Alberta Rules of Court*, as directed by the Court in its discretion.<sup>309</sup>

### **3.5.4.4 Pre-payment**

Under section 20, when providing compensation under a right of entry order the operator must pre-pay ‘a sum of money equal to 80% of the compensation offered in the written offer filed with the application in respect of the first compensation year of the term of the right of entry order and... the operator shall not exercise the operator’s right of entry until the money has been paid’.<sup>310</sup> This sum can then be set off against the final amount of compensation payable.<sup>311</sup>

### **3.5.4.5 Review of compensation orders and surface leases**

---

<sup>299</sup> Ibid, s 25(5)(b).

<sup>300</sup> Ibid, s 25(5)(c).

<sup>301</sup> *Dome Petroleum Ltd v Richards* (1985) 66 AR 245.

<sup>302</sup> *Livingston v Siebens Oil & Gas Ltd* (1978) 8 AR 439. See also: Sarah Nykolaishen and Nigel Bankes, ‘The Jurisdiction of the Alberta Surface Rights Board Under Section 30 of the *Surface Rights Act*’ (2011) 49 *Alberta Law Review* 1; Barry Barton, ‘Controversy in Surface Rights Compensation: Pattern of Dealings Evidence and Global Awards’ (1985) 24 *Alberta Law Review* 34.

<sup>303</sup> Barry Barton, ‘Controversy in Surface Rights Compensation: Pattern of Dealings Evidence and Global Awards’ (1985) 24 *Alberta Law Review* 34, 58.

<sup>304</sup> *Surface Rights Act*, RSA 2000, c S-24, s 26(6).

<sup>305</sup> Ibid, s 26(1).

<sup>306</sup> Ibid, s 26(2).

<sup>307</sup> Ibid, s 26(9)(a).

<sup>308</sup> Ibid, s 26(9)(b)(i).

<sup>309</sup> Ibid, s 26(9)(b)(ii).

<sup>310</sup> Ibid, s 20(1).

<sup>311</sup> Ibid, s 25(6).

The *SRA* relevantly provides for the review of ‘compensation orders and surface leases that provide for the payment of compensation on an annual or other periodic basis’.<sup>312</sup> Operators are required to give a notice ‘on or within 30 days after the 4<sup>th</sup> anniversary of the date’ of the commencement of the surface lease or the making of the right of entry order.<sup>313</sup> This notice is required to state, in relation to subsequent ‘compensation years’ of the lease:

- ‘that the operator wishes to have the rate of compensation reviewed’;<sup>314</sup>
- ‘that the lessor or respondent... has a right to have the rate of compensation reviewed’;<sup>315</sup> or
- ‘where no rate of compensation has been fixed, that the lessor or respondent... has a right to have a rate of annual compensation fixed’.<sup>316</sup>

Parties then to enter into ‘negotiations in good faith’ to determine any change to compensation,<sup>317</sup> and any changes are incorporated into the lease or the compensation order.<sup>318</sup> If no agreement is reached ‘by the end of the compensation year’, an application may be made to the Board to determine the compensation.<sup>319</sup> This application is heard and determined in largely the same manner as original determinations under section 23 of the *SRA*,<sup>320</sup> and can also be appealed to the Court.<sup>321</sup> This procedure is then repeated every five years from the date the original, fourth anniversary notice, should have been given.<sup>322</sup> Also, it should be noted that if the operator does not give the notice as required, the lessor or respondent may ‘within a reasonable time after the failure, give a notice to the operator’, and the same procedures then apply.<sup>323</sup>

#### **3.5.4.6 Non-payment of compensation**

Section 36 of the *SRA* provides an avenue for occupants and owners to prevent access to land where there has been a failure to provide the required compensation.<sup>324</sup> Where the due date for the receipt of compensation has passed ‘the person entitled to receive the money may submit to the Board written evidence of the non payment’.<sup>325</sup> If satisfied of the non-payment, the Board must send ‘a written notice to the operator demanding full payment’.<sup>326</sup> If this is then not complied with, the Board may ‘suspend the operator’s right to enter the site affected by the compensation order or lease’<sup>327</sup> and ‘terminate all the operator’s rights under the right of entry order or lease’.<sup>328</sup> The Board can then direct that compensation to the occupant or owner be paid out of consolidated revenue.<sup>329</sup>

---

<sup>312</sup> Ibid, s 27(3)(a).

<sup>313</sup> Ibid, s 27(4)(a).

<sup>314</sup> Ibid, s 27(5)(a).

<sup>315</sup> Ibid, s 27(5)(b).

<sup>316</sup> Ibid, s 27(5)(c).

<sup>317</sup> Ibid, s 27(6).

<sup>318</sup> Ibid, s 27(7).

<sup>319</sup> Ibid, s 27(8).

