

# Mining Law in New South Wales

A guide for the community



**NSW**



DEFENDING THE ENVIRONMENT  
ADVANCING THE LAW

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## **Currency**

The information contained in this guide is current as at 24 January 2017.

## **Disclaimer**

This guide seeks to provide general information only and is not a substitute for legal advice in individual cases. If you wish to receive legal advice, please call our advice line (contact details above).

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<sup>1</sup> It was a condition of the grant that feedback be sought from relevant government agencies on a draft of this publication. Only the Department of Planning and Infrastructure provided such feedback.

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# Chapter 1 - Overview of Mining in New South Wales

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## Purpose of this guide

As mining and coal seam gas (CSG) activities expand throughout the State, the potential for land use conflicts is greatly increased, as is the potential for negative environmental, social and economic impacts.

This guide aims to educate the public about the assessment and approval processes applying to mining and CSG activities in NSW and how to engage effectively in those processes. It is our hope that this guide will help the people of NSW to understand their rights and obligations in relation to mining and CSG developments and assist them to use the law to the fullest extent possible to protect their interests and those of the environment.

It is not the purpose of this guide to provide technical information about how mining is carried out or what the likely impacts of such developments will be on the environment, the economy or society. To find out more about a particular project, you should look at the environmental assessment that has been carried out. If you want general information about mining and CSG impacts, there are references at the back of this guide.

Given the broad range of resources mined and extracted in NSW, it would not be feasible to cover them all in this guide. Therefore, we focus on coal and CSG activities because, in our experience, these two industries are causing the most concern within the community. However, coal is a mineral and coal mining is regulated in the same way as large-scale mining of other minerals, such as gold. Therefore, the information in this guide about coal exploration and mining can generally be applied to other types of minerals.<sup>2</sup> CSG is a type of petroleum. Petroleum includes any naturally occurring hydrocarbon,<sup>3</sup> whether in a gaseous, liquid or solid state, but does not include coal or oil shale.<sup>4</sup> This guide often refers to coal as a mineral and CSG as petroleum.

This guide does not cover uranium mining which is banned in most circumstances in NSW.<sup>5</sup> However, uranium exploration is permitted in NSW.<sup>6</sup> A mineral allocation area has been declared over the State for uranium,<sup>7</sup>

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<sup>2</sup> See glossary at the back of this book for a list of minerals that are covered by the *Mining Act 1992* (NSW).

<sup>3</sup> Whilst 'hydrocarbon' is not defined by the law, the Macquarie Dictionary defines hydrocarbon as 'any class of compounds containing only hydrogen and carbon, such as methane, CH<sub>4</sub>.' CSG is a natural gas consisting primarily of methane.

<sup>4</sup> Australian Atlas of Mineral Resources, *Coal Bed Methane-fact sheet*, available at: [http://www.australianminesatlas.gov.au/education/fact\\_sheets/coal\\_seam\\_gas.html](http://www.australianminesatlas.gov.au/education/fact_sheets/coal_seam_gas.html).

<sup>5</sup> Under the *Uranium Mining and Nuclear Facilities (Prohibitions) Act 1986* (NSW).

<sup>6</sup> *Mining Act 1992* (NSW), ss 10A, 379AA, Dictionary.

<sup>7</sup> NSW Government Gazette No 92 of 14 September 2012 at p. 3937.

which means that an application is required to seek the Industry, Resources and Energy Minister's consent before lodging an exploration licence application for uranium. At the time of writing, no uranium exploration licences have been granted in NSW.<sup>8</sup>

This guide does not cover the mining of substances collectively referred to as 'extractive materials'. Extractive materials (such as sand, soil, stone, gravel and turf) are obtained through quarrying operations rather than mining operations.<sup>9</sup>

The laws and processes referred to in this guide are specific to NSW, including the Chapter dealing with Commonwealth approvals.

### **Size and scale of the industry**

Mining has been undertaken in Australia almost from the moment of European arrival in 1788, and Indigenous Australians mined ochre and stone for thousands of years before that.<sup>10</sup> As of 2014, Australia was the fourth-largest producer and the second-largest exporter of coal, and had the fourth-largest reserves of coal in the world.<sup>11</sup> In 2015-16, NSW produced 191 million tonnes of saleable coal, worth approximately 80% of the total value of the State's mineral production. While the CSG industry is less established than the coal mining industry, it has sought to expand throughout many parts of NSW over the past decade, and is well established in Queensland.

Mining and CSG projects in regional areas can bring benefits to local communities, including direct and indirect employment, although sometimes these benefits are overstated by mining companies.<sup>12</sup> The introduction of mining and CSG operations into an area can also cause a great deal of concern amongst community members, and potentially long term social, economic and environmental disruption.

Over the past decade, commodity prices for a range of mined materials, including coal and gas, have been in flux, as has the mining industry's contribution to Australia's Gross Domestic Product.<sup>13</sup> The mining industry's share of output in the Australian economy was measured at 7% as of September 2016.<sup>14</sup> Parliament of Australia statistics show that, in February

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<sup>8</sup> See Common Ground: <http://commonground.nsw.gov.au/>.

<sup>9</sup> Extractive industries are regulated under the *Environmental Planning and Assessment Act 1979* (NSW) and various environmental planning instruments.

<sup>10</sup> NSW Department of Primary Industries, (2007) *Primefacts*, 'Mining by Aborigines – Australia's first miners'.

<sup>11</sup> Australian Government, *Australian Energy Resources Assessment* (2014).

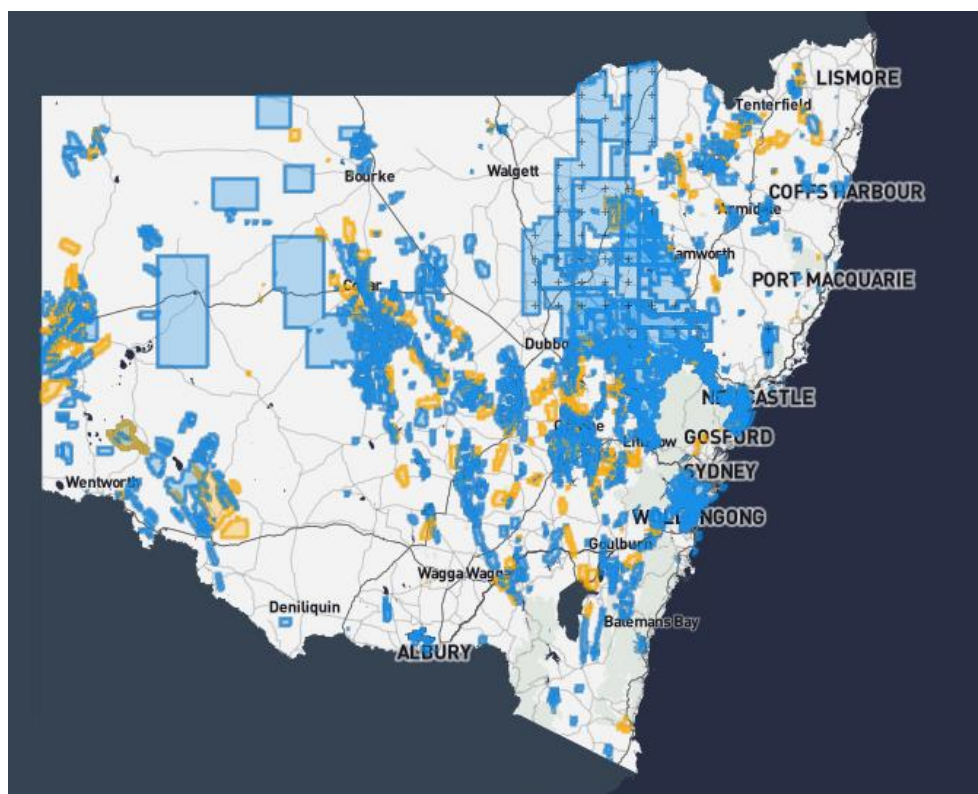
<sup>12</sup> *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 [575].

<sup>13</sup> The Australia Institute, 2011, *Mining the Truth: The rhetoric and reality of the commodities boom*, available at: <http://www.tai.org.au/node/1777>.

<sup>14</sup> Reserve Bank of Australia, *Australian Economy Snapshot*, available at <http://www.rba.gov.au/snapshots/economy-snapshot/pdf/australian-economy-snapshot.pdf?v=2016-09-20-13-13-21>.

2016, total mining employment accounted for 1.9% of the workforce.<sup>15</sup> In NSW, mining contributed 4.8% to Gross State Product (GSP) in 2014/15, and made up 3.7% percent of total employment.<sup>16</sup>

Mining occurs in almost all regions of NSW. The extent of mining licences and leases across NSW is illustrated by the following map. It represents current coal, mineral and petroleum (including CSG) titles and applications.<sup>17</sup> This map shows that the regulation of mining and CSG activities is relevant to most people in NSW.



### Key departments and decision-makers

Mining in NSW is regulated by three main government departments. It is important to note that the Ministers responsible for administering the relevant Acts can change, as can their titles and the names of their departments.<sup>18</sup>

<sup>15</sup> *Employment by industry statistics: a quick guide* Parliament of Australia, available at: [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1516/Quick\\_Guides/EmployIndustry](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Quick_Guides/EmployIndustry).

<sup>16</sup> NSW Minerals Council, NSW Mining Industry Economic Impact Assessment (2016), available at: [http://www.nswmining.com.au/NSWMining/media/NSW-Mining/Economic%20Report%202015/NMC0228\\_Economic-Impact-Report-2016\\_Final\\_HiRes\\_for-web-1.pdf](http://www.nswmining.com.au/NSWMining/media/NSW-Mining/Economic%20Report%202015/NMC0228_Economic-Impact-Report-2016_Final_HiRes_for-web-1.pdf).

<sup>17</sup> NSW Government Department of Industry: Resources and Energy, *Common Ground*: <http://commonground.nsw.gov.au/#!/title-map/Show%20All%20Resources/Show%20All%20Stages/Standard/6/-32.73184089686568/148.743896484375>. Map generated 14 December 2016.

<sup>18</sup> You can tell which Minister is responsible for a particular NSW Act by checking the *Allocation of the Administration of Acts*, found under 'Regulations' at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

Local councils have no power to assess coal and CSG applications. Councils can (and often do) communicate their views of a proposal to the responsible government department.

### **1. Department of Industry – Division of Resources and Energy**

The NSW Department of Industry is a large department with a number of separate operational areas, including the Division of Resources and Energy, which is responsible for regulating the mineral and petroleum resources of NSW.<sup>19</sup>

The Minister for Industry, Resources and Energy administers the *Mining Act 1992* (NSW) which regulates mining activities, including coal, and the *Petroleum (Onshore) Act 1991* (NSW) which regulates CSG activities. The Minister for Industry, Resources and Energy is responsible for granting the licences and leases that authorise coal and CSG activities such as exploration and extraction. See Chapters 2 and 3 for more information.

### **2. Department of Planning and Environment**

The NSW Department of Planning and Environment is responsible for assessing and approving certain developments.

Many coal and CSG activities require development consent under the *Environmental Planning and Assessment Act 1979* (NSW). The Minister for Planning administers that Act and can be the decision-maker for development applications relating to coal and CSG projects.

The Minister for Planning has the power to delegate his or her consent power to the Planning Assessment Commission (PAC) or the Department of Planning and Environment, and the current Minister has done so for most projects.<sup>20</sup> See Chapter 4 for more information.

### **3. Environment Protection Authority**

The NSW Environment Protection Authority (EPA) is the lead regulator for CSG activities in NSW once they have commenced. The EPA is responsible for the enforcement of the various approvals required for CSG, including development consent and conditions, pollution, mining titles, and water use.<sup>21</sup>

Other government departments also have input into the assessment and approval of mineral and petroleum projects. For example, the Office of

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<sup>19</sup> For more information see the NSW Government Department of Industry – Division of Resources and Energy website at: <http://www.resourcesandenergy.nsw.gov.au/>

<sup>20</sup> Access the instruments of delegation to see what powers have been delegated to the PAC and the Department here: <http://www.planning.nsw.gov.au/en/Assess-and-Regulate/Development-Assessment/Systems/Delegated-Decisions>.

<sup>21</sup> See: <http://www.epa.nsw.gov.au/licensing/csgfaqs.htm>.

Environment and Heritage (OEH)<sup>22</sup> may have a role to play in issuing certain permits that coal or CSG projects need to operate, such as permits to damage or destroy Aboriginal heritage. As discussed above, the EPA<sup>23</sup> is the lead regulator for CSG, and is also responsible for issuing permits to pollute (known as environment protection licences) for both coal and CSG activities. The Department of Primary Industries – Water (DPI Water) is responsible for issuing licences to access water.<sup>24</sup>

### ***Who owns minerals and petroleum?***

As a general rule, the Crown owns the minerals and petroleum on and under your land.<sup>25</sup> This means that even though you may own your land, you generally don't own the coal or CSG that is on or beneath the surface of your land. The only rare exception is where minerals or petroleum are reserved to the landholder in some old property deeds issued under old system title.

Because almost all minerals and petroleum are owned by the Crown, and not the landowner, the Government has the power to authorise others to look for and remove them from your land.

### ***How does a company gain access to minerals and petroleum on my land?***

Mining and CSG companies require permission (in the form of a title) to access minerals and petroleum under your land. The Minister for Industry, Resources and Energy is usually responsible for granting these titles, which include:

- Exploration licences;
- Assessment leases; and
- Mining/Petroleum production leases.

In addition, some form of development consent is often needed. The Minister for Planning is usually the consent authority, although this role is often delegated to the Planning Assessment Commission.<sup>26</sup>

There are also a number of smaller titles that can be issued, including special prospecting authorities, low impact exploration licences, mineral claims and opal prospecting licences.

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<sup>22</sup> The OEH is part of the planning and environment cluster of the NSW Government. The OEH develops policy in all environmental matters and regulates biodiversity, Aboriginal culture and heritage, waters and rivers, wildlife and native vegetation. See: <http://www.environment.nsw.gov.au/> and <http://www.planning.nsw.gov.au/About-Us/Structure>.

<sup>23</sup> See: <http://www.epa.nsw.gov.au/>.

<sup>24</sup> See: <http://www.water.nsw.gov.au/>

<sup>25</sup> See: *Coal Acquisition Act 1981* (NSW), s 5; *Mining Act 1992* (NSW), s 282; *Petroleum (Onshore) Act 1991* (NSW), s 6.

<sup>26</sup> See: <http://www.pac.nsw.gov.au/>

A special prospecting authority gives the holder the right to look for petroleum in the area covered by the authority for an initial term of up to 12 months.<sup>27</sup> They tend to authorise preliminary exploration methods only, such as geological surveys, and are used to ascertain the CSG potential of large areas of land. If the holder of a special prospecting authority wants to undertake more intensive exploration, an exploration licence will be required.

Exploration over native title lands can take place with a low-impact exploration licence (for coal) or a low impact prospecting title (for CSG).<sup>28</sup> The consent of the native title holders/the native title body is required<sup>29</sup> and the Minister for Industry, Resources and Energy must be satisfied that the exploration activities are unlikely to have a significant impact on the land.<sup>30</sup>

Mineral claims are small mining titles that can cover up to 2 hectares.<sup>31</sup> They are granted for up to five years and can be renewed.<sup>32</sup> These titles are easier to obtain than regular mining titles, though they are much less common. Mineral claims are permitted within mineral claims districts. Certain areas may be deemed mineral claims districts by the Minister for Industry, Resources and Energy with notification to the local council and government agencies that are materially affected.<sup>33</sup> At present, there are two mineral claims districts in NSW – White Cliffs and Lightning Ridge. Whilst the great majority of mineral claims are granted for opal mining in these two districts, mineral claims can be granted throughout the onshore areas of NSW for all minerals except for coal.<sup>34</sup>

Opal prospecting licences are smaller, short-term licences (generally for 3 months although they can be granted for up to 5 years) that give the title holder an exclusive right to prospect on an opal prospecting block. These areas are smaller sections of Crown land that are determined by the Minister for Industry, Resources and Energy.<sup>35</sup> Although opal prospecting licences cover Crown Land, landholders who may be leasing the Crown Land from the Government do retain certain rights, such as the right to be notified that the land is proposed to become an opal prospecting area and the right to object on the grounds that the land is agricultural land, or contains improvements (such as a house or garden).<sup>36</sup>

## **Royalties**

Mining companies must pay the Government a royalty for publicly owned minerals that they extract.<sup>37</sup> Different mining methods attract different

<sup>27</sup> *Petroleum (Onshore) Act 1991* (NSW), ss 38-40.

<sup>28</sup> *Mining Act 1992* (NSW), Part 3 Div 5; *Petroleum (Onshore) Act 1992* (NSW), Part 3 Div 6.

<sup>29</sup> *Native Title Act 1993* (Cth), s 26A.

<sup>30</sup> *Mining Act 1992* (NSW), s 32C; *Petroleum (Onshore) Act 1991* (NSW), s 45C.

<sup>31</sup> *Mining Act 1992* (NSW), s 180.

<sup>32</sup> *Mining Act 1992* (NSW), s 193.

<sup>33</sup> *Mining Act 1992* (NSW), s 174.

<sup>34</sup> *Mining Act 1992* (NSW), s 180(4).

<sup>35</sup> *Mining Act 1992* (NSW), ss 220, 224.

<sup>36</sup> *Mining Act 1992* (NSW), s 221.

<sup>37</sup> *Mining Act 1992* (NSW), ss 282(1), 282(1A).

royalties. For example, the holder of a coal mining lease using open cut methods must pay 8.2% of the value of the resource recovered.<sup>38</sup> Mining using underground methods requires a royalty of 7.2%<sup>39</sup> and deep underground mining attracts a 6.2% royalty.<sup>40</sup> Royalties for minerals other than coal are calculated using a formula.<sup>41</sup>

Privately-owned minerals only attract royalties for the landholder if the owner of the minerals is not the licence holder. In such cases, the owner of the minerals can receive seven eighths of the royalties paid to the Government.<sup>42</sup>

Petroleum title holders must also pay the Government a royalty for any CSG that is extracted<sup>43</sup> at an annual rate of 10% of the value at the well-head of the petroleum.<sup>44</sup> These royalties do not apply to methane recovered in conjunction with coal mining operations. Rather, coal mining leaseholders will pay additional royalties under a mining title<sup>45</sup> at a rate of 10% of the value at the well-head of the petroleum.<sup>46</sup>

It is important to note that, if you don't own the minerals or petroleum under your land, you don't receive royalties for any coal or CSG that is extracted.

### The bottom line

- Coal is a mineral and is regulated under the *Mining Act 1992* (NSW).
- CSG is petroleum and is regulated under the *Petroleum (Onshore) Act 1991* (NSW).
- In almost all cases, minerals and petroleum are owned by the Crown.
- To obtain access to minerals/petroleum, a mining or CSG company requires some form of title from the Minister for Industry, Resources and Energy<sup>47</sup> (see Chapters 2 and 4), and in some cases, a development consent from the Minister for Planning or the Planning Assessment Commission (see Chapter 5).<sup>48</sup>
- The main titles are exploration licences and mining/petroleum production leases. There are also a number of smaller titles that aren't covered in detail in this guide.
- Landholders are not entitled to mining royalties unless they own the rights to the minerals or petroleum being extracted (which is very rare).
- Laws and policies on mining and CSG are subject to change. If you need advice, you should speak to a lawyer to advise you on how the

<sup>38</sup> *Mining Regulation 2016* (NSW), cl 74.

<sup>39</sup> *Mining Regulation 2016* (NSW), cl 74.

<sup>40</sup> *Mining Regulation 2016* (NSW), cl 74.

<sup>41</sup> Set out in the *Mining Regulation 2016* (NSW), cl 73.

<sup>42</sup> *Mining Act 1992* (NSW), s 284(2)(a).

<sup>43</sup> *Petroleum (Onshore) Act 1991* (NSW), s 85.

<sup>44</sup> *Petroleum (Onshore) Regulation 2016* (NSW), cl 42.

<sup>45</sup> *Mining Act 1992* (NSW), s 286.

<sup>46</sup> *Petroleum (Onshore) Regulation 2016* (NSW), cl 43.

<sup>47</sup> Under the *Mining Act 1992* (NSW) in the case of coal, or the *Petroleum (Onshore) Act 1991* (NSW) in the case of CSG.

<sup>48</sup> Under the *Environmental Planning and Assessment Act 1979* (NSW).

current law applies to your circumstances. You can call EDO NSW on 1800 626 239 to request free initial legal advice.

# Chapter 2 – Exploration

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The exploration stage of a coal or CSG project is an important time to be engaged. If you are not aware of the process and your rights at this stage, you may begin your relationship with a mining or CSG company on the back foot.

Exploration is regulated similarly for both coal and CSG, but there are also some important differences. This Chapter explains how exploration is regulated and points out where there are differences between coal and CSG.

There is a completely separate process for assessing and determining applications for mining and CSG developments under planning laws and this is addressed in Chapter 4. This Chapter deals only with the process for licensing exploration activities.

In this Chapter:

**Minister** means the NSW Minister for Industry, Resources and Energy

**Secretary** means the Secretary of the NSW Department of Industry

## ***What does exploration involve?***

Exploration involves looking for minerals or petroleum and testing whether the land contains a commercial amount of the resource.

Exploration can involve a range of techniques. However, it is usually a three-step process:

### **1. Reconnaissance**

A geologist visits the area to look at rock outcrops and to map the local geology. This stage can involve people and vehicles passing over the land and taking away some samples for chemical analysis. Airborne surveys using low-flying helicopters or light aircraft might also be used.

Seismic surveys may be used. Seismic surveys use reflected sound to identify what lies under the surface of the ground. A vehicle-mounted seismograph generates sound waves to detect deep coal seams. Seismic surveys are usually completed over a period of weeks.<sup>49</sup>

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<sup>49</sup> Kearey, P, Brooks, M & Hill, I, 2002, *An Introduction to Geophysical Exploration*, Blackwell Publishing, Oxford UK, p 21.

## 2. Follow-up investigations

Areas that warrant further investigation are revisited. Samples are taken for analysis. Further electronic geophysical surveys or air surveys may also be undertaken.

## 3. Detailed investigations

Detailed investigations are conducted on sites that look promising. The aim is to obtain bulk samples. This is normally done through digging trenches and test pits or drilling holes using large rigs.<sup>50</sup> These rigs are usually mounted on or transported to the site by large trucks. Exploration drilling usually occurs over a period of weeks or months.

With CSG, exploration can involve pilot testing of a gas well. Pilot testing involves a small-scale production trial with associated water and gas control facilities such as pits or sumps to hold water. Multiple gas wells may be drilled which may involve fracking (the process of removing CSG from the coal seam using hydraulic fracturing). While fracking is permitted in NSW, there is a ban on the use of BTEX compounds in CSG activities.<sup>51</sup> The gas is brought to the surface for analysis. The pilot testing phase may also involve the construction of worker accommodation on the site and the construction or upgrade of roads. Some clearing of native vegetation may also be required.

While drilling may only last 6-8 weeks, monitoring of the pilot well may continue for several months, and sometimes over a year. Pilot wells are likely to be used in full production operations later on.<sup>52</sup>

### ***Who can explore?***

In most cases, minerals and petroleum are reserved to the Crown which means they are controlled by the Government. Even if you own your land, you almost certainly don't own the minerals or petroleum in your land. This means that the Government can allow others to come onto your property and look for coal and CSG.

There are two main approvals (also known as titles) that can be granted to companies or individuals who wish to explore for coal and CSG. They are:

- exploration licences; and
- assessment leases.

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<sup>50</sup> NSW Minerals Council, *Fact Sheet: Mineral exploration and you*, available at: <http://www.nswmining.com.au/NSWMining/media/NSW-Mining/Publications/Fact%20Sheets/Fact-Sheet-Mineral-Exploration-and-You.pdf>.

<sup>51</sup> See: <http://www.industry.nsw.gov.au/policies/items/ban-on-use-of-btex-compounds-in-csg-activities>.

<sup>52</sup> APPEA, *CSG well construction and bore specifications*, available at: <http://www.westsidecorporation.com/LinkClick.aspx?fileticket=JdAzENZcqTM%3D&tabid=40>

An exploration licence gives the holder the right to explore for the minerals or petroleum listed in the licence over the area covered by the licence. An exploration licence for coal or CSG can be issued for up to 6 years.<sup>53</sup>

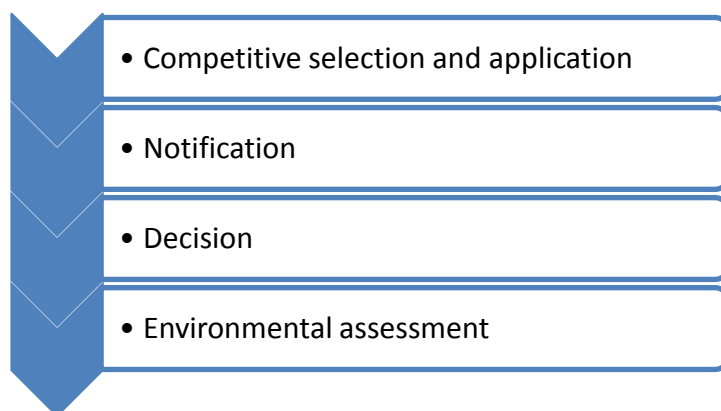
An assessment lease is designed to allow the retention of rights over an area where a significant mineral or petroleum deposit has been identified if mining the deposit is not commercially viable in the short term but there is a reasonable prospect that it will be in the longer term. An assessment lease for coal or CSG can be granted for up to 6 years.<sup>54</sup>

These titles are issued by the Minister for Industry, Resources and Energy. This Chapter focuses on exploration licences.

Once granted, exploration licences can be wholly or partially renewed. There are strict requirements for renewing licences with regards to the timing of renewal applications.<sup>55</sup> If an application for renewal is made, the licence continues to operate until the licence is renewed or cancelled, or the renewal application is withdrawn, even if the original exploration licence expires.<sup>56</sup>

Anyone can apply for an exploration licence<sup>57</sup> but the applicant needs to demonstrate it has the financial resources and technical qualifications to undertake the exploration.<sup>58</sup>

### ***How are applications for exploration licences assessed?***



#### **1. Applicant lodges an application via competitive selection process**

Applications for coal and CSG exploration licences can only be lodged in response to an invitation from the Minister.<sup>59</sup> The Minister can invite

<sup>53</sup> *Mining Act 1992 (NSW)*, s 27; *Petroleum (Onshore) Act 1991 (NSW)*, s 31.

<sup>54</sup> *Mining Act 1992 (NSW)*, s 45; *Petroleum (Onshore) Act 1991 (NSW)*, s 35.

<sup>55</sup> *Mining Act 1992 (NSW)*, s 113(2); *Petroleum (Onshore) Act 1991 (NSW)*, s 18.

<sup>56</sup> *Mining Act 1992 (NSW)*, s 117; *Petroleum (Onshore) Act 1991 (NSW)*, s 20.

<sup>57</sup> *Mining Act 1992 (NSW)*, s 13; *Petroleum (Onshore) Act 1991 (NSW)*, s 8.

<sup>58</sup> *Mining Act 1992 (NSW)*, s 13; *Petroleum (Onshore) Act 1991 (NSW)*, s 15.

<sup>59</sup> *Mining Act 1992 (NSW)*, s 13(5); *Petroleum (Onshore) Act 1991 (NSW)*, s 13.

<sup>59</sup> *Mining Act 1992 (NSW)*, ss 13, 368A, 13C, Sch 1A; *Petroleum (Onshore) Act 1991 (NSW)*, ss 8, 11, Sch 1A. Invitations will be published in a newspaper circulating generally throughout the State, and in one or more newspapers circulating in the locality in which the land

applications by publishing a notice in the NSW Government Gazette,<sup>60</sup> and applications can be lodged with the Secretary of the Department of Industry in response to this invitation.<sup>61</sup> This is called the 'competitive selection process'.<sup>62</sup> This process is administered by a panel made up of representatives from the Department of Premier and Cabinet, NSW Treasury and the Division of Resources and Energy.<sup>63</sup>

The application must describe the proposed exploration area.<sup>64</sup> For CSG, this means the application must be accompanied by a map or plan that shows the boundaries of the area to be explored.<sup>65</sup>

The application must also provide details of the program of work that is intended to be carried out.<sup>66</sup>

All applications must be accompanied by a fee.<sup>67</sup>

## **2. The applicant notifies the public of the application**

There are different notification requirements for coal and CSG.

### *Coal*

Affected landholders do not have a general right to be personally notified of an application for an exploration licence over their land. However, the applicant must publish a notice of their application in both State-wide and local newspapers within 45 days of receiving confirmation from the Secretary that the application has been lodged.<sup>68</sup> These notices must contain a plan of the proposed exploration area.<sup>69</sup>

### *CSG*

Affected landholders do not have a general right to be personally notified of an application for an exploration licence over their land. There is also no legal requirement for applications for CSG exploration licences to be publicly notified.

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concerned is situated. If a company already holds a mineral title the competitive selection process does not apply in relation to application for a prospecting title for an operational allocation purpose.

<sup>60</sup> *Mining Act 1992* (NSW), Sch 1A; *Petroleum (Onshore) Act 1991* (NSW), Sch 1A.

<sup>61</sup> *Mining Act 1992* (NSW), s 13; *Petroleum (Onshore) Act 1991* (NSW), s 11.

<sup>62</sup> See:

[http://www.resourcesandenergy.nsw.gov.au/\\_data/assets/pdf\\_file/0011/579395/Overarching-Policy-Framework.pdf](http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0011/579395/Overarching-Policy-Framework.pdf).

<sup>63</sup> See:

[http://www.resourcesandenergy.nsw.gov.au/\\_data/assets/pdf\\_file/0011/579395/Overarching-Policy-Framework.pdf](http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0011/579395/Overarching-Policy-Framework.pdf).

<sup>64</sup> *Mining Act 1992* (NSW), s 13(5); *Petroleum (Onshore) Act 1991* (NSW), s 13.

<sup>65</sup> *Petroleum (Onshore) Act 1991* (NSW), s 13.

<sup>66</sup> *Mining Act 1992* (NSW), s 129A; *Petroleum (Onshore) Act 1991* (NSW), s 14.

<sup>67</sup> To see a list of fees, visit <http://www.resources.nsw.gov.au/titles/fees>.

<sup>68</sup> *Mining Act 1992* (NSW), s 13A; *Mining Regulations 2010* (NSW), cl 15(1), 21(1).

<sup>69</sup> *Mining Act 1992* (NSW) s 13A.

For both coal and CSG, a list of exploration licence applications is published on the Division of Resources and Energy website,<sup>70</sup> and in the NSW Government Gazette every Friday.<sup>71</sup>

EDO NSW has a free weekly eBulletin that notifies readers of applications for exploration licences.<sup>72</sup>

### **3. The panel assesses the application and the Minister makes a decision**

The panel assesses the application and makes a recommendation to the Minister. The decision to approve or refuse the application is made by the Minister.

The Minister must not make a decision before taking into account the need to conserve and protect the environment.<sup>73</sup> Under the competitive selection process, the Minister also seeks the endorsement of the Government before granting the title.<sup>74</sup>

Exploration licences for coal or CSG can be granted for a period of up to 6 years.<sup>75</sup> There is no statutory limitation on the size of the exploration area for coal.<sup>76</sup> CSG exploration licences can be granted over an area of up to 140 blocks.<sup>77</sup>

#### **Fit and proper person**

The Minister can refuse an application for a coal or CSG title if they are of the opinion that the applicant is not a 'fit a proper person' to hold a title.<sup>78</sup> In determining this, the Minister can take into consideration a number of things, including:<sup>79</sup>

- criminal conduct issues;
- record of compliance with relevant legislation;
- technical competence in regard to management of activities or works;

<sup>70</sup> See: <http://www.resources.nsw.gov.au/titles/current-coal-and-petroleum-exploration-licence-applications/current-coal-exploration-licence-applications>.

<sup>71</sup> See: <http://www.nsw.gov.au/gazette>.

<sup>72</sup> To subscribe to the eBulletin, visit: <http://www.edonsw.org.au/ebulletin>.

<sup>73</sup> *Mining Act 1992* (NSW), Sch 1B Part 2; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B Part 2.

<sup>74</sup> See: [http://www.resourcesandenergy.nsw.gov.au/\\_data/assets/pdf\\_file/0011/579395/Overarching-Policy-Framework.pdf](http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0011/579395/Overarching-Policy-Framework.pdf).

<sup>75</sup> *Mining Act 1992* (NSW), s 27; *Petroleum (Onshore) Act 1991* (NSW), s 31.

<sup>76</sup> *Mining Act 1992* (NSW), s 25; *Mining Regulation 2016* (NSW), cl 16, Sch 2.

<sup>77</sup> *Petroleum (Onshore) Act 1991* (NSW), s 30. A block is a 'graticular' section of the Earth's surface. Graticular sections are made up of 5 minutes of latitude and 5 minutes of longitude.

<sup>78</sup> *Mining Act 1992* (NSW), s 380A; *Petroleum (Onshore) Act 1991* (NSW), s 24A.

<sup>79</sup> *Mining Act 1992* (NSW), s 380A(2); *Petroleum (Onshore) Act 1991* (NSW), s 24A(2).

- whether the company or a director of that company is not of good repute;
- whether the company or a director of that company is not of good character, with particular regard to honesty and integrity; and
- financial capacity to comply with obligations under the title.

If you are aware that one of these factors applies to a company seeking a new or renewed title (including an exploration licence, assessment lease, and mining or petroleum production lease), you should bring this to the Minister's attention and ask that the application be refused on these grounds.

Once a decision is made, it should be published on the Division of Resources and Energy website.<sup>80</sup>

If the licence is granted, it can be subject to conditions.<sup>81</sup> Conditions can address a range of issues and are often designed to minimise or avoid environmental impacts. For example, they may require the applicant to take steps to protect the environment from harm or mitigate such harm, or to rehabilitate the land or water that has been affected by exploration activities.<sup>82</sup> Importantly, conditions are not limited to land that is covered by the exploration licence, but can also apply to other land which may be impacted by the exploration activities.<sup>83</sup>

### **Requirement for a security deposit**

One important condition that can be attached to a title is for the applicant to give and maintain a financial security to ensure the applicant fulfils their legal obligations, including those imposed by the conditions.<sup>84</sup> This condition is not often applied in practice, but is one way the Government could help ensure that mining and CSG companies rehabilitate the site properly after the activities are finished.

This condition does not need to be applied at the time the title is issued; rather, it can be applied at any time.<sup>85</sup> The Minister can also require that a security deposit is required to be made before a title is granted.<sup>86</sup> Imposing such a condition may be one way of responding to situations where a company has breached other conditions, for example, by harming the environment without authorisation.

<sup>80</sup> See: <http://www.resources.nsw.gov.au/titles/current-coal-and-petroleum-exploration-licence-applications>.

<sup>81</sup> *Mining Act 1992* (NSW), s 22, Sch 1B; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B.

<sup>82</sup> *Mining Act 1992* (NSW), Sch 1B ; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B.

<sup>83</sup> *Mining Act 1992* (NSW), Sch 1B ; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B.

<sup>84</sup> *Mining Act 1992* (NSW), ss 261B, 261BA; *Petroleum (Onshore) Act 1991* (NSW), ss 106B, 106C.

<sup>85</sup> *Mining Act 1992* (NSW), s 261B(4); *Petroleum (Onshore) Act 1991* (NSW), s 106B(3).

<sup>86</sup> *Mining Act 1992* (NSW), s 261BD; *Petroleum (Onshore) Act 1991* (NSW), s 106F.