<sup>320</sup> Ibid, ss 27(9)-(13).

<sup>321</sup> Ibid, s 27(12).

<sup>322</sup> Ibid, s 27(14).

<sup>323</sup> Ibid, s 27(15).

<sup>324</sup> Ibid, s 36.

<sup>325</sup> Ibid, s 36(3).

<sup>326</sup> Ibid, s 36(4).

<sup>327</sup> Ibid, s 36(5)(a).

<sup>328</sup> Ibid, s 36(5)(b).

<sup>329</sup> Ibid, s 36(6).

### 3.5.4.7 Compensation for additional damage and expense

The SRB has jurisdiction over claims for compensation for subsequent activity brought within two years of the alleged damage<sup>330</sup> and for an amount within the relevant monetary limit, currently \$25,000.<sup>331</sup> These claims must relate to one of the following types of damage:

- for damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator;<sup>332</sup>
- (for any loss or damage to livestock or other personal property of the owner or occupant arising out of the operations of the operator whether or not the land on which the loss or damage occurred is subject to the surface lease or right of entry order,<sup>333</sup> or,
- for time spent or expense incurred by an owner or occupant in recovering any of the owner's or occupant's livestock that have strayed due to an act or omission of the operator whether or not the act or omission occurred on the land that is subject to the surface lease or right of entry order.<sup>334</sup>

A recently produced summary of the Board's decisions in this area indicate that claimants recover on average approximately \$33,000 each year.<sup>335</sup> However, despite the similarity between these heads of damage and the factors to be taken into account in initial compensation orders, it has been noted that the SRB's decisions on this aspect of its jurisdiction lack consistency.<sup>336</sup> Nykolaishen and Bankes argue that this stems from Board members' differing opinions on the relationship between compensation for additional damage and compensation which ought to be the subject of an initial compensation order or the subject of the compensation review process discussed above.<sup>337</sup> It may be that jurisdictional complexity is an inevitable disadvantage of an exhaustive legislative scheme such as the *SRA*.

### 3.5.4.8 Trespass

Section 38 of the *SRA* also clarifies that any person entering on, using or taking any of the surface of land in contravention of the *SRA* is 'deemed to have committed a trespass' and is liable to compensate the owner or occupant of the land.<sup>338</sup> It appears that compensation for trespass will be awarded when tangible loss has been caused to the landowner.<sup>339</sup>

## 3.1.5 Other aspects of mineral exploration regulation in Alberta

In a similar fashion to Queensland's *Strategic Cropping Land Act 2011* (Qld) discussed above, the *Alberta Land Stewardship Act* ("ALSA") aims to introduce a regional planning approach to land development and use, including mineral exploration.<sup>340</sup> The *ALSA* will broaden the considerations taken into account by the authority granting mineral rights, but conflicts between surface and sub-

---

<sup>330</sup> Ibid, s 30(2)(a).

<sup>331</sup> Ibid, s 30(2)(c).

<sup>332</sup> Ibid, s 30(1)(a).

<sup>333</sup> Ibid, s 30(1)(b).

<sup>334</sup> Ibid, s 30(1)(c).

<sup>335</sup> Sarah Nykolaishen and Nigel Bankes, 'The Jurisdiction of the Alberta Surface Rights Board Under Section 30 of the *Surface Rights Act*' (2011) 49 *Alberta Law Review* 1, 32.

<sup>336</sup> Ibid, 8.

<sup>337</sup> Ibid.

<sup>338</sup> *Surface Rights Act*, RSA 2000, c S-24, s 38.

<sup>339</sup> *Wrangler West Energy Corp v Kaup* (2010) SRB Decision 2010/0338.

<sup>340</sup> *Alberta Land Stewardship Act*, SA 2009, c A-26.8.

surface activities will largely remain the preserve of the SRB and there seems to be no scope for landholder interests to be directly taken into account in the grant process.<sup>341</sup>

---

<sup>341</sup> For a discussion of these developments, see: Alan Harvie and Trent Mercier, 'The Alberta Land Stewardship Act and its Impact on Alberta's Oil and Gas Industry' (2010) 48 *Alberta Law Review* 295.

## 4 COMPARISON OF APPROACHES

As has been outlined above, the land access regimes in the jurisdictions considered above have both significant similarities and significant differences. This section identifies these features, referencing sections of the previous discussion where relevant. First, it should be noted that none of the jurisdictions afford landholders a general power of veto over land access. The various land access regimes proceed on the assumption that access will ultimately be granted. However, they differ in terms of their approach to the grant of land access, and in providing for some limited situations in which land access cannot be imposed without the landholder's consent.