The amount of the security deposit is decided by the Secretary.<sup>87</sup> A title holder can apply for a review of the amount within 28 days of being notified of the amount,<sup>88</sup> and the review must be undertaken by the Minister or a delegate who is not the person who determined the original security deposit amount.<sup>89</sup> The minimum deposit amount for a coal or CSG title is \$10,000.<sup>90</sup>

The security deposit is forfeited by the company if it fails to fulfil its legal obligations.<sup>91</sup> In such cases, the money must be used to fulfil those obligations.<sup>92</sup>

Conditions are legally binding. If the conditions are being breached, the Minister, the Secretary or an inspector can direct the licence holder to take steps to comply with the condition within a set period of time.<sup>93</sup> It is an offence to not comply with such a direction.<sup>94</sup>

If the licence holder does not comply with a direction to rehabilitate the land, the work can be undertaken by the Minister at the licence holder's expense.<sup>95</sup>

The public also has a role to play in enforcing conditions. See Chapter 7 for information on finding and enforcing conditions.

## Renewals

Where an application has been made for a renewal of a title, the Minister can renew or refuse the application.<sup>96</sup>

The Minister may refuse to renew an application on any ground, particularly where the applicant has breached the law or the conditions attached to the approval.<sup>97</sup>

## ***Does the public get a say?***

While there is no legal right for the public to comment on whether an exploration licence is granted, it is Government policy to allow the public to comment on exploration licence applications for coal and CSG.<sup>98</sup> However,

<sup>87</sup> *Mining Act 1992* (NSW), s 261BC; *Petroleum (Onshore) Act 1991* (NSW), s 106E.

<sup>88</sup> *Mining Act 1992* (NSW), s 261BC; *Petroleum (Onshore) Act 1991* (NSW), s 106F.

<sup>89</sup> *Mining Act 1992* (NSW), s 261BD; *Petroleum (Onshore) Act 1991* (NSW), s 106G.

<sup>90</sup> *Mining Regulation 2016* (NSW), cl 93; *Petroleum (Onshore) Regulation 2016* (NSW), cl 49.

<sup>91</sup> *Mining Act 1992* (NSW), s 261F; *Petroleum (Onshore) Act 1991* (NSW), s 106I.

<sup>92</sup> *Mining Act 1992* (NSW), s 261F; *Petroleum (Onshore) Act 1991* (NSW), s 106I.

<sup>93</sup> *Mining Act 1992* (NSW), s 240; *Petroleum (Onshore) Act 1991* (NSW), s 77.

<sup>94</sup> *Mining Act 1992* (NSW), s 240C; *Petroleum (Onshore) Act 1991* (NSW), s 78A.

<sup>95</sup> *Mining Act 1992* (NSW), s 241; *Petroleum (Onshore) Act 1991* (NSW), s 78D.

<sup>96</sup> *Mining Act 1992* (NSW), s 114(1); *Petroleum (Onshore) Act 1991* (NSW), s 19(2B).

<sup>97</sup> *Mining Act 1992* (NSW), s 114, Sch 1B; *Petroleum (Onshore) Act 1991* (NSW), s 19, Sch 1B.

<sup>98</sup> See: <http://www.resources.nsw.gov.au/community-information/comment>.

comment will only be sought on the effects of *exploration*.<sup>99</sup> Anything you have to say about the potential impacts of any future mining or petroleum production will not be considered.

The only information you will have to base your comment on is the proposed area of the exploration licence. You will not have access to the environmental assessment because it will not have been completed yet and will only be made available after the actual exploration licence has been approved.<sup>100</sup>

Where a licence is being renewed, there is no legal requirement to inform the public of the renewal application and no formal opportunity for the public to comment. However, if you are aware of a renewal application and wish to bring certain matters to the attention of the decision-maker, there is no reason why you cannot seek to do this.

You may be able to convince the Minister not to grant an exploration licence by clearly expressing the grounds upon which you object to the granting of the licence. It is helpful to refer to the things that the Minister must take into account when making a decision, such as the need to conserve and protect the environment (see 'Decision' above for more information).

If an exploration licence is granted over your land, you can still have a say about what happens on your land. The way to do this is through an access arrangement. See Chapter 5 for more information on access arrangements.

#### **4. The applicant undertakes an environmental assessment and seeks an activity approval**

The exploration licence only gives the holder the right to explore. The licence holder still needs to get approval for their specific exploration activities before operations can commence, and they need to undertake an environmental assessment to ascertain what the impacts of their planned activities will be before this approval can be granted.

The environmental assessment is lodged with the Division of Resources and Energy as part of an activity approval application.<sup>101</sup> The Minister for Industry, Resources and Energy must examine and take into account to the fullest extent possible all matters that are likely to affect the environment if the activity goes ahead.<sup>102</sup> After considering the environmental impacts, the Minister for Industry, Resources and Energy can then either approve or refuse the activity.<sup>103</sup> Binding conditions can be attached.

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<sup>99</sup> Department of Industry – Division of Resources and Energy, 2011, *Public Comment Process for the exploration of coal and petroleum, including coal seam gas*, available at: <http://www.resources.nsw.gov.au/community-information/comment>.

<sup>100</sup> You can access environmental assessments for exploration here: <http://www.resources.nsw.gov.au/environment/ref>.

<sup>101</sup> *Mining Act 1992* (NSW), s 23A; *Petroleum (Onshore) Act 1991* (NSW), s 31A.

<sup>102</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 111.

<sup>103</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 112(4).

The applicant needs to prepare a report that assesses the likely impacts of the exploration on the environment. This is usually done through a Review of Environmental Factors (REF).<sup>104</sup> A REF is a preliminary study that provides a basic overview of the potential environmental impacts of a proposed project, and any measures that will be taken to minimise those impacts.

A REF is usually prepared by an environmental consultant who is engaged by the applicant.

REFs are only published once the activity has been approved.<sup>105</sup> The difficulty for many communities is that, despite REFs often having considerable deficiencies or inaccuracies, there is no opportunity to challenge a REF, making it impossible to question the environmental assessment.

If the REF reveals that there is likely to be a significant environmental impact, the applicant will need to undertake an Environmental Impact Statement (EIS). An EIS is a much more detailed assessment of the possible environmental impacts of the development.<sup>106</sup> In cases where there is likely to be a significant effect on threatened species, populations, ecological communities or their habitat, a Species Impact Statement (SIS) may also be required.<sup>107</sup> Where an EIS or a SIS is required, the study must be made publicly available and the community must be given an opportunity to make submissions for at least 30 days.<sup>108</sup>

### ***Can any exploration activities go ahead without undergoing an environmental assessment?***

Certain low intensity activities don't require environmental assessment unless they are on critical habitat or land that is part of a wilderness area.<sup>109</sup> These include:<sup>110</sup>

- the construction, maintenance and use of equipment for the monitoring of weather, noise, air, groundwater or subsidence;
- geological mapping and airborne surveying;
- sampling and coring using hand-held equipment;
- geophysical (but not seismic) surveying and downhole logging; and
- accessing areas by vehicle that does not involve the construction of an access way such as a track or road.

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<sup>104</sup> See Department of Industry, 2015, *Guideline for Preparing a Review of Environmental Factors*: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/codes-and-guidelines/guidelines/guideline-for-preparing-a-review-of-environmental-factors>

<sup>105</sup> To find the REF go to: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/environmental-assessment/ref>. You will need to know the year the activity you are interested in was approved.

<sup>106</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 112.

<sup>107</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 112.

<sup>108</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 113.

<sup>109</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 76; *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, cl 10.

<sup>110</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 10.

For all other coal and CSG exploration activities, the applicant needs to lodge their environmental assessment as part of an activity approval application to the Division of Resources and Energy.<sup>111</sup>

Even if an activity approval has been granted, exploration activities on private land cannot commence without an access arrangement being in place between the mining or CSG company and the landholder. See Chapter 3 for more information on access arrangements.

### ***Are there any restrictions on exploration?***

Generally, exploration licences can be granted over any land, including privately owned land.<sup>112</sup>

However, there are some restrictions which mostly relate to the rights of other title holders. For example, an exploration licence cannot be granted over land that is subject to an existing title such as another exploration licence.<sup>113</sup>

The Governor of NSW can declare certain areas to be reserves over which no mining titles can be granted.<sup>114</sup> This does not happen very often<sup>115</sup> and does not apply to CSG.

There are also some restrictions on where exploration can take place. These are designed to protect certain land, including some public places and some privately owned land. These restrictions are outlined below.

#### **1. Protections for houses, gardens and other significant improvements**

Exploration on the *surface* of private land is restricted to protect the assets of the landholder. As a general rule, exploration on the surface of land cannot come within:<sup>116</sup>

- 200 metres of a dwelling house that is the principal place of residence of the person occupying it; or
- 50 metres of a garden for coal; or
- 50 metres of a garden, vineyard or orchard for CSG.

Exploration also cannot occur over any 'significant improvement'.<sup>117</sup>

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<sup>111</sup> See Department of Industry, 2015, *Assessment Requirements for Exploration Activities*: [http://www.resourcesandenergy.nsw.gov.au/\\_data/assets/pdf\\_file/0006/565962/ESG5-Assessment-Requirements-for-Exploration-Activities.pdf](http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0006/565962/ESG5-Assessment-Requirements-for-Exploration-Activities.pdf)

<sup>112</sup> *Mining Act 1992* (NSW), s 24 (3); *Petroleum (Onshore) Act 1991* (NSW), s 9.

<sup>113</sup> *Mining Act 1992* (NSW), s 19; *Petroleum (Onshore) Act 1991* (NSW), s 9.

<sup>114</sup> *Mining Act 1992* (NSW), s 367. Such a declaration must appear in the Government Gazette.

<sup>115</sup> Search the NSW Government Gazette for reservations and revocations: <http://www.gazette.legislation.nsw.gov.au/so/ds/index.w3p>

<sup>116</sup> *Mining Act 1992* (NSW) s 31; *Petroleum (Onshore) Act 1991* (NSW) s 72.

<sup>117</sup> *Mining Act 1992* (NSW) s 31; *Petroleum (Onshore) Act 1991* (NSW) s 72.

Exploration can only go ahead in these areas with the written consent of the landowner and, in the case of a dwelling house, with the written consent of the occupier as well.<sup>118</sup> Once written consent is given, it cannot be taken back.<sup>119</sup> It is therefore important to ensure that any access arrangement or other document that you sign does not waive these protections.

It is also possible for mining and CSG exploration to take place *under* these areas.

Landholder consent for seismic surveys on a *road* is not required even if the work comes within the restricted areas for dwellings, gardens and orchards.<sup>120</sup> But the landholder needs to be given at least 21 days' written notice before the survey starts.<sup>121</sup> Consent is also not required from the owner of the road<sup>122</sup>

A 'significant improvement' is a work or structure that:<sup>123</sup>

- a. is a substantial and valuable improvement to the land, and
- b. is reasonably necessary for the operation of the landholder's lawful business or use of the land, and
- c. is fit for its purpose (immediately or with minimal repair), and
- d. cannot reasonably co-exist with the exercise of rights under the exploration licence or the access arrangement without the full and unencumbered operation or functionality of the work or structure being hindered, and
- e. cannot reasonably be relocated or substituted without material detriment to the landholder.

The restriction only applies to the actual land containing the improvement, not the entire parcel of land upon which there are improvements.<sup>124</sup>

For both coal and CSG, disputes over whether something is a 'significant improvement' will be decided by the Land and Environment Court. Either party can apply to the Court for a ruling.<sup>125</sup>

### **Case studies: 'significant improvement'**

*NOTE: The following case studies show how the Court has interpreted 'significant improvement' in the past. Since these case studies, the legal definition has changed slightly and there are no judgments on the newer definition at this stage.*

<sup>118</sup> *Mining Act 1992 (NSW)* s 31; *Petroleum (Onshore) Act 1991 (NSW)*, s 72.

<sup>119</sup> *Mining Act 1992 (NSW)* s 31(3); *Petroleum (Onshore) Act 1991 (NSW)*, s 72(2).

<sup>120</sup> *Mining Act 1992 (NSW)*, s 31(7); *Petroleum (Onshore) Act 1991 (NSW)*, s 72(7).

<sup>121</sup> *Mining Act 1992 (NSW)*, s 31(7); *Petroleum (Onshore) Act 1991 (NSW)*, s 72(7).

<sup>122</sup> *Under the Road Transport Act 2013 (NSW)*.

<sup>123</sup> *Mining Act 1992 (NSW)*, Dictionary; *Petroleum (Onshore) Act 1991 (NSW)*, s.72(6).

<sup>124</sup> *Ulan Coal Mines Ltd v Minister for Mineral Resources* [2007] NSWSC 1299.

<sup>125</sup> *Mining Act 1992 (NSW)*, s 31(5); *Petroleum (Onshore) Act 1991 (NSW)*, s 72(4).

In the case *Kayuga Coal Pty Ltd v John Earl Ducey and 4 others*<sup>126</sup> the landholders claimed that a dam, a contour bank and fences were 'significant improvements'. The Court agreed with them and also found that the requirement for the improvement to be 'valuable' should not be read as meaning 'of special value' or 'considerable value'.

In *Ulan Coal Mines v Minister for Mineral Resources*<sup>127</sup> the Court said that 'to be valuable, an improvement must be of more than minimal or little value'. The Court then went on to consider whether certain items were substantial and valuable. Generally speaking, the Court found that fences, stock yards and dams (including some of their catchment) that were of some use, or that could be put to a proper use after some minor work, were improvements. The Court also found that cleared land with native, unimproved grasses did not constitute an improvement as it did not meet the definition of 'other valuable work'. More than mere land clearing will therefore be necessary to establish a significant improvement.

In *Martin v Hume Coal Pty Ltd*<sup>128</sup> the Court found that roads and driveways, paddocks with improved pastures and lucerne, an equestrian cross-country event course, cattle laneways, irrigation piping and fences could be 'significant improvements'. The Court also found that access across land for the purpose of undertaking exploration activities on other land is covered by an exploration licence. This means that landholder consent is required for access over or onto a significant improvement. The Court also found that a significant improvement does not have to be in place at the time that an access arrangement is made to trigger the requirement for landholder consent – it simply needs to be in place before the mining company proposes to use the land that it is on.

## 2. Protections for water

It is recommended that landholders engage independent water experts to conduct baseline studies and monitor surface and ground water. Try to get the costs covered, or partly covered, by the mining or CSG company. Although there is no legal requirement for this, landholders should seek to have the quantity, quality and flow regimes of water on their properties tested prior to any work being undertaken. Water should also be monitored throughout the mining or production phase. This information will help landholders to understand the impacts, if any, that the activity is having on water and may be useful in any claims later on.<sup>129</sup>

<sup>126</sup> *Kayuga Coal Pty Ltd v John Earl Ducey and 4 others* [2000] NSWCA 54.

<sup>127</sup> *Ulan Coal Mines v Minister for Mineral Resources* [2007] NSWSC 1299.

<sup>128</sup> *Martin v Hume Coal Pty Ltd* [2016] NSWLEC 51.

<sup>129</sup> There are mandatory requirements for mining and CSG companies to prepare Groundwater Monitoring and Modelling Plans in consultation with DPI Water prior to constructing or using any borehole or petroleum well. Department of Industry, 2015, *Exploration Code of Practice: Environmental Management*.  
<http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/codes-and-guidelines/codes-of-practice/environmental-management>.

For coal, if an exploration licence is granted over the surface of land, a landholder who is entitled to use the land for stock watering or water drainage purposes is entitled to free and uninterrupted access for those purposes to the water in any stream, lagoon or swamp either on the land or on neighbouring land.<sup>130</sup> This does not apply to CSG.

### 3. Protections for exempted areas

There are a number of areas where no exploration activities can take place under an exploration licence without the specific consent of the Minister.<sup>131</sup>

Exempted areas tend to be land that is held for a public purpose. Examples include State Forests, Travelling Stock Reserves, State Conservation Areas, public reserves, community land, Crown land and land held on trust as a racecourse, cricket ground, recreation reserve, park or permanent common.<sup>132</sup>

Notwithstanding this restriction, the Minister can always issue an 'exempted area consent' to allow for exploration in such areas.<sup>133</sup>

#### Case study: exploration in exempted areas

In 2011, Hume Coal was granted an 'exempted area consent' to explore for coal in Belanglo State Forest in the NSW Southern Highlands. Before any exploration could go ahead, Forests NSW had to issue Hume Coal with an Occupation Permit to allow access to the State Forest for exploration purposes. This permit was granted soon after the exempted area consent.

Santos holds a CSG exploration licence in an exempted area, the Pilliga State Forest, west of Narrabri. The Pilliga is a recognised biodiversity hotspot and home to a number of threatened species. So far, the exploration has involved seismic surveys, clearing of numerous roads and tracks, drilling of up to 92 coal seam gas drill holes and wells, development of five pilot production fields and construction of 13 major water treatment dams and a water treatment plant.<sup>134</sup>

At the time of writing, Santos was seeking approval to drill up to 850 individual CSG production wells in the forest.<sup>135</sup>

<sup>130</sup> *Mining Act 1992* (NSW), s 165.

<sup>131</sup> *Mining Act 1992* (NSW), s 30; *Petroleum (Onshore) Act 1991* (NSW), s 70.

<sup>132</sup> *Mining Act 1992* (NSW), Dictionary; *Petroleum (Onshore) Act 1991* (NSW), s 70.

<sup>133</sup> *Mining Act 1992* (NSW) s 30; *Petroleum (Onshore) Act 1991* (NSW), s 70.

<sup>134</sup> <https://narrabrigasproject.com.au/about/environment/>.

<sup>135</sup> See: [http://majorprojects.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=6456](http://majorprojects.planning.nsw.gov.au/index.pl?action=view_job&job_id=6456)

#### 4. Protections for National Parks and other Special Areas

While an exploration licence may cover them, it is generally unlawful to explore in a National Park, historic site, nature reserve, karst conservation reserve or Aboriginal area.<sup>136</sup>

However, a special Act of Parliament can authorise exploration in these areas,<sup>137</sup> or the reserved status of the land could be revoked.

It is also possible for the NSW Minister for the Environment to approve exploration in these areas if the exploration is being undertaken on behalf of the Government.<sup>138</sup> In such cases, there needs to be a notice of the Minister for the Environment's intention to issue such an approval laid before both Houses of Parliament, and members of Parliament are allowed 15 sitting days to put on a motion objecting to such notice. If that motion is passed, then the Minister for the Environment cannot grant the approval for the exploration.<sup>139</sup>

CSG exploration is also prohibited within a State recreation area<sup>140</sup> without the agreement of the Minister for the Environment.<sup>141</sup>

#### 5. Protections for exclusion zones and 'off limits' areas

New CSG developments, including developments for the purpose of exploration, are prohibited on or within 2 kilometres of the following CSG exclusion zones:<sup>142</sup>

1. Land within a residential zone.
2. Future residential growth area land.
3. Additional rural village land.

New CSG developments are also prohibited on 'critical industry cluster land'.<sup>143</sup> This is land with a concentration of equine (horse) and viticulture

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<sup>136</sup> *National Parks and Wildlife Act 1974* (NSW), ss 41, 54, 58O and 64.

<sup>137</sup> *National Parks and Wildlife Act 1974* (NSW), s 41.

<sup>138</sup> *National Parks and Wildlife Act 1974* (NSW), ss 41(4), 54, 58O and 64. The Minister for Industry, Resources and Energy can nominate a person to undertake the exploration on behalf of the Government.

<sup>139</sup> *National Parks and Wildlife Act 1974* (NSW), ss 41(5), 54, 58O and 64. Note that the *Mining Act 1992* (NSW) and the *Petroleum (Onshore) Act 1991* (NSW) do not apply to National Parks and other Special Areas. Therefore, there is no requirement for an exploration licence to be issued. Rather, the process set out under the *National Parks and Wildlife Act 1974* (NSW) is the process for authorising exploration in these areas.

<sup>140</sup> Under the *National Parks and Wildlife Act 1974* (NSW).

<sup>141</sup> *Petroleum (Onshore) Act 1991* (NSW), s 70(3).

<sup>142</sup> 'CSG developments' include development for the purpose of CSG exploration: SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9A, 3. But note that pipelines that are ancillary to coal seam gas development are not prohibited in the 2km buffer zone.

<sup>143</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9A.

(wine) industries that has been mapped by the NSW Government in the Upper Hunter.<sup>144</sup>

These exclusion zones do not apply to coal. However, open cut coal mines are prohibited in parts of two local government areas – Lake Macquarie City Council and the Upper Hunter Shire Council.<sup>145</sup>

The Governor of NSW can create further exclusion zones or ‘off limits’ areas by amending the Mining SEPP.<sup>146</sup> While there are no mandatory public consultation requirements before amendments are made to SEPPs, it is common practice for the Minister for Planning to request public comment before recommending that the Governor makes such amendments.<sup>147</sup>

See Chapter 5 for more information about the limits that planning law places on coal and CSG developments.

### ***Can I get compensation?***

When an exploration licence is granted, a landholder may become entitled to compensation for any loss suffered or likely to be suffered as a result of exploration activities.<sup>148</sup>

The land in question does not need to be covered by an exploration licence for the landowner to be entitled to compensation.<sup>149</sup>

The key question is whether the land suffered ‘compensable loss’.<sup>150</sup>

The type of loss that will be compensated includes:<sup>151</sup>

- damage to the *surface* of land;
- damage to crops, trees, grasses or other vegetation (including fruit and vegetables);
- damage to buildings, structures or works;
- deprivation of the possession or of the use of the *surface* of land or any part of the surface;
- severance of land from other land of the landholder;
- surface rights of way and easements;
- destruction, loss of, injury to, disturbance of or interference with, stock; or
- damage consequential to any matter referred to above.

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<sup>144</sup> See: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Critical-Industry-Clusters-in-the-Upper-Hunter>.

<sup>145</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9, Sch 1.

<sup>146</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9, Sch 1.

<sup>147</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 37, 38.

<sup>148</sup> *Mining Act 1992* (NSW), ss 263, 264; *Petroleum (Onshore) Act 1991* (NSW), s 107.

<sup>149</sup> *Mining Act 1992* (NSW), s 263; *Petroleum (Onshore) Act 1991* (NSW), s 107.

<sup>150</sup> *Mining Act 1992* (NSW), s 263(1); *Petroleum (Onshore) Act 1991* (NSW), s 107(1).

<sup>151</sup> *Mining Act 1992* (NSW), s 262; *Petroleum (Onshore) Act 1991* (NSW), s 107A.

There is no specific category that recognises damage to water (e.g. pollution of aquifers) as compensable loss.

Sometimes the company offers to undertake in-kind work in lieu of monetary compensation. This might involve the replacement or maintenance of fences or roads or the repair of dam walls.

Landholders may wish to request that compensation be paid to offset the inconvenience and noise associated with having exploration occur on the land.

Some landholders have negotiated temporary employment or contract work as part of a compensation agreement.

For coal, there are various ways that compensation can be dealt with. An access arrangement can set out the compensation to be paid to the landholder in the event that certain damage occurs.<sup>152</sup> It is common for such arrangements to set out how much compensation will be paid for each exploration hole that is drilled. But access agreements for coal exploration do not have to deal with compensation, and it is possible to enter a stand-alone agreement about compensation. These agreements must be in writing and signed by all the parties to the agreement.<sup>153</sup>

For CSG, an access arrangement *must* specify the compensation that is to be paid to the landholder in the event that certain damage occurs.<sup>154</sup>

See Chapter 3 for more information on access arrangements.

Compensation agreements can require a certain amount of speculation as to the loss that is likely to be suffered. Sometimes unexpected damage is caused by exploration activities. If it turns out that the actual loss is more than what has been originally assessed, the landholder can ask the mine or CSG company to provide additional compensation.

The Land and Environment Court can also assess compensation if you can't come to an agreement in the first place or if the agreement does not cover the loss that has actually been caused.<sup>155</sup>

### **Case study: compensation for exploration**

Mr and Mrs O'Brien's property comprised 16 separate paddocks. Exploratory drilling for coal was to take place on paddocks 3, 4 and 5. The landholders and the mining company couldn't agree on compensation so it was assessed by the Mining Warden's Court. The compensation was assessed at \$32,500 in total. This included \$100 for each drill hole, \$1,000 to compensate the landholders for time spent supervising and inspecting the work and \$20,000

<sup>152</sup> *Mining Act 1992* (NSW), s 141(1)(f).

<sup>153</sup> *Mining Act 1992* (NSW), ss 263(2), 264(2).

<sup>154</sup> *Petroleum (Onshore) Act 1991* (NSW), s 69D(2).

<sup>155</sup> *Mining Act 1992* (NSW), ss 275, 276; *Petroleum (Onshore) Act 1991* (NSW) ss 108, 111.

as a lump sum to compensate the landholders for any 'compensable loss' that arose.

After drilling finished, the landholders sought additional compensation for loss that was actually suffered.<sup>156</sup> They claimed that the exploration had prevented them from being able to sow oats in one of their paddocks and, as a result, they could not obtain the seed or fatten their lambs and so suffered financial loss. They also claimed that the water levels in the bores had dropped, requiring them to obtain a new pump to access the water.

The Mining Warden's Court had to decide whether this additional loss was caused by the exploration activities and whether this loss was additional to the loss that had already been compensated for. A number of experts were called to give their opinions on these matters. In the end, the Court found that the loss was not a result of the exploration and therefore did not need to be compensated.

This case highlights the importance of doing baseline studies and undertaking ongoing monitoring, as you need to be able to prove that the loss occurred and that the exploration activities caused it.

### ***Will I have to sell my land?***

It is highly unlikely that exploration activities will impact your land to such an extent that the mining or CSG company will offer to buy your property. This is more likely to happen at the mining or production stage. However, some companies offer to purchase properties in areas they intend to mine. It is up to you to decide whether you want to sell your property to a mining or CSG company.

See Chapter 7 for more information on selling your land to mining and CSG companies.

### **The bottom line**

- Exploration licences can be granted over your land without your consent.
- You will be able to raise objections, but you won't be personally notified if an application for a licence is lodged over your land. You'll need to stay vigilant.
- There are some restrictions on where exploration can take place.
- An access arrangement will be needed before a company can explore on your land (see Chapter 3).
- You may be eligible for compensation for loss suffered as a result of exploration activities.

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<sup>156</sup> *O'Brien and Anor v Jesusu Pty Ltd* [1997] 13 Mining Warden's Court.

# Chapter 3 - Access Arrangements

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Your right to negotiate an access arrangement at the exploration stage is one of the most important opportunities you will have to influence how coal or CSG exploration is carried out and to protect your property from any adverse impacts. This Chapter is designed to familiarise you with the process and provide some tips on how to get the best outcomes from it.

In this Chapter:

**Minister** means the NSW Minister for Industry, Resources and Energy

**Secretary** means the Secretary of the NSW Department of Industry

## ***What is an access arrangement?***

An exploration licence can be granted over your land without your consent. However, no exploration can take place on your land until an access arrangement is in place.<sup>157</sup> An access arrangement sets out the terms upon which the mining or CSG company who holds the licence can access your land to explore for minerals or petroleum. The exploration activities must be carried out only in accordance with the terms of the access arrangement (and, of course, the exploration licence).

Access arrangements are only legally required at the exploration stage.

## ***What is the process for making an access arrangement?***

### **1. Licence holder serves the landholder with an intention to seek an access arrangement**

The mining or CSG company who holds the exploration licence will serve you with a written notice of their intention to enter into an access arrangement with you.<sup>158</sup> The notice must include a plan and description of the land where the exploration will take place and the exploration methods intended to be used.<sup>159</sup> The notice will usually be delivered by post, but sometimes a representative of the mining or CSG company will come to your home and try to serve notice on you in person.

Along with the notice, you will also receive a draft access arrangement. Access arrangements are usually prepared by the mining or CSG company and can range from simple one-page documents to detailed contracts. There

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<sup>157</sup> *Mining Act 1992* (NSW), s 140; *Petroleum (Onshore) Act 1991* (NSW), s 69C.

<sup>158</sup> *Mining Act 1992* (NSW), s 142; *Petroleum (Onshore) Act 1991* (NSW), s 69E.

<sup>159</sup> *Mining Act 1992* (NSW), s 142; *Petroleum (Onshore) Act 1991* (NSW), s 69E.

is a template access arrangement for minerals and coal.<sup>160</sup> Use of the template is voluntary – you can amend the template or not use it at all for your own access arrangement.<sup>161</sup> This template does not apply to CSG. However, there is a code of practice for negotiating access arrangements for CSG exploration.<sup>162</sup>

### **Meeting with mining or CSG company representatives**

During the negotiation process, or even beforehand, a mining or CSG company representative may request a meeting with you or seek access to your property to have a look around. You do not have to meet with the representative or allow access to your property. If you do decide to meet with the representative, you may wish to choose a neutral location such as a cafe in your local town.

## **2. The landholder and the licence holder negotiate the terms of the access arrangement**

The draft access arrangement can be used as the basis for negotiations. You should carefully review a proposed access arrangement and seek independent legal advice before signing anything. You are allowed to suggest whatever changes you think are appropriate. For example, you can ask for certain clauses to be removed or changed and suggest new clauses to cover issues that are not dealt with by the draft access arrangement.

Another option is to draft your own access arrangement (or have a lawyer do this for you) and present that to the mining or CSG company as the basis for negotiations.

The mining or CSG company must pay the reasonable costs of the landholder in negotiating the access arrangement.<sup>163</sup> The maximum amount determined by the Minister as of December 2016 is \$2,500, or \$1,500 where the prospecting activities are 'exempt'.<sup>164</sup> Exempt activities are low intensity exploration methods that don't require any environmental assessment. See Chapter 2 for more information.

You should not feel pressured to sign the access arrangement and you do not need to engage in negotiations at all if you don't want to. However, you should

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<sup>160</sup> See: <http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/minerals-and-coal/template-for-land-access>.

<sup>161</sup> *Mining Act 1992* (NSW), s 141(1A).

<sup>162</sup> *Petroleum (Onshore) Act 1991* (NSW), ss 69DA, 69DB; *Petroleum (Onshore) Regulation 2016* (NSW), cl 16A; NSW Department of Industry, Skills and Regional Development, Division of Resources and Energy, *Exploration code of practice: petroleum land access* (1 December 2016):

[http://www.resourcesandenergy.nsw.gov.au/\\_data/assets/pdf\\_file/0005/688595/PUB16-428-FINAL-Exploration-code-of-practice-petroleum-land-access.pdf](http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0005/688595/PUB16-428-FINAL-Exploration-code-of-practice-petroleum-land-access.pdf).

<sup>163</sup> *Mining Act 1992* (NSW) s 142(2A); *Petroleum (Onshore) Act 1991* (NSW), s 69E(2A).

<sup>164</sup> *Mining Act 1992* (NSW), ss 142(2A), 142(2B); *Petroleum (Onshore) Act 1991* (NSW), ss 69E(2A), 69E(2B); NSW Government Gazette No 101 of 1 December 2016 at p 3313.

be aware that you can be taken to arbitration if you do not come to an agreement after 28 days.<sup>165</sup>

### **3. The access arrangement is finalised or the parties may go to arbitration**

You will have a minimum of 28 days to come to an agreement from the date you are served with a notice of intention to seek an access arrangement. If you can reach an agreement about the access arrangement in that time, all the parties will sign the arrangement and it will become binding on them.<sup>166</sup>

However, if you cannot agree within 28 days (or if you choose not to negotiate at all), the mining or CSG company can start the arbitration process.<sup>167</sup>

It is important to keep in mind that a failure to agree does not necessarily mean that you will have to go to arbitration. The company may decide not to pursue this option against you.

Secondary landholders need to be notified of an access arrangement but they do not have a right to negotiate the terms of such arrangements.<sup>168</sup>

Secondary landholders include mortgagees. The mining or CSG company has to serve any secondary landholders with notice of an access arrangement within 14 days of the access arrangement being agreed upon.<sup>169</sup>

### ***What happens at arbitration?***

Any person can be chosen as the arbitrator so long as both parties agree.<sup>170</sup> If the parties cannot agree, either party can apply to the Secretary of the Department of Industry who will choose an arbitrator from a list.<sup>171</sup>

The arbitrator will set a time and place for conducting a hearing.<sup>172</sup> Both the mining or CSG company and the landholder/s are allowed to appear at the hearing and be heard, and also have the right to be represented by an agent or a lawyer.<sup>173</sup>

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<sup>165</sup> *Mining Act 1992* (NSW), s 143; *Petroleum (Onshore) Act 1991* (NSW), s 69F.

<sup>166</sup> *Mining Act 1992* (NSW), s 142(3); *Petroleum (Onshore) Act 1991* (NSW), s 69E(3).

<sup>167</sup> *Mining Act 1992* (NSW), ss 139, 140(1)(b), 143-153; *Petroleum (Onshore) Act 1991* (NSW), ss 69B(1)(b), 69F-69P.

<sup>168</sup> *Mining Act 1992* (NSW) s 142A, *Petroleum (Onshore) Act 1991* (NSW), s 69EA.

<sup>169</sup> *Mining Act 1992* (NSW) s 142A(3), *Petroleum (Onshore) Act 1991* (NSW), s 69EA(3).

<sup>170</sup> *Mining Act 1992* (NSW), s 143; *Petroleum (Onshore) Act 1991* (NSW), s 69F.

<sup>171</sup> *Mining Act 1992* (NSW), s 144; *Petroleum (Onshore) Act 1991* (NSW), s 69G. See the current list of arbitrators: [http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/landholders-rights/arbitration\\_process/current-arbitrators](http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/landholders-rights/arbitration_process/current-arbitrators).

<sup>172</sup> *Mining Act 1992* (NSW), s 145; *Petroleum (Onshore) Act 1991* (NSW), s 69H.

<sup>173</sup> *Mining Act 1992* (NSW), s 146; *Petroleum (Onshore) Act 1991*, NSW, s 69I.

The Department of Industry has released guidelines for land access arbitration procedure.<sup>174</sup> At all times, the arbitrator must act fairly and in good conscience.<sup>175</sup>

The arbitrator will first try to get the parties to agree through mediation.<sup>176</sup> If agreement can be reached, then the access arrangement will be entered into.<sup>177</sup>

If the parties cannot agree, the arbitrator must set a time and place for an arbitration hearing, and notify both the landholder and the mining or CSG company.<sup>178</sup>

The arbitrator can conduct a site assessment of the land during the arbitration process,<sup>179</sup> but before doing so they must give reasonable notice to the landholder.<sup>180</sup>

After the hearing, the arbitrator will make an interim determination as to whether the mining or CSG company should have access to the land.<sup>181</sup> If the arbitrator determines that access is to be granted, they will need to prepare a draft access arrangement and serve it on all the parties.<sup>182</sup>

Once an interim determination order and access arrangement has been received, either party has 14 days to apply to the arbitrator to:<sup>183</sup>

- reconsider the question of access to land; or
- vary the terms of the draft access arrangement.

If no such application is made, the interim determination order and draft access arrangement become final.<sup>184</sup> If such an application is made, the arbitrator will set a time and place for a further hearing into the matter, and notify the landholder and the mining or CSG company.<sup>185</sup> After this further

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<sup>174</sup> *Mining Act 1992* (NSW), s 148A; *Petroleum (Onshore) Act 1991*, (NSW), s 69KA; NSW Department of Industry, Skills and Regional Development, Division of Resources and Energy, *Land access arbitration procedure: Mediations and arbitrations under the Mining Act 1992 and the Petroleum (Onshore) Act 1991* (1 December 2016): [http://www.resourcesandenergy.nsw.gov.au/\\_data/assets/pdf\\_file/0009/688590/PUB16-543-Land-Access-Arbitration-Procedure.pdf](http://www.resourcesandenergy.nsw.gov.au/_data/assets/pdf_file/0009/688590/PUB16-543-Land-Access-Arbitration-Procedure.pdf).

<sup>175</sup> *Mining Act 1992* (NSW), s 148; *Petroleum (Onshore) Act 1991*, (NSW), s 69K.

<sup>176</sup> *Mining Act 1992* (NSW), s 148B; *Petroleum (Onshore) Act 1991*, (NSW), s 69KB.

<sup>177</sup> *Mining Act 1992* (NSW), s 147; *Petroleum (Onshore) Act 1991*, (NSW), s 69J.