A distinction is made in several jurisdictions between preliminary activities, generally consisting of surveys and initial exploration activities, and advanced activities, involving full-scale extraction operations on the land in question. In Queensland and Alberta there is no requirement that an access arrangement be in place before entering the land for preliminary activities. Instead, there is a requirement that notice be given to the landholder of the intended entry. In Queensland, this requires notice of 10 business days, and Alberta merely requires that a 'reasonable attempt to give notice' be made, with no minimum notice period being specified. Western Australia requires a successful application for a "permit to enter" and notification of entry to the owner or occupier. However, it appears that only subsequent (albeit prompt) notice of the entry is required.

However, the legislative scheme in New South Wales confers significantly greater protections on landholders. The distinction, in terms of land access, between preliminary and advanced activities is removed by the existence three stages of land access: exploration, assessment and production, and there is no possibility of entry on land before an access agreement has been negotiated or imposed as a result of arbitration. Similarly, South Australia makes no distinction between preliminary and advanced activities. Instead, the licence holder must serve a notice of intended entry on the landholder 21 days prior to entry, and the landholder must object within 14 days of the notice being given in order to activate the dispute.

All jurisdictions except Queensland require that landholders voluntarily reach agreement with license holders or have an arbitrated access arrangement in place (provided landholders have objected), before entering the land for full-scale production activities. Extraordinarily, Queensland allows entry onto land for advanced activities without any concluded access or compensation arrangement in place, as long as arbitration before the Land Court has commenced and the required negotiation and mediation periods have expired. However, all jurisdictions ultimately require landholders to be compensated for the land access arrangements imposed or voluntarily entered into.

The measurement of compensation operates in a broadly similar manner in the jurisdictions considered: the relevant Acts contain a non-exhaustive list of relevant factors, and the assessing judicial or administrative authority makes an overall assessment based on these factors. In Queensland, landholders are to be compensated for any compensable effect, which includes deprivation of possession, diminution in value and diminution of use, extending to the loss of use of the land and effects on land retained. While there is nothing to prevent other factors operating in the assessment of compensation, other jurisdictions do specify in greater detail the factors to be taken into account. For example, the New South Wales and Alberta legislation specifies interference or disturbance with stock as a head of compensation. Also, it should be noted that Alberta has the most extensive and detailed scheme for compensation. Alberta's *Surface Rights Act* makes provision for entry fees, initial compensation orders and periodic review of compensation orders and leases, which can take into account future losses suffered by landholders.

Most jurisdictions provide a limited power of veto to landholders in relation to mineral production in relation to land in the vicinity of dwellings, significant structures, cultivated land and water supplies. However, none of the jurisdictions extend these protections to petroleum and gas production, except Western Australia, which provides for some limited restrictions when the activities involve relatively small areas of private land and reservoirs.

Other restrictions of significance include various regimes designed to protect areas of land from mining activity, such as Queensland's *Strategic Cropping Land Act 2011*, and Alberta's *Alberta Land Stewardship Act*. However, these acts operate at the stage of the grant of the mining tenement, and are neither directly connected to landholder interests nor an aspect of the relevant land access regimes.

## 5 RECOMMENDATIONS

Policy considerations, such as the State ownership of mineral and petroleum rights and the risk of impeding development to an unacceptable degree, militate against legislating for a right of veto in favour of landholders. However, the jurisdictions discussed in this Research Note all offer landholders some, albeit varying, levels of protection. Based on the examination of various jurisdictions, both domestic and international, the following recommendations may be made in order to ensure landholders are placed in a more equitable position in resource project negotiations.

Exceptionally, the Queensland legislative regime allows mining and petroleum operations to commence without an access agreement in place, where proceedings are before the Land Court and relevant negotiation periods have been complied with. It is recommended that this provision for entry be removed, in order to bring Queensland's land access regime into line with the position in other Australian jurisdictions.

Attention should also be directed to the lack of detail in Queensland's provisions for compensation in relation to land access for mineral and petroleum development. The legislative scheme for compensation in Alberta and also in other Australian jurisdictions may serve as a model of detail for any amendments to the Queensland legislation. Detailed compensation provisions, identifying the relevant factors to be taken into account, are relevant not only for judicial or administrative decision-makers in arriving at an arbitrated compensation outcome, but also provide the basis for negotiations between landholders and tenement owners. It is recommended that further detail be included in the *PAG Act* and the *MRA* in relation to compensation.

'Restricted land', or land that is otherwise exempt from development, is a feature of most jurisdictions. Unusually, Queensland's *PAG Act* does not provide for 'restricted land', despite the *PAG Act*'s close resemblance to the *MRA vis-à-vis* conduct and compensation. Given the similar significance of mineral and petroleum extraction to the categories of land designated as 'restricted', it is recommended that there be uniformity across the Queensland legislative regime, so that both the *PAG Act* and the *MRA* have identical provisions in relation to 'restricted land'.