<sup>178</sup> *Mining Act 1992* (NSW), s 145B; *Petroleum (Onshore) Act 1991*, (NSW), s 69HB.

<sup>179</sup> *Mining Act 1992* (NSW), ss 145, 145A; *Petroleum (Onshore) Act 1991*, (NSW), ss 69H, 69HA.

<sup>180</sup> *Mining Act 1992* (NSW), ss 145, 145A; *Petroleum (Onshore) Act 1991*, (NSW), ss 69H, 69HA.

<sup>181</sup> *Mining Act 1992* (NSW), s 149; *Petroleum (Onshore) Act 1991* (NSW), s 69L.

<sup>182</sup> *Mining Act 1992* (NSW), s 149; *Petroleum (Onshore) Act 1991* (NSW), s 69L.

<sup>183</sup> *Mining Act 1992* (NSW), s 150; *Petroleum (Onshore) Act 1991* (NSW), s 69M.

<sup>184</sup> *Mining Act 1992* (NSW), s 151; *Petroleum (Onshore) Act 1991* (NSW), s 69N.

<sup>185</sup> *Mining Act 1992* (NSW), s 150; *Petroleum (Onshore) Act 1991* (NSW), s 69M.

hearing, the arbitrator will make a final determination and serve a copy of the access arrangement on the landholder and the mining or CSG company.<sup>186</sup>

It is possible to withdraw from the arbitration process but this can only be done if all the parties to the arbitration agree and serve notice in writing on the arbitrator.<sup>187</sup>

As soon as practicable after determining an access arrangement, the mining or CSG company must provide a copy of the final access arrangement to the Secretary of the Department of Industry. The Secretary needs to make a register of access arrangements available on the Department's website.<sup>188</sup>

### ***What if I don't like the arbitrator's decision?***

If you are unhappy with the arbitrator's final determination, you can apply to the Land and Environment Court for a review of the determination.<sup>189</sup> You have to do this within 28 days of an interim determination being served on you, or within 14 days of a final determination being served on you.<sup>190</sup>

The decision of the Court is final.

See Chapter 7 for more information on Court action.

### **Case study: challenging the terms of access arrangements**

A number of landholders have chosen to challenge the arbitrator's decision. This used to be done in the Mining Warden's Court but now happens in the Land and Environment Court.

It's important to note that you can include any terms you want in your access arrangement so long as the mining or CSG company agrees. However, if the matter goes before an arbitrator or the Court, you'll need to think about what kinds of terms are going to be seen as reasonable by an impartial third party.

The cases are helpful in understanding what kinds of terms are likely to survive a challenge. Below are some terms that have been included in access arrangements decided by the Court:

1. Requirement for the licence holder to provide the landholder with a 42 day written notice in advance of the first date upon which they intended to enter the property.
2. Requirement for the licence holder to let the landholder know where they will be on the land, for safety reasons.

<sup>186</sup> *Mining Act 1992 (NSW)*, s 151; *Petroleum (Onshore) Act 1991 (NSW)*, s 69N.

<sup>187</sup> *Mining Act 1992 (NSW)*, s 153; *Petroleum (Onshore) Act 1991 (NSW)*, s 69P.

<sup>188</sup> *Mining Act 1992 (NSW)*, s 156A; *Petroleum (Onshore) Act 1991 (NSW)*, s 69SA.

<sup>189</sup> *Mining Act 1992 (NSW)*, s 155; *Petroleum (Onshore) Act 1991 (NSW)*, s 69R.

<sup>190</sup> *Mining Act 1992 (NSW)*, s 155; *Petroleum (Onshore) Act 1991 (NSW)*, s 69R.

3. Requirement that no one other than those workers reasonably necessary for and/or ancillary to the operation of a drilling rig would be permitted to enter the property.
4. Requirement that the licence holder advise the landholder about drilling within 1km of a watering point.
5. Requirement for the licence holder to have public liability insurance of \$20 million, to note the interests of the landholder on the insurance policy and to give the landholder a copy of the policy and certificates of currency if and when the policy is renewed.
6. Term allowing the licence holder to camp on the landholder's property in order to provide security to the rig.
7. Requirement for the licence holder to pay the landholder's costs of undertaking a WH&S safety induction course which was necessary for the landholder to discharge his WH&S responsibilities.
8. Requirement for safety vests to be worn by the licence holder's staff and for flags to be attached to vehicles.
9. Requirement for the directors of the licence holder company to provide personal guarantees for any liabilities the company might incur under the access arrangement. The licence holder here was a \$2 company.
10. Term stating that the access arrangement was to last for 5 years (the same length of time as the exploration licence) so that the licence holder would always have access to the property.
11. Requirement that the licence holder bury all pipelines and electricity lines beneath the surface to avoid impacts on crops and stock.
12. Requirement for the licence holder to pay for a registered surveyor to survey the property if there is a dispute between the parties.
13. Terms stating that the licence holder can access the landholder's property at any time, but can only carry out operations during certain hours (7am-6pm Monday to Friday and 7am-2pm on Saturday).
14. Requirement for the licence holder to remove any excessive garbage and waste from the land.

When negotiating access arrangements, it's important that you don't agree to less protection than the law allows. For example, the Land and Environment Court removed an indemnity clause from an access arrangement on the grounds that the *Mining Act* provided better immunity to landholders than was provided for in the access arrangement.

### ***Do I have to go to arbitration?***

You don't have to go to arbitration, but it is likely to be in your best interests to attend and be heard. If you don't attend, the arbitrator can make a decision in your absence.<sup>191</sup> It is therefore advisable to attend and have your views heard.

### ***Do I have to pay for arbitration?***

The mining or CSG company must pay the reasonable costs of the landholder in participating in the mediation and arbitration.<sup>192</sup> The mining or CSG company must also pay the arbitrator's costs.<sup>193</sup>

### ***What can I do to prepare for arbitration?***

Before you begin arbitration it would be useful to think about the following.

If you do not want to grant a company access to your land, you must be prepared to explain your reasons why. Reasons may include the agricultural importance of your land, the disruption to your reasonable use and enjoyment of your land, predicted impacts on threatened species, and potential damage to the aquifers underneath your land. Your reasoning must be well thought out and communicated to the arbitrator as early on in the process as possible.

It may also be worth asking the company to demonstrate why it is necessary for them to access your land. If accessing your land is not absolutely necessary to allow the company to explore effectively, you can argue that access should not be granted.

It is possible for the arbitrator to deny access to the company, although access has generally been granted for mining. For CSG, there have been few, if any, arbitrations. In any event, you should be prepared to discuss access to some extent – especially any conditions that you'd like to include in any access arrangement. By thinking about this ahead of time, you will be better prepared to negotiate the best possible access arrangement should you fail to have access denied.

### ***What rights does an access arrangement give the licence holder?***

This will depend on the terms of the access arrangement. Generally, the access arrangement will allow the company to come onto your land at certain times to do certain things authorised by the exploration licence.

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<sup>191</sup> *Mining Act 1992 (NSW)*, s 148; *Petroleum (Onshore) Act 1991 (NSW)*, s 69K.

<sup>192</sup> *Mining Act 1992 (NSW)*, s 148C; *Petroleum (Onshore) Act 1991 (NSW)*, s 69KC. The Minister may set a maximum amount of reasonable costs by publishing an order in the *Gazette*. At this time of writing no maximum amount had been set.

<sup>193</sup> *Mining Act 1992 (NSW)*, s 152; *Petroleum (Onshore) Act 1991 (NSW)*, s 69O.

Beyond that, any restrictions will be decided by the terms of the access arrangement. The more detailed and thorough the access arrangement is the more protections will be in place for the landholder.

### ***What should an access arrangement cover?***

Each access arrangement will be different as the landholder and the company must negotiate the terms. Much will therefore depend on the negotiating skills of the landholder, the land, including what it is currently used for, and the nature of the exploration activities that are proposed.

However, as a general rule, access arrangements should cover a number of matters, such as:<sup>194</sup>

- the periods during which the holder of the exploration licence can access the land;
- the parts of the land on which the licence holder can explore;
- the means by which the licence holder may gain access to those parts of the land;
- the kinds of exploration operations that may be carried out on the land;
- the conditions to be observed by the licence holder when exploring on the land;
- the manner of resolving any dispute arising in connection with the arrangement;
- the manner of varying the arrangement; and
- the notification to the licence holder of any person who becomes an additional landholder.

For coal, an access arrangement may also cover compensation to be paid to the landholder.<sup>195</sup> For CSG, compensation arrangements must be included in the access arrangement.<sup>196</sup>

See Appendix 1 for a checklist that lists some additional things an access arrangement should address.

### ***What happens if the licence holder breaches the access arrangement?***

The mining or CSG company can only carry out exploration activities in accordance with the access arrangement.<sup>197</sup>

If the company breaches the access arrangement, the landholder is allowed to deny the company access until they stop breaching the arrangement, or the breach is remedied to the reasonable satisfaction of an arbitrator appointed by the Secretary.<sup>198</sup>

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<sup>194</sup> *Mining Act 1992* (NSW), s 141; *Petroleum (Onshore Act) 1991* (NSW), s 69D.

<sup>195</sup> *Mining Act 1992* (NSW), s 141(1)(f).

<sup>196</sup> *Petroleum (Onshore Act) 1991* (NSW), s 69D(2).

<sup>197</sup> *Mining Act 1992* (NSW), s 140(1); *Petroleum (Onshore) Act 1991* (NSW), s 69C(1).

<sup>198</sup> *Mining Act 1992* (NSW), s 141(4); *Petroleum (Onshore) Act 1991* (NSW), s 69D(4).

Where a breach has occurred, a landholder can request the Secretary to appoint an arbitrator to decide how the breach should be fixed, or whether the breach has been fixed properly.<sup>199</sup> The company can also request an arbitrator to be appointed. The Secretary must appoint an arbitrator within 48 hours of being requested to do so, and the arbitrator must deal with the matter within 5 business days of being appointed.

### ***What are my obligations under an access arrangement?***

Once an exploration licence is granted and an access arrangement is finalised, you are legally obliged to grant access in accordance with the access arrangement. If you unlawfully prevent the mining or CSG company from accessing your land or carrying out authorised activities, you will be committing an offence. The maximum penalty for this offence is \$11,000.<sup>200</sup>

However, if you are denying access to prevent an ongoing breach of the access arrangement by the mining or CSG company and an arbitrator has not made a determination about the breach as discussed above, your obstruction would not be considered to be unlawful.<sup>201</sup> You should ensure that your access arrangement is detailed enough to be able to identify breaches. Seek legal advice if you have any doubts.

### ***Am I liable for the actions of the licence holder?***

Under the law landholders are immune from any action, liability, claim or demand that arises as a result of the mining company's acts or omissions.<sup>202</sup> However, this immunity does not extend to things done by the landholder recklessly or with the intention to cause harm.<sup>203</sup>

### ***What if my neighbour signs an access arrangement?***

Unfortunately, some landholders sign access arrangements that allow exploration activities to occur that will have a negative impact on their neighbours. For example, if you allow drilling on your boundary fence, it may have minimal impact on your land, but may be extremely disruptive to your neighbour.

There is no legal requirement to consider your neighbour when negotiating an access arrangement, but it would be the neighbourly thing to do. By meeting with your neighbours and discussing your concerns, you may be able to help protect each other's interests.

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<sup>199</sup> *Mining Act 1992* (NSW), s 141(4); *Petroleum (Onshore) Act 1991* (NSW), s 69D(4).

<sup>200</sup> *Mining Act 1992* (NSW), s 378B; *Petroleum (Onshore) Act 1991* (NSW), s 136(3).

<sup>201</sup> *Mining Act 1992* (NSW), s 141(4); *Petroleum (Onshore) Act 1991* (NSW), s 69D(4).

<sup>202</sup> *Mining Act 1992* (NSW), s 383C; *Petroleum (Onshore) Act 1991* (NSW), s 141.

<sup>203</sup> *Mining Act 1992* (NSW), s 383C(1A); *Petroleum (Onshore) Act 1991* (NSW), s 141(1A).

If the actions of the mining or CSG company are interfering unreasonably with your use and enjoyment of your land, you may be able to bring an action in nuisance. See Chapter 7 for more information.

### ***Is there any way of getting out of an access arrangement?***

If the access arrangement sets out how it can be terminated or varied, it can be terminated or varied by following that process.<sup>204</sup> It is therefore advisable to include end dates and termination provisions in your access arrangement.

Otherwise, the arrangement can be varied or terminated so long as all parties to the arrangement agree.<sup>205</sup>

If the arrangement was decided by an arbitrator, the arbitrator can vary or terminate it but all the parties must agree.<sup>206</sup>

An arrangement can also be varied or terminated by the Land and Environment Court if the arrangement was originally decided by the Court or an arbitrator.<sup>207</sup>

### ***What happens if I sell my land or buy land that already has an access arrangement in place?***

An access arrangement does not run with the land so if you sell your land, or die, the access arrangement will no longer apply.<sup>208</sup>

However, if the arrangement is with two or more landholders, and one of the landholders sells their share of the property, the access arrangement continues in force for the others.<sup>209</sup>

When you buy land that is subject to an access arrangement, you will not automatically be bound by that arrangement. Much depends on how you buy the land. If you are the only purchaser, any existing access arrangement will not apply to you.<sup>210</sup> However, if you buy a share of land and one of the other landholders has already entered an access arrangement, you can be bound by that arrangement, but only if the mining or CSG company gives you a copy of the access arrangement.<sup>211</sup> If this happens, you have 28 days from the date you are given the access arrangement to object.<sup>212</sup>

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<sup>204</sup> *Mining Act 1992* (NSW), s 157(1); *Petroleum (Onshore) Act 1991* (NSW), s 69T(1).

<sup>205</sup> *Mining Act 1992* (NSW), s 157(2); *Petroleum (Onshore) Act 1991* (NSW), s 69T(2).

<sup>206</sup> *Mining Act 1992* (NSW), s 157(2); *Petroleum (Onshore) Act 1991* (NSW), s 69T(2).

<sup>207</sup> *Mining Act 1992* (NSW), s 157(2); *Petroleum (Onshore) Act 1991* (NSW), s 69T(2).

<sup>208</sup> *Mining Act 1992* (NSW), s 158(3); *Petroleum (Onshore) Act 1991* (NSW), s 69U.

<sup>209</sup> *Mining Act 1992* (NSW), ss 158(1), 158(2); *Petroleum (Onshore) Act 1991* (NSW), ss 69U(1), 69U(2).

<sup>210</sup> *Mining Act 1992* (NSW), s 158(3); *Petroleum (Onshore) Act 1991* (NSW), s 69U(3).

<sup>211</sup> *Mining Act 1992* (NSW), s 158(4); *Petroleum (Onshore) Act 1991* (NSW), s 69U(4).

<sup>212</sup> If you object, the access arrangement will stop applying to you as soon as: you enter into a new access arrangement with the title holder; or an arbitrator makes a new access arrangement; or 60 days go by since you objected and no access arrangement has been

## ***Can my property be accessed in any other way?***

Sometimes, a company will seek to access your land using an authority that is not an access arrangement. This is particularly relevant at the mining/production phase, where access arrangements are not required at all.

### **1. Environmental assessment permit**

For coal activities, title holders can get an 'environmental assessment permit' to allow them to enter your land to carry out an environmental assessment.<sup>213</sup>

If any compensable loss is caused during the environmental assessment, you can seek compensation from the Land and Environment Court.<sup>214</sup>

See Chapters 2, 4 and 7 for more information on compensation.

### **2. Easements and rights of way**

For coal activities, title holders are entitled to a right of way between the land they are working on and a public road.<sup>215</sup> Where possible, this should follow existing roads and tracks.<sup>216</sup> The title holder has to cover the costs of any grids or gates needed to rabbit-proof, marsupial-proof or dog-proof your land or contain livestock.<sup>217</sup> Any disputes regarding rights of way are heard in the Land and Environment Court.<sup>218</sup>

For CSG activities, title holders can be granted an easement or right of way over your property if it is necessary to allow them to work on your land or any other land that is included in the title area.<sup>219</sup> This can allow the title holder to construct access roads.<sup>220</sup> Easements are usually granted at the production stage where an access arrangement is not required.

For example, Camden Gas had a CSG production lease and in order to get to the land in the production lease they needed to access the properties of a landholder named Gatenby and others. Gatenby challenged the easement in the Mining Warden's Court. The Chief Mining Warden found that Camden Gas was entitled to an easement over the land of Gatenby and others to allow them to exercise their rights under the production lease.<sup>221</sup>

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made. However, if the matter is being arbitrated or if it goes to the Land and Environment Court, the existing access arrangement continues until a decision is made about the new one.

<sup>213</sup> *Mining Act 1992* (NSW), s 252.

<sup>214</sup> *Mining Act 1992* (NSW), s 270.

<sup>215</sup> *Mining Act 1992* (NSW), s 164(1).

<sup>216</sup> *Mining Act 1992* (NSW), s 164(2).

<sup>217</sup> *Mining Act 1992* (NSW), s 164.

<sup>218</sup> *Mining Act 1992* (NSW), s 164.

<sup>219</sup> *Petroleum (Onshore) Act 1991* (NSW), s 105.

<sup>220</sup> *Petroleum (Onshore) Act 1991* (NSW), s 106.

<sup>221</sup> *Sydney Gas (Camden) Operations Pty Ltd v Gatenby & Anor* (2005), NSW mining Warden's Court 2005/15.

### **3. Inspection and control**

The Secretary has appointed inspectors<sup>222</sup> who have the right to enter your land to see whether the requirements of the title and the law are being met.<sup>223</sup>

You must be notified in advance that your land is going to be inspected, unless it is impractical to do so. No one can come into your home or other residential parts of your land without your consent or a search warrant.<sup>224</sup>

#### **The bottom line**

It is important to keep in mind that an access arrangement is a contract. You are agreeing to let someone else come onto your land to carry out certain activities. You should make sure the access arrangement protects you and your land from any damage that could result by either minimising the likelihood of harm, or providing for appropriate compensation.

Some general tips about negotiating access arrangements are:

#### **1. Get independent legal advice**

An access arrangement is your best opportunity to have some control over exploration on your land. It is a legal document and you may need to rely on it down the track if anything goes wrong. As such, it is very important to make sure that you fully understand what it says and what rights and obligations you have. See Appendix 3 for information on finding a lawyer.

#### **2. Come up with your own access arrangements**

Most mining and CSG companies will begin negotiating an access arrangement with you by giving you their standard access arrangement. Many landholders sign these without negotiating further. This is not recommended.

One way around this is to draft your own access arrangement and ask that the title holder sign it or at least start negotiations based on your arrangement.

Some landholders have formed groups and come up with a single access arrangement that they have all agreed to use if required. This provides a united front to the mining or CSG company and strengthens the position of each landholder.

#### **3. Avoid 'divide and conquer' strategies**

Mining and CSG companies often include a confidentiality agreement as part of the access arrangement. The law does not require you to sign this, and you have a right to refuse to do so. If you sign a confidentiality agreement, you

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<sup>222</sup> Inspectors are appointed by the Secretary of the Department of Industry. See *Mining Act 1992* (NSW), s 361; *Petroleum (Onshore) Act 1991* (NSW), s 98.

<sup>223</sup> *Mining Act 1992* (NSW), Part 12; *Petroleum (Onshore) Act 1991* (NSW), Part 9.

<sup>224</sup> *Mining Act 1992* (NSW), s 248D; *Petroleum (Onshore) Act 1991* (NSW), s 103.

may be prevented from discussing the access arrangement and this is not likely to be in your best interests. It helps to talk to others about their access arrangements so that you can get ideas about what sorts of protections to include and what sorts of compensation you can reasonably ask for. It also allows you to speak to your neighbours about what is happening on your land.

Access arrangements can differ markedly between landholders based on how well each landholder negotiates. It's therefore much better to work as a community and know what others are getting. It will help you to negotiate a better deal.

If you sign a confidentiality agreement, you will not be able to discuss the terms of your access arrangement, and may even be prevented from speaking to the media if anything goes wrong.

#### **4. Legal expenses**

The mining or CSG company is required to pay the reasonable costs of the landholder in obtaining initial legal advice about the making of an access arrangement.<sup>225</sup> This requirement only applies if the landholder asks for their legal costs to be met so it's important to make this request. At present there has been no maximum amount set for these costs so this could be used as a strong point of negotiation.

#### **5. Protect yourself**

It's important to come up with the best possible access arrangement. This will mean different things for different people. Some things you should consider including are set out in the checklist in Appendix 1 of this guide.

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<sup>225</sup> *Mining Act 1992* (NSW) s 142(2A); *Petroleum (Onshore) Act 1991* (NSW), s 69E(2A).  
Note: it is unclear whether the landholder's legal costs must be paid in the event that the landholder decides not to sign the access arrangement.

# Chapter 4 – Mining and Petroleum Production

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Once a project progresses to the mining/petroleum production stage, you will have a number of opportunities to have a say. It's important that you use these opportunities effectively to ensure your interests are protected as much as possible.

The process for authorising mining and petroleum production activities is similar, but there are also some important differences. This Chapter takes you through the process and highlights where there are differences.

There is a completely separate process for assessing and approving mining and CSG developments under planning laws and this is addressed in Chapter 5. This Chapter deals only with the process for issuing mining leases and petroleum production leases.

In this Chapter:

**Minister** means the NSW Minister for Industry, Resources and Energy

**Secretary** means the Secretary of the NSW Department of Industry

## ***What does mining/petroleum production involve?***

There are two main types of coal mines – surface mines such as open cut pits, and underground mines such as longwall mines.

Activities associated with coal mining include blasting, road construction, vegetation clearing, onsite buildings and offices, plant to transport and process the ore, tailings dams, stockpiles, and transport infrastructure.

CSG is extracted by drilling wells up to 1,000 metres deep. CSG is held in the coal seam by water pressure so the first step in the extraction process is to remove this water.<sup>226</sup> This reduces the pressure and releases the gas from the coal seam. In addition to gas wells, typical CSG production activities include road construction to access each well, ponds to store the water that is pumped from the ground (also known as 'produced' water) and water treatment plants, and pipelines to transport the gas and water. Some vegetation clearing may also be required as well as worker accommodation.

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<sup>226</sup> See: [http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/coal-seam-gas/the-facts/anatomy-of-a-csg-well#\\_drilling-and-testing](http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/coal-seam-gas/the-facts/anatomy-of-a-csg-well#_drilling-and-testing).

## ***Who can mine?***

Most minerals and petroleum are the property of the Crown so you almost certainly don't own the coal or CSG in your land.<sup>227</sup> The NSW Government can authorise others to come onto your land and remove any coal or CSG that is found there.

There are different authorisation provisions for coal and CSG

### *Coal*

In order to mine for coal it is first necessary to get a mining lease which is issued by the Minister. A mining lease allows the holder to prospect and mine on a specified area of land for a specific mineral or group of minerals. It will also allow the holder to carry out primary treatment operations such as crushing, sizing, grading, washing and leaching the ore to separate minerals.<sup>228</sup> Mining leases can be granted for up to 21 years.<sup>229</sup>

### *CSG*

Pilot production can be authorised under an exploration licence, but in order to move to full production it is first necessary to get a petroleum production lease which is issued by the Minister. A petroleum production lease allows the holder to conduct petroleum production operations on the land together with the right to construct associated works such as buildings, plant, waterways, roads, pipelines, dams, reservoirs, tanks, pumping stations, tramways, railways, telephone lines, electricity power lines etc.<sup>230</sup> A petroleum production lease can be granted for up to 21 years<sup>231</sup> and must not cover an area greater than 4 blocks.<sup>232</sup>

Once granted, mining and petroleum production leases can be wholly or partially renewed. There are strict requirements for renewing leases, particularly with regards to the timing of renewal applications.<sup>233</sup> If an application for renewal is made, the lease will continue to operate until the lease is renewed or cancelled, even if the original lease expires.<sup>234</sup> See Chapter 2 for more information on renewals.

It is illegal to mine coal or extract CSG without a mining or petroleum title.<sup>235</sup>

Anyone can apply for a mining lease,<sup>236</sup> but the applicant needs to demonstrate that they have the financial resources and technical

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<sup>227</sup> *Coal Acquisition Act 1981* (NSW), s 5; *Petroleum (Onshore) Act 1991* (NSW), s 6.

<sup>228</sup> *Mining Act 1992* (NSW), s 73.

<sup>229</sup> *Mining Act 1992* (NSW), s 71.

<sup>230</sup> *Petroleum (Onshore) Act 1991* (NSW), s 41.

<sup>231</sup> *Petroleum (Onshore) Act 1991* (NSW), s 45.

<sup>232</sup> *Petroleum (Onshore) Act 1991* (NSW), s 44. A block is a 'graticular' section of the Earth's surface. Graticular sections are made up of 5 minutes of latitude and 5 minutes of longitude.

<sup>233</sup> *Mining Act 1992* (NSW), s 113; *Petroleum (Onshore) Act 1991* (NSW), s 19.

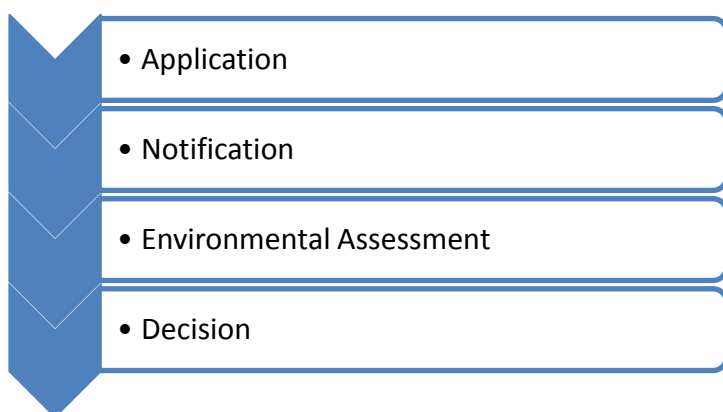
<sup>234</sup> *Mining Act 1992* (NSW), s 117; *Petroleum (Onshore) Act 1991* (NSW), s 20.

<sup>235</sup> *Mining Act 1992* (NSW), s 5; *Petroleum (Onshore) Act 1991* (NSW), s 7.

qualifications to undertake the work.<sup>237</sup> Generally, a petroleum production lease can only be granted to an applicant who has held the land concerned under an exploration licence or assessment lease. The applicant also needs to demonstrate that they have the financial resources and technical qualifications to undertake the work.<sup>238</sup>

In addition to a mining or petroleum production lease, development consent is also needed. This is issued by the Minister for Planning (or a delegate such as the Planning Assessment Commission). See Chapter 5 for more information.

### ***How are applications for mining and petroleum production leases assessed?***



#### **1. Applicant lodges an application**

Applications can be initiated by the applicant or can be in response to an invitation for tenders (coal) or applications (CSG) made by the Minister.<sup>239</sup>

Before inviting tenders for a mining lease, the Minister must publish a notice in a newspaper circulating generally in the State and in one or more newspapers circulating in the local area.<sup>240</sup>

Applications are lodged with the Secretary of the Department of Industry.<sup>241</sup> For coal, the application must describe the proposed mining area.<sup>242</sup> For CSG, the application must be accompanied by a map or plan that shows the boundaries of the proposed petroleum production area.<sup>243</sup> The application

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<sup>236</sup> *Mining Act 1992* (NSW), s 51.

<sup>237</sup> *Mining Act 1992* (NSW), s 51(5).

<sup>238</sup> *Petroleum (Onshore) Act 1991* (NSW), ss 42, 15.

<sup>239</sup> *Mining Act 1992* (NSW), ss 51, 52; *Petroleum (Onshore) Act 1991* (NSW), s 42. Invitations are published in a newspaper circulating generally throughout the State, and in one or more newspapers circulating in the locality in which the land concerned is situated (coal), or the NSW Government Gazette (CSG).

<sup>240</sup> *Mining Act 1992* (NSW), Sch 1 cl 24.

<sup>241</sup> *Mining Act 1992* (NSW), s 51; *Petroleum (Onshore) Act 1991* (NSW), s 11.

<sup>242</sup> *Mining Act 1992* (NSW), s 51.

<sup>243</sup> *Petroleum (Onshore) Act 1991* (NSW), s 13.

must also be accompanied by a program of work that the applicant proposes to carry out.<sup>244</sup>

All applications must be accompanied by a fee.<sup>245</sup>

## **2. The applicant notifies the public of the application**

There are different notification requirements for coal and CSG.

### *Coal*

Within 45 days of lodging an application for a mining lease,<sup>246</sup> the applicant must publish a notice in a newspaper circulating generally in the State<sup>247</sup> and in at least one newspaper circulating in the local area. The notice must contain a plan of the proposed mining area.<sup>248</sup>

A list of mining lease applications is also published in the NSW Government Gazette every Friday.<sup>249</sup>

EDO NSW has a free weekly eBulletin that notifies readers of applications for coal mining and petroleum production leases.<sup>250</sup>

Affected landholders also have a right to be personally notified of a mining lease application if it extends to the *surface* of their land. This notice should inform you of your rights to object to the granting of the lease, for example, on the grounds that your land is agricultural land, and to make a claim that there is a significant improvement on the land.<sup>251</sup>

### *CSG*

Within 21 days of lodging an application, the applicant has to notify the public of the application by publishing a notice in a newspaper circulating generally in the State.<sup>252</sup>

A list of CSG production lease applications is also published in the NSW Government Gazette every Friday.<sup>253</sup>

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<sup>244</sup> *Mining Act 1992* (NSW), s 129A; *Petroleum (Onshore) Act 1991* (NSW), s 14.

<sup>245</sup> *Mining Act 1992* (NSW), ss 51(4); *Petroleum (Onshore) Act 1991* (NSW), s 12. To see a list of fees, visit: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/titles-application-forms/mining-act-fees> and <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/titles-application-forms/petroleum-act-fees>.

<sup>246</sup> *Mining Act 1992* (NSW), s 51A; *Mining Regulation 2016* (NSW), cl 26.

<sup>247</sup> *The Land* is often chosen to make such notifications.

<sup>248</sup> *Mining Act 1992* (NSW), s 51A.

<sup>249</sup> See: <http://www.legislation.nsw.gov.au/#/notifications>.

<sup>250</sup> To subscribe to the eBulletin, visit: <http://www.edonsw.org.au/ebulletin>.

<sup>251</sup> *Mining Act 1992* (NSW), Sch 1 cl 21.

<sup>252</sup> *Petroleum (Onshore) Act 1991* (NSW), s 43. *The Land* is often chosen to make such notifications.

<sup>253</sup> See: <http://www.legislation.nsw.gov.au/#/notifications>.

EDO NSW has a free weekly eBulletin that notifies readers of applications for coal mining and petroleum production leases.<sup>254</sup>

For both coal and CSG, different community notification provisions apply at the development application stage. See Chapter 5 for more information.

### **3. The applicant undertakes an environmental assessment**

The environmental assessment is undertaken at the development application stage. See Chapter 5 for more information.

### **4. Decision**

The Division of Resources and Energy assesses the application but the decision to approve or reject the application is made by the Minister for Industry, Resources and Energy.

The Minister must not make a decision before taking into account the need to conserve and protect the environment in or on the land over which the lease is sought.<sup>255</sup>

The Minister can grant or refuse to grant the lease. However, for CSG, if the applicant held the land under an exploration licence, they are legally entitled to be granted the production lease in respect of the land if they complied with the terms and conditions of the exploration licence and accept the conditions of the proposed petroleum production lease.<sup>256</sup>

A lease may be refused for any number of reasons, including where the Minister decides that the company has an unsatisfactory compliance history.<sup>257</sup>

If the lease is granted, it can be subject to conditions.<sup>258</sup> These conditions are in addition to any conditions imposed as part of a development consent.

Conditions can relate to any number of things and are typically designed to avoid or minimise the impacts of the activity. For example, they may require the applicant to take steps to protect or rehabilitate the environment, protect land or water from harm or mitigate such harm.<sup>259</sup> Other conditions can require the company to ensure the safety of the public.<sup>260</sup> Importantly,

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<sup>254</sup> To subscribe to the eBulletin, visit: <http://www.edonsw.org.au/ebulletin>.

<sup>255</sup> *Mining Act 1992* (NSW), Sch 1B cl 3; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B cl 3.

<sup>256</sup> *Petroleum (Onshore) Act 1991* (NSW), s 42. Also, granting the lease must not breach the *Environmental Planning and Assessment Act 1979* (NSW) or any other Act.

<sup>257</sup> *Mining Act 1992* (NSW), Sch 1B cl 6; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B cl 6.

<sup>258</sup> *Mining Act 1992* (NSW), Sch 1B Part 3; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B Part 3.

<sup>259</sup> *Mining Act 1992* (NSW), Sch 1B Part 3; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B Part 3.

<sup>260</sup> *Mining Act 1992* (NSW), Sch 1B Part 3; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B Part 3.

conditions can apply to land that is not covered by the title, but which may be impacted by the activities.<sup>261</sup>

One important condition that can be attached to an approval is for the applicant to give and maintain a financial security to ensure the applicant fulfils their legal obligations, including those imposed by the conditions.<sup>262</sup> See Chapter 2 for more information on security deposits.

Conditions are legally binding. If conditions are breached, the Secretary can direct the leaseholder to take steps to comply with the condition within a set period of time.<sup>263</sup> It is an offence to not comply with such a direction.<sup>264</sup>

If the leaseholder does not comply with a direction to rehabilitate the land, the work can be carried out by the Minister at the leaseholder's expense.<sup>265</sup>

The public also has a role to play in enforcing conditions. See Chapter 7 for more information.

### ***Does the public get a say?***

#### *Coal*

Landholders who own agricultural land have special rights to object to the granting of a mining lease over the surface of their land. See below for more information.

There is a further opportunity to have a say at the time that the development application goes on exhibition under planning laws. See Chapter 5 for more information.

Where a lease is being renewed, there is no legal requirement to inform the public of the renewal application and no formal opportunity for the community to comment. However, if you are aware of a renewal application and wish to bring certain matters to the attention of the decision-maker, there is no reason why you cannot seek to do this.

#### *CSG*

Members of the public, including affected landholders, are not provided with the opportunity to comment on whether the production lease should be granted.<sup>266</sup>

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<sup>261</sup> *Mining Act 1992* (NSW), Sch 1B Part 3; *Petroleum (Onshore) Act 1991* (NSW), Sch 1B Part 3.

<sup>262</sup> *Mining Act 1992* (NSW), s 261B; *Petroleum (Onshore) Act 1991* (NSW), s 106B.

<sup>263</sup> *Mining Act 1992* (NSW), s 240; *Petroleum (Onshore) Act 1991* (NSW), s 77.

<sup>264</sup> *Mining Act 1992* (NSW), s 240C; *Petroleum (Onshore) Act 1991* (NSW), s 78A.

<sup>265</sup> *Mining Act 1992* (NSW), s 241; *Petroleum (Onshore) Act 1991* (NSW), s 78D.

<sup>266</sup> *Mining Act 1992* (NSW), Sch 1 cl 26, 28.

However, as the project also requires development consent, the public will have a right to comment on whether development consent should be granted for the project. See Chapter 5 for more information.

Where a lease is being renewed, there is no legal requirement to inform the public of the renewal application and no formal opportunity for the community to comment. However, if you are aware of a renewal application and wish to bring certain matters to the attention of the decision-maker, there is no reason why you cannot seek to do this.

For both coal and CSG, there is also provision for government agencies and local councils to object to the granting of a lease.<sup>267</sup>

### ***Are there any restrictions on mining/petroleum production?***

Generally, mining and petroleum production leases can be granted over any land, including privately owned land.<sup>268</sup>

However, there are some restrictions which mostly relate to the rights of other title holders. For example, a mining or production lease can't be granted over land that is subject to an existing title such as an exploration licence or another mining lease.<sup>269</sup>

There are also restrictions designed to protect certain land, including some public places and some privately owned land.