In terms of the content of the 'restricted land' provisions, the Western Australia legislation offers more generous protections than those provided for by the *MRA*. As such, these provisions should be adopted in Queensland. Furthermore, the legislature should consider the inclusion of a provision that operates as a 'catch all', pursuant to which the Land Court may exercise some discretion as to whether or not development should be barred.

Strategic cropping land legislation has been introduced in Queensland in an attempt to protect parcels of prime agricultural land that may otherwise have been the subject of resource development. Although the *Strategic Cropping Land Act* does not of itself permit landholders to veto development, it does provide landholders with some level of assurance if their land is designated as strategic cropping land. Pasture land used for livestock grazing is not encompassed by the *Strategic Cropping Land Act*.<sup>342</sup> It is recommended that the legislation be expanded in order to protect grazing land. Such an approach may be seen as a legitimate compromise between mining and petroleum interests and the agricultural lobby: the legislation does not seek to bar development altogether, rather, it serves as a reversal of the onus of proof, requiring the tenement holder to show that resource activity will not permanently alienate the land. The recently elected Liberal National Party of Queensland have

---

<sup>342</sup> Queensland Government, 'Strategic Cropping Land Frequently asked questions' (2012) <[http://www.derm.qld.gov.au/land/planning/strategic-cropping/faqs.html#does\\_the\\_scl\\_legislation\\_protect](http://www.derm.qld.gov.au/land/planning/strategic-cropping/faqs.html#does_the_scl_legislation_protect)>.

indicated that ensuring predictable outcomes for the agricultural sector is a primary objective of the Government's resources policy, and amendments to the *Strategic Cropping Land Act* may assist in achieving this end.

As detailed above, Santos has taken the approach of not pursuing resources projects where they do not obtain an agreement from the landholder, despite being under no obligation to take such action pursuant to the current legislative and regulatory regime. Tenement holders may be encouraged to broker similar agreements in order to generate social capital. Although legislating for such action is tantamount to imposing a power of veto, other steps may be introduced as a means of ameliorating landholder and tenement holder animosity. The guidelines in South Australia that provide for the appointment of a specially qualified liaison officer may be introduced to the Queensland regime. Although the use of a liaison officer may be seen as good business practice, the specific mention of the post in the guidelines will ensure that a liaison officer exists for every resources project, with the object of ensuring maximum success in negotiations and the preservation of good landholder-tenement holder relations.

**Recommendation 1:** Entry onto land should not be permitted until a negotiated or arbitrated agreement, with adequate provision for compensation, is in place.

**Recommendation 2:** Further detail on the compensation process should be included in the relevant Queensland legislation, to facilitate the making of adequate compensation awards in the Land Court and to form the basis of negotiations between landholders and tenement owners.

**Recommendation 3:** The "restricted land" regime under Queensland's *MRA* should be extended to all mineral and petroleum activities under both the *MRA* and the *PAG Act*.

**Recommendation 4:** The definition of "restricted land" should be broadened to reflect the position in Western Australia.

**Recommendation 5:** The protections afforded by Queensland's *Strategic Cropping Land Act* should be extended to grazing land.

**Recommendation 6:** A qualified landholder liaison officer should be appointed by the Queensland Government to facilitate positive relationships between landholders and tenement owners.

## 6 CONCLUSION

This research note has compared land access laws in Queensland, Western Australia, New South Wales, South Australia, Victoria and Alberta, Canada. Although none of these jurisdictions grant landholders a “right” to exclude mining companies from their land, various protections are afforded to landholders, in terms of access requirements and compensation, based on the level of intrusion of, and the nature of land affected by the mining operations in question.

As discussed in section 4 above, Queensland has one of the least protective regimes for landholders. A particularly striking feature of the Queensland regime is that mining companies can commence operations without an agreement with the landholder in place, as long as the Land Court arbitration process has commenced and relevant negotiation periods have been complied with. Also, the Queensland regime contains relatively undetailed provisions for compensation, compared with some of the other jurisdictions considered.

Thus, it has been recommended that entry onto land should not be permitted until a land access agreement is in place, that further detail on compensation be provided, and that there be uniformity across all mining and petroleum exploration activities in relation to restricted land. It has also been recommended that these restrictions be broadened, as should the protections afforded by Queensland’s *Strategic Cropping Land Act*. Finally, a qualified liaison officer should be appointed by the Queensland Government to facilitate positive relations between stakeholders.

By implementing these recommendations the Queensland government would be adopting the best features of the land access regimes in other Australian jurisdictions. Furthermore, adopting these recommendations would facilitate greater protections for landholders, and recognise their interests to a greater extent than currently occurs. In turn, providing proper protections for the interests of landholders would go some way to ensuring public support for the continuing development of mining and petroleum activities in Queensland.