#### **1. Protections for houses, gardens and significant improvements**

Coal mining and CSG production on private land is restricted to protect the assets of the landholder. As a general rule, mining and CSG production activities are not permitted on the *surface* of land:<sup>270</sup>

- within 200 metres of a dwelling house that is the principal place of residence of the person occupying it;
- within 50 metres of a garden for coal;
- within 50 metres of a garden, vineyard or orchard for CSG; or
- on which there is a 'significant improvement'.

It is possible for mining and CSG production to go ahead in these areas with the written consent of the landowner and, in the case of a dwelling house, with the written consent of the occupier as well.<sup>271</sup> Once written consent is given, it cannot be taken back.<sup>272</sup> It is therefore important to ensure that any access

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<sup>267</sup> *Mining Act 1992* (NSW), Sch 1 Div 1, 3; *Petroleum (Onshore) Act 1991* (NSW), Part 4 Div 2, 3.

<sup>268</sup> *Mining Act 1992* (NSW), s 68; *Petroleum (Onshore) Act 1991* (NSW), s 9(3).

<sup>269</sup> *Mining Act 1992* (NSW), s 58; *Petroleum (Onshore) Act 1991* (NSW), s 9.

<sup>270</sup> *Mining Act 1992* (NSW), s 62; *Petroleum (Onshore) Act 1991* (NSW), s 72.

<sup>271</sup> *Mining Act 1992* (NSW), s 62; *Petroleum (Onshore) Act 1991* (NSW), s 72.

<sup>272</sup> *Mining Act 1992* (NSW), s 62; *Petroleum (Onshore) Act 1991* (NSW), s 72.

arrangement or other document that you sign does not waive these protections.

It is also possible for mining and CSG production to take place *under* these areas.

For coal, it is important to note that landholder consent is only required if the house, garden or significant improvement existed at the 'relevant date'.<sup>273</sup> What this date is will depend on the specific circumstances of each situation. For example, the relevant date could be the date that an exploration licence application was lodged over the land by the mining company who is now seeking the mining lease.<sup>274</sup> This does not apply to CSG.

A 'significant improvement' is a work or structure that:<sup>275</sup>

- a. is a substantial and valuable improvement to the land, and
- b. is reasonably necessary for the operation of the landholder's lawful business or use of the land, and
- c. is fit for its purpose (immediately or with minimal repair), and
- d. cannot reasonably co-exist with the exercise of rights under the lease without the full and unencumbered operation or functionality of the work or structure being hindered, and
- e. cannot reasonably be relocated or substituted without material detriment to the landholder.

The restriction only applies to the actual land containing the improvement, not the entire parcel of land upon which there are improvements.<sup>276</sup>

For coal, a landholder wanting to claim that something is a significant improvement must write to the Secretary within 28 days of being notified of the mining lease application or the intention to invite tenders.<sup>277</sup> The claim must provide details of the improvements such as what they are and where they are located.<sup>278</sup> There is no procedure set out in the law for claiming a significant improvement for CSG applications as there is with coal.

For both coal and CSG, disputes over whether something is a 'significant improvement' will be decided by the Land and Environment Court. Either party can apply to the Court for a ruling.<sup>279</sup>

Typically, the courts have given a relatively broad interpretation to the meaning of 'improvement' and this has made it easier for landholders to successfully argue that they have improvements on their property. However,

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<sup>273</sup> *Mining Act 1992* (NSW), s 62(5).

<sup>274</sup> *Mining Act 1992* (NSW), s 62(5). It is important to seek legal advice about what the 'relevant date' is in any particular situation.

<sup>275</sup> *Mining Act 1992* (NSW), Dictionary; *Petroleum (Onshore) Act 1991* (NSW), s.72(6).

<sup>276</sup> *Ulan Coal Mines Ltd v Minister for Mineral Resources* [2007] NSWSC 1299.

<sup>277</sup> *Mining Act 1992* (NSW), Sch 1 cl 23A.

<sup>278</sup> *Mining Act 1992* (NSW), Sch 1 cl 23A.

<sup>279</sup> *Mining Act 1992* (NSW), s 31(5); *Petroleum (Onshore) Act 1991* (NSW), s 72(6A).

changes to clarify the statutory definition of 'significant improvement' in the Mining and Petroleum (Onshore) Acts commenced in 2016, and this new, narrower definition has not yet been tested in court. See Chapter 2 for more information on significant improvements.

## **2. Protections for agricultural land and cultivated land**

### *Coal*

Upon being notified that an application for a mining lease has been lodged or of an intention to invite tenders for a lease, an affected landholder can write to the Secretary and object to the inviting of tenders or the granting of the lease over their land on the grounds that the land, or part of it, is *agricultural land*.<sup>280</sup>

The objection must be in writing and must be lodged within 28 days of receiving the notice.<sup>281</sup> It should clearly state that you object to the granting of the mining lease on the grounds that your land, or part of it, is agricultural land. You should be clear about which part of your land is agricultural land and also outline the reasons you believe the land is agricultural land.

Agricultural land is legally defined as:<sup>282</sup>

- land that has been sown with not less than 2 crops of an annual species during the 10 years prior to the invitation for tenders for the mining lease being published or the application for the mining lease being lodged; or
- land that has been sown with 1 crop of an annual species during the 10 years prior to the application for the mining lease being lodged in cases where it would not be reasonable to expect more than one crop to have been sown, and there was a sufficient reason for not having brought the land under cultivation at an earlier date;<sup>283</sup> or
- land on which shade, shelter or windbreak trees are growing, or at any time during the past 10 years, edible fruit or nut trees, vines or any other perennial crop approved by the Secretary or their delegate has been growing; or
- pastures that are sown with seed of a species and at a rate of application, or treated with fertiliser of a composition and at a rate of application, satisfactory to the Secretary or their delegate, and that have, as a result of that sowing or treatment, maintained a level of pasture production that is substantially above that which might be expected of natural pastures; or
- land that is used, to an extent acceptable to the Secretary or their delegate, for the production of grass seed, pasture legume seed, hay or silage; or

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<sup>280</sup> *Mining Act 1992* (NSW), Sch 1 cl 22.

<sup>281</sup> *Mining Act 1992* (NSW), Sch 1 cl 22.

<sup>282</sup> *Mining Act 1992* (NSW), Sch 2 cll 1, 2.

<sup>283</sup> Unless the Secretary believes that more than one crop should reasonably have been sown in that time or that the land should have been brought under cultivation at an earlier date.

- land that has a preponderance of improved species of pasture grasses.

Whether or not land is agricultural land will often depend on what has happened to the land over the 10 years preceding the invitation for tenders or the lodgement of a mining lease application. However, in cases where the mining lease applicant also held an exploration licence over the land, the Secretary will have to decide whether the land was agricultural land for the 10 years preceding the exploration licence application.<sup>284</sup>

If the Secretary finds that the land is agricultural land, a mining lease *cannot* be granted and an invitation for tenders cannot be made without the written consent of the landholder.<sup>285</sup> If the landholder gives consent, the consent cannot be revoked.<sup>286</sup>

However, a mining lease can be granted over agricultural land if the Minister considers that the granting of the lease over that land is necessary to give access to any other part of the land to which the lease applies.<sup>287</sup>

In deciding whether the land is agricultural land, the Secretary can ask you to provide background information such as a paddock plan and history of the land, photos and maps. Departmental staff may also conduct a field inspection of your property and you may be asked to show them around and point out any relevant features of your land. You might also be interviewed as part of this process. The staff will then prepare a report for the Secretary who will have the final say as to whether the land is agricultural land.

A mining lease may not be granted beneath the surface of any agricultural land except at such depths, and subject to such conditions, as the Minister considers sufficient to minimise damage to the surface.<sup>288</sup>

## CSG

As a general rule, the holder of a petroleum production lease cannot carry out any production operations on the *surface* of any land which is under cultivation except with the consent of the landholder.<sup>289</sup>

However, the Minister can define an area of cultivated land on which production activities can be carried out if the Minister thinks the circumstances warrant it.<sup>290</sup> If this happens, a compensation assessment has to be made before any production activities start to ensure the landholder is compensated for any loss or damage to any crop on the land concerned.<sup>291</sup>

<sup>284</sup> *Mining Act 1992* (NSW), Sch 2 cl 2, 3.

<sup>285</sup> *Mining Act 1992* (NSW), Sch 1 cl 23.

<sup>286</sup> *Mining Act 1992* (NSW), Sch 1 cl 23(2), 22(4).

<sup>287</sup> *Mining Act 1992* (NSW), Sch 1 cl 23(4).

<sup>288</sup> *Mining Act 1992* (NSW), Sch 1 cl 23(3).

<sup>289</sup> *Petroleum (Onshore) Act 1991* (NSW), s 71(1).

<sup>290</sup> *Petroleum (Onshore) Act 1991* (NSW), s 71(2).

<sup>291</sup> *Petroleum (Onshore) Act 1991* (NSW), s 71(2A). The assessment can be made between the landholder and the gas company or, if they can't agree, by the Land and Environment Court.

There is no legal definition for what constitutes cultivated land; however, cultivation for the growth and spread of pasture grasses is not to be taken to be cultivation unless the Minister thinks the circumstances warrant it.<sup>292</sup> If there is a dispute about whether particular land is cultivated, the Minister has the final say.<sup>293</sup>

Clearly, this protection depends to a great extent on how the Minister exercises his or her power.

There is no formal right to object to the granting of a production lease, so there is no real opportunity to object on the grounds that the land is cultivated land. However, this does not mean you cannot write to the Minister upon becoming aware of an application for a petroleum production lease over your land, and strongly argue for your cultivated land to be afforded this protection.

#### **Case study: a right to have a say as a matter of procedural fairness?**

In 2011, one mining company – Moolarben Coal Mines Pty Ltd – had an exploration licence over land that was owned by another mining company – Ulan Coal Mines Pty Ltd, and applied for a mining lease over that land. Ulan objected to the granting of the lease on the grounds that some of the land was agricultural land. The Department of Industry and Investment inspected the land and confirmed that it was agricultural land and therefore the mining lease could not be granted over that land. Moolarben argued that it should have been given the chance to respond to Ulan's objection. The Department of Industry and Investment did not seek Moolarben's input because the legislation did not specifically provide for such an opportunity.

The Land and Environment Court found that, by denying Moolarben the right to respond to Ulan's objection, the Director-General of the Department of Industry and Investment (Agriculture Division) had denied Moolarben 'procedural fairness'.<sup>294</sup> The Court found that, because Moolarben had an exploration licence over the land, it had an interest in the outcome of the decision as to whether the land was agricultural land. It should therefore have been permitted to defend that interest by making submissions to the Director-General in order to resist the objections made by Ulan.

Looked at another way, it could be argued that any landholder has 'an interest' in their land and should therefore be allowed to respond to any application for a petroleum production lease over their land as a way of defending that interest. A failure to provide landholders with this opportunity could therefore be construed as a denial of procedural fairness.<sup>295</sup>

<sup>292</sup> *Petroleum (Onshore) Act 1991* (NSW), s 71(3).

<sup>293</sup> *Petroleum (Onshore) Act 1991* (NSW), s 71(4).

<sup>294</sup> *Moolarben Coal Mines Pty Ltd v Director-General of the (former) Department of Industry and Investment NSW (Agriculture Division); Moolarben Coal Mines Pty Ltd v Director-General of the Department of Trade and Investment, Regional Infrastructure and Services* [2011] NSWLEC 191.

<sup>295</sup> It's always important to seek legal advice before considering court action.

### 3. Protections for water

It is recommended that landholders engage independent water experts to conduct baseline studies, and monitor surface and ground water, and seek to have the mining or CSG company pay for this. Although there is no legal requirement for this, landholders should seek to have the quantity, quality and flow regimes of water on their properties tested prior to any work being undertaken. Water should also be monitored throughout the mining or production phase. This information will help landholders to understand the impacts, if any, that the activity is having on water and may be useful in any claims later on.

There are mandatory requirements for mining and CSG companies to prepare Groundwater Monitoring and Modelling Plans in consultation with DPI Water prior to constructing or using any borehole or petroleum well.<sup>296</sup>

For coal, if a mining lease is granted over the surface of land, a landholder who is entitled to use the land for stock watering or water drainage purposes is entitled to free and uninterrupted access for those purposes to the water in any stream, lagoon or swamp either on the land or on neighbouring land.<sup>297</sup>

### 4. Protections for exempted areas

There are a number of areas where no CSG production activities can take place under a production lease without the specific consent of the Minister.<sup>298</sup> These exempted areas don't apply to coal mining (but do apply to coal exploration – see Chapter 2).

Exempted areas tend to be land that is held for a public purpose. Examples include State Forests, public reserves, community land, Crown land and land held on trust as a racecourse, cricket ground, recreation reserve, park or permanent common.<sup>299</sup>

Notwithstanding this restriction, the Minister can always issue an 'exempted areas consent' to allow CSG production in such areas.<sup>300</sup>

### 5. Protections for National Parks and other Special Areas

It is unlawful to carry out mining or CSG production in a National Park, historic site, nature reserve, karst conservation reserve or Aboriginal area.<sup>301</sup> A special Act of Parliament would be needed to authorise mining or CSG production in these areas. Many National Parks go to the centre of the Earth,

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<sup>296</sup> Department of Industry, 2015, *Exploration Code of Practice: Environmental Management*: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/codes-and-guidelines/codes-of-practice/environmental-management>

<sup>297</sup> *Mining Act 1992* (NSW), s 165.

<sup>298</sup> *Petroleum (Onshore) Act 1991* (NSW), s 70.

<sup>299</sup> *Petroleum (Onshore) Act 1991* (NSW), s 70.

<sup>300</sup> *Petroleum (Onshore) Act 1991* (NSW), s 70.

<sup>301</sup> *National Parks and Wildlife Act 1974* (NSW), ss 41, 54, 58O and 64.

while some have depth restrictions.<sup>302</sup> If there is a depth restriction, it is possible to mine beneath the National Park below that depth.

CSG production is also prohibited within a State Recreation Area<sup>303</sup> without the agreement of the NSW Minister for the Environment.<sup>304</sup>

With regards to coal, the NSW Governor can declare certain land to be a reserve and can direct that no exploration or mining is permitted within that reserve.<sup>305</sup> A mining lease can't be granted over land within a reserve in respect of which there is such an order.<sup>306</sup> For example, 56.7 hectares of land at Badgerys Creek was reserved in 1995.<sup>307</sup>

## **6. Protections for exclusion zones and 'off limits' areas**

New CSG developments are prohibited on, or within 2 kilometres of, the following CSG exclusion zones.<sup>308</sup>

1. Land within a residential zone.
2. Future residential growth area land.
3. Additional rural village land.

New CSG developments are also prohibited on 'Critical industry cluster land'.<sup>309</sup> This is land with a concentration of equine (horse) and viticulture (wine) industries that has been mapped by the NSW Government in the Upper Hunter.<sup>310</sup>

These exclusion zones do not apply to coal. However, open cut coal mines are prohibited in parts of two local government areas – Lake Macquarie City Council and the Upper Hunter Shire Council.<sup>311</sup>

The Governor of NSW can create further exclusion zones or 'off limits' areas by amending the Mining SEPP.<sup>312</sup> While there are no mandatory consultation requirements before amendments are made to SEPPs, it is common practice

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<sup>302</sup> See the plan of management for the relevant National Park for information about depth restriction:

<http://www.environment.nsw.gov.au/parkmanagement/ParkManagementPlans.htm>.

<sup>303</sup> Under the *National Parks and Wildlife Act 1974* (NSW).

<sup>304</sup> *Petroleum (Onshore) Act 1991* (NSW), s 70(3).

<sup>305</sup> *Mining Act 1992* (NSW), s 367. Such a declaration would appear in the NSW Government Gazette.

<sup>306</sup> *Mining Act 1992* (NSW), ss 57, 367.

<sup>307</sup> NSW Government Gazette No 3228 of 17 November 1995 at p 7866.

<sup>308</sup> 'CSG developments' include development for the purpose of CSG exploration: SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9A, 3. But note that pipelines that are ancillary to coal seam gas development are not prohibited in the 2km buffer zone.

<sup>309</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9A.

<sup>310</sup> See: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Critical-Industry-Clusters-in-the-Upper-Hunter>.

<sup>311</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9, Sch 1.

<sup>312</sup> See: SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9 and Sch 1.

for the Minister for Planning to seek public comment before recommending that the Governor makes such amendments.<sup>313</sup>

See Chapter 5 for more information about the limits that planning law places on mining and CSG development.

### **Case study: mining in public places**

Unlike with exploration, there are no restrictions on coal mining in 'exempted areas' such as State Forests and State Conservation Areas and Travelling Stock Reserves. Mining can therefore take place in these areas without the need for an exempted areas consent.

The Leard State Forest is located on the Liverpool Plains, about 80km north-west of Tamworth. The forest is home to a number of endangered species and ecological communities. It is also home to a three major coal mines – Boggabri, Tarrawonga, and Maules Creek mines. All three mines involve clearing thousands of hectares of native vegetation, including habitat for endangered species.<sup>314</sup>

### ***Can I get compensation?***

When a mining or petroleum production lease is granted, a landholder may become entitled to compensation for any loss suffered or likely to be suffered as a result of the mining or production activities.<sup>315</sup>

The loss in question does not need to occur on land covered by the lease for compensation to be payable.<sup>316</sup> The key question is whether the land suffered 'compensable loss'. The type of loss that will be compensated includes:<sup>317</sup>

- damage to the *surface* of land;
- damage to crops, trees, grasses or other vegetation (including fruit and vegetables);
- damage to buildings, structures or works;
- deprivation of the possession or of the use of the *surface* of land or any part of the surface;
- severance of land from other land of the landholder;
- surface rights of way and easements;
- destruction, loss of, injury to, disturbance of or interference with, stock;
- or
- damage consequential to any matter referred to above.

<sup>313</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 37, 38.

<sup>314</sup> See the NSW Government's 2016 clearing audit of the mines in the Leard for more information: <http://www.planning.nsw.gov.au/News/2016/Leard-State-Forest-Coal-Mines-Clearing-Audit-released>.

Landholders may wish to seek compensation for the inconvenience and noise associated with having mining or petroleum production occur on the land.

Sometimes the company offers to undertake in-kind work in lieu of monetary compensation. This might involve the replacement or maintenance of fences or roads or the repair of dam walls.

Some landholders have negotiated temporary employment or contract work as part of a compensation agreement.

For coal, the holder of a mining lease is not allowed to exercise any rights under that lease until appropriate arrangements have been made regarding compensation.<sup>318</sup>

There are various ways that compensation can be dealt with. The landholder and the mining company can agree on the amount of compensation that is payable. For coal, these agreements must be in writing and signed by all the parties to the agreement.<sup>319</sup>

For both coal and CSG, if no agreement can be reached, either party can apply to the Land and Environment Court to have the compensation assessed.<sup>320</sup>

Compensation agreements can require a certain amount of speculation as to the loss that is likely to be suffered. Sometimes unexpected damage is caused by coal or CSG activities. If it turns out that the actual loss is more than what has been originally assessed, the landholder can ask the mining or CSG company to provide additional compensation, or go to Court for an assessment.<sup>321</sup>

For coal, the maximum amount of compensation that can be assessed by the Land and Environment Court is the market value (for other than mining purposes) of the land and the buildings, structures and works situated on the land.<sup>322</sup>

If coal mining occurs underneath your property (for example, by a longwall mine) you may be eligible for compensation for any damage caused to your property by subsidence. Compensation is paid out of a Mines Subsidence Compensation Fund<sup>323</sup> which is partly funded by payments from coal mines.<sup>324</sup> Compensation can be for damage to improvements such as buildings, sewers, and roads,<sup>325</sup> as well as household and other effects.<sup>326</sup>

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<sup>318</sup> *Mining Act 1992* (NSW), s 265.

<sup>319</sup> *Mining Act 1992* (NSW), s 265.

<sup>320</sup> *Mining Act 1992* (NSW), s 265; *Petroleum (Onshore) Act 1991*(NSW), s 108.

<sup>321</sup> *Mining Act 1992* (NSW), s 276; *Petroleum (Onshore) Act 1991*(NSW), s 111.

<sup>322</sup> *Mining Act 1992* (NSW), s 272.

<sup>323</sup> *Mine Subsidence Compensation Act 1961* (NSW), s 10.

<sup>324</sup> *Mines Subsidence Compensation Act 1961* (NSW), s 10.

<sup>325</sup> *Mine Subsidence Compensation Act 1961* (NSW), s 4.

<sup>326</sup> *Mine Subsidence Compensation Act 1961*(NSW), s 12.

If you have suffered damage due to mine subsidence, you should contact Subsidence Advisory NSW.<sup>327</sup> It can be difficult to establish that the damage was caused by mine subsidence. It's best to have evidence of the state of your property before and after mining. One way to do this is to get the Subsidence Advisory NSW to conduct a pre-mining inspection and provide you with a report. This report can be used to lodge a claim which will be decided by Subsidence Advisory NSW.<sup>328</sup>

### **Case study: compensation under a mining lease**

In 1998, seven landholders from Douglas Park, south-west of Sydney, sought compensation from the Mining Warden's Court for damage caused to their properties by longwall mining undertaken by BHP.<sup>329</sup> The landholders claimed that the mining had caused:

- cracks to appear in the Cataract River with the result that rock pools had drained;
- gas to be released in a number of places, with associated foul odours; and
- rock falls and an increase in the likelihood of rock falls in the future.

In order to be entitled to compensation, each landholder had to establish the condition of their property before mining. Each landholder told the Court about the activities they used to engage in, such as bushwalking, swimming, canoeing and fishing and that, since mining took place, these activities hadn't been possible due to the dangers of rock falls, polluted river water, the death of aquatic life and vegetation dieback.

The Court also heard evidence from three expert valuers about the impact of these changes on the market value of each landholder's property. The valuers agreed that all but one of the property values had declined due to loss of amenity and environmental alterations in the general area. The Court did not consider the impact on the landholders personally in terms of loss of recreational opportunities, and general enjoyment of the river and surrounds.

The Court heard evidence that some of the impacts that the landholders complained of were due to the drought and/or a weir managed by Sydney Water. The Court therefore had to determine the extent to which the mine contributed to each of the problems the landholders complained of. The Court found that the mine contributed 80% while the drought and lack of water released from the weir contributed 20%.

<sup>327</sup> See: <http://www.subsidenceadvisory.nsw.gov.au/>.

<sup>328</sup> See:

[http://www.subsidenceadvisory.nsw.gov.au/templates/mine\\_subsidence\\_board.aspx?edit=false&pageID=3990](http://www.subsidenceadvisory.nsw.gov.au/templates/mine_subsidence_board.aspx?edit=false&pageID=3990).

<sup>329</sup> *Andrewartha & Ors v BHP Steel (AIS) Pty Ltd*, available at:

[http://www.lec.justice.nsw.gov.au/Pages/types\\_of\\_disputes/class\\_8/Mining-matters-the-process/MiningMattershelpfulmaterials/Mining\\_Warden%27s\\_Court\\_decisions/mining\\_warden\\_decisions\\_alphabetical\\_order.aspx](http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_8/Mining-matters-the-process/MiningMattershelpfulmaterials/Mining_Warden%27s_Court_decisions/mining_warden_decisions_alphabetical_order.aspx).

The Court then went on to allocate compensation to each of the landholders. The compensation varied from nil to \$32,000, with the average being \$14,857.

### ***Will I have to sell my land?***

There is no law that says a mine must buy your property.

Some mining activities, especially those on the surface of the land, will have significant impacts on local residents. Noise, dust, light and vibrations from mining activities can be disruptive to the use and enjoyment of neighbouring land. This often leads to numerous complaints from neighbours.

Typically, a mining company will voluntarily attempt to purchase those properties that are likely to be significantly impacted by the mining activities. This helps reduce complaints and removes restrictions about how close the mine can come to dwellings, gardens and significant improvements.

For large coal mines, it is often a condition of consent that the mine offers to purchase properties within the 'zone of affectation', or does so when requested to do so by the landholder.<sup>330</sup> The zone of affectation includes those properties that are identified as being impacted by the mine in various ways, usually by unacceptable levels of noise and dust. If the mine is open cut and on your property, your property may need to be acquired before mining can occur.

### **Case study: purchasing land**

Mining companies commonly purchase land where exploration or mining is planned, sometimes through a third party. If you are concerned that the buyer is actually a mining company you can order a company search with the Australian Securities and Investments Commission (ASIC) to reveal the shareholding and directors who may be linked with a company.<sup>331</sup>

It is not common for gas companies to offer to purchase properties impacted by CSG production. The industry is of the opinion that CSG production is largely compatible with other land uses.<sup>332</sup> However, some companies may

<sup>330</sup> See draft Standard and Model Conditions for Open Cut and Underground Mining: <http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/State-Significant-Development>. Also see the NSW Government's Voluntary Land Acquisition and Mitigation Policy: <http://www.planning.nsw.gov.au/Policy-and-Legislation/~media/E785D4AFFE7B447487FF9D96111C502B.ashx>.

<sup>331</sup> The ASIC search can be done here: <http://www.search.asic.gov.au/gns001.html>.

<sup>332</sup> See: <http://www.naturalcsg.com.au/coexistence/working-with-farmers/>; <http://www.couriermail.com.au/business/miners-snap-up-prime-farming-land/news-story/0a25ff62760618a6cc57bc7e3a6c2829>. Also see the NSW Government's Voluntary Land Acquisition and Mitigation Policy: <http://www.planning.nsw.gov.au/Policy-and-Legislation/~media/E785D4AFFE7B447487FF9D96111C502B.ashx>.

offer to purchase properties in areas they intend to develop to remove objectors and ensure a smoother process.

See Chapter 7 for more information on selling your land to mining and CSG companies.

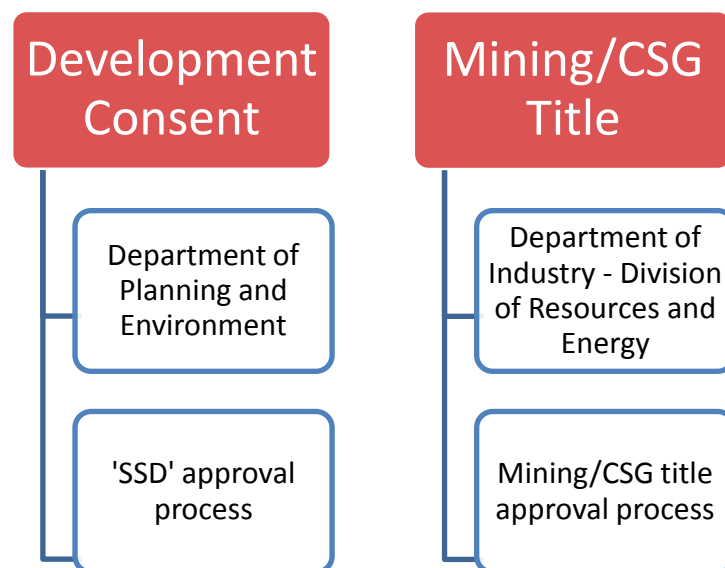
### **The bottom line**

1. A mining lease (coal) or petroleum production lease (CSG) can be granted over your land without your consent.
2. You can raise objections, especially if you own agricultural land or cultivated land.
3. There are a number of other restrictions on where mines and CSG developments can operate.
4. Development consent is also required (see Chapter 5).
5. You can get compensation if you suffer compensable loss.
6. There is no legal requirement for mining or CSG companies to have an access arrangement at the mining/production stage (see Chapter 3).

# Chapter 5 - Development Consent

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In addition to a mining or petroleum production lease, many mining and CSG projects require some kind of development consent under the planning system before they can go ahead. This means a two-stream approval process applies.



This Chapter outlines process for getting development consent. In general, coal mining and CSG production developments will fall into the category of *State significant development* (SSD). These are projects that are deemed to be of State or regional significance<sup>333</sup> and the Minister for Planning is the decision-maker unless that role is delegated to the Planning Assessment Commission.

At the time of writing, the Minister for Planning had delegated the decision-making power to the Department of Planning and Environment for 'non-controversial' SSD applications and the Planning Assessment Commission for 'controversial' SSD applications.<sup>334</sup>

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<sup>333</sup> They are assessed under Part 4, Division 4.1 of the *Environmental Planning and Assessment Act 1979* (NSW). Types of SSD are listed in the State Environmental Planning Policy (State and Regional Development) 2011, Sch. 5 and 6.

<sup>334</sup> Non-controversial applications are those that have received less than 25 objections and have local council support. Controversial applications are those that have received more than 25 objections, or where the local council has objected or where there is a reportable political donation in connection with the application. For more information, see the two separate development assessment instruments of delegation here: <http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/Delegated-Decisions>.

In this Chapter:

**Minister** means the NSW Minister for Planning

**Secretary** means the Secretary of the NSW Department of Planning and Environment

### **The Planning Assessment Commission (PAC)**

The Planning Assessment Commission (PAC) is a planning body whose members are appointed by the Minister for Planning.<sup>335</sup> For the most part, the PAC is independent and is not subject to the direction or control of the Minister (except in relation to procedure).<sup>336</sup>

The PAC consists of a Chair and eight members.<sup>337</sup> For each matter the PAC has to deal with, the Chair nominates the PAC members who will make up the PAC for that matter. It is common for three members to form the PAC for any given matter. Each PAC member must have expertise in one or more of the following fields: planning, architecture, heritage, the environment, urban design, land economics, traffic and transport, law, engineering, tourism or government and public administration.<sup>338</sup>

### ***What types of mining and coal seam gas projects qualify as SSD?***

All development for the purposes of coal mining and CSG production is classified as SSD.<sup>339</sup> However, coal and CSG exploration activities are not classified as SSD.<sup>340</sup> See Chapter 2 for more information on exploration. Many developments related to mining, such as processing plants and storage facilities, are also classified as SSD.<sup>341</sup>

Developments relating to CSG production such as pipelines or processing plants are also classified as SSD in some circumstances.<sup>342</sup>

For other types of mines, such as gold or antimony mines, the development will only be SSD if it is in an environmentally sensitive area of State

<sup>335</sup> *Environmental Planning and Assessment Act 1979* (NSW), Sch 3.

<sup>336</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 23B(3).

<sup>337</sup> To see the current PAC members, visit: <http://www.pac.nsw.gov.au/commission-members>.

<sup>338</sup> *Environmental Planning and Assessment Act 1979* (NSW), Sch 3 Part 2.

<sup>339</sup> <sup>339</sup> SEPP (State and Regional Development) 2011, Sch 1 cl 5, 6.

<sup>340</sup> SEPP (State and Regional Development) 2011, Sch 1 cl 5.

<sup>341</sup> SEPP (State and Regional Development) 2011, Sch. 1 cl 5.

<sup>342</sup> SEPP (State and Regional Development) 2011, Sch 1, cl 6(4). The development must have a capital investment value of more than \$30 million.

significance,<sup>343</sup> or has a capital investment value of more than \$30 million,<sup>344</sup> unless it is 'called in' by the Minister for Planning as SSD.

### ***How is a SSD application processed?***

Prior to seeking development consent, some proposed coal and CSG projects will need to obtain a gateway certificate from the Mining and Petroleum Gateway Panel. See below for more information.

#### **1. Applicant applies for the environmental assessment requirements**

The applicant starts the process by lodging an online request for the Secretary's Environmental Assessment Requirements (SEARs).<sup>345</sup> The SEARs set out what the applicant needs to cover in their environmental impact assessment, and typically include groundwater and surface water studies, biodiversity impact studies, dust and noise impact studies, etc.

#### **2. Secretary sets environmental assessment requirements**

In preparing the SEARs, the Secretary of the Department of Planning and Environment must consult with relevant public authorities such as the Office of Environment and Heritage and the local council in the area where the project is to take place, to ensure that all key issues are identified and assessed.<sup>346</sup> The NSW Government has released 'Indicative SEARs', which outline common assessment requirements that applications must address.<sup>347</sup>

If a gateway certificate has been issued, the Secretary must address any recommendations of the Gateway Panel set out in the certificate. See below for more information on gateway certificates.<sup>348</sup>

The Secretary has 28 days to issue the SEARs,<sup>349</sup> which are then placed on the Department of Planning and Environment website within 5 days of issue.<sup>350</sup> Those Government agencies that are consulted by the Secretary have 14 days to provide their recommended requirements.

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<sup>343</sup> See the glossary at the back of this guide for a definition of 'environmentally sensitive area of State significance'.

<sup>344</sup> SEPP (State and Regional Development) 2011, Sch. 1, cl. 5.

<sup>345</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2 cl 3(1).

<sup>346</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2 cl 3(4).

<sup>347</sup> The Indicative SEARs are part of the integrated Mining Policy. See:

<http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Integrated-Mining-Policy>.

<sup>348</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2 cl 3(4A).

<sup>349</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2 cl 3.

<sup>350</sup> To find the SEARs for a particular project go to: <http://majorprojects.planning.nsw.gov.au/> and search for the project using the search function. It is often easiest to search by local government area.

The SEARs will remain valid for 2 years, after which the applicant will need to consult further with the Secretary.<sup>351</sup>

### **3. Applicant prepares a development application and an environmental impact statement**

The applicant must then prepare a development application and an environmental impact statement (EIS) that meets the environmental assessment requirements that have been set by the Secretary. In practice, this role is performed by an environmental consultant engaged by the applicant.

The development application must be prepared in accordance with the NSW Government's Mine Application Guideline.<sup>352</sup>

In addition to addressing the SEARs, an EIS must also include the following.<sup>353</sup>

- a summary of the environmental impact statement;
- a statement of the objectives of the development;
- an analysis of any feasible alternatives to the carrying out of the development, including the consequences of not carrying out the development;
- an analysis of the development, including a description of the development, the environment likely to be affected by the development, the likely impacts of the development on the environment, the proposed measures to reduce or avoid those impacts and a list of any additional approvals that might be needed (such as a pollution licence from the Environment Protection Authority); and
- reasons justifying the carrying out of the development in the manner proposed.

The applicant must also complete a cost benefit analysis and a local area assessment as part of its economic assessment.<sup>354</sup>

The applicant often consults with local council, government agencies and the community when preparing the EIS.

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<sup>351</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2 cl 3(7).

<sup>352</sup> The Mine Application Guideline is part of the Integrated Mining Policy. See: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Integrated-Mining-Policy>.

<sup>353</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 2 cl 7.

<sup>354</sup> The Guidelines for the economic assessment of mining and coal seam gas proposals is part of the Integrated Mining Policy. See: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Integrated-Mining-Policy>.

#### 4. Applicant lodges a project application

Once the applicant has completed the development application and EIS, these are sent to the Secretary.<sup>355</sup>

The Department of Planning and Environment can reject the application within 14 days of receiving it if it is illegible, unclear, or incomplete.<sup>356</sup> Otherwise, the Department will place the application on public exhibition.

#### 5. The application goes on public exhibition

The minimum exhibition period for SSD is 30 days.<sup>357</sup> The development application and EIS are exhibited on the Department of Planning and Environment major projects website.<sup>358</sup>

Public notice of the application must be published in a local newspaper and on the website of the Department.<sup>359</sup> A copy of the notice must also be given to people owning or occupying adjoining land, detailing the proposed development and the submission period.<sup>360</sup>

#### Tracking SSD applications

The Department of Planning and Environment allows the public to track the progress of SSD applications online.<sup>361</sup> The search function allows you to search for projects by their title, or by local government area. You can search for projects at any stage of the assessment process – from SEARs stage, through to the public exhibition stage. You can also search for projects that have been determined and access the consent conditions and environmental assessment undertaken as part of the application process.

The search function allows you to keep an eye on the progress of a project and find out about the project well before it goes on public exhibition.

EDO NSW has a free weekly eBulletin that notifies readers when SSD applications go on public exhibition. It also contains a number of other useful alerts and information about environmental law and policy, including notifications of applications for exploration licences.<sup>362</sup>

<sup>355</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), Sch 1.

<sup>356</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 51.

<sup>357</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89F; *Environmental Planning and Assessment Regulation 2000* (NSW), cl 83.

<sup>358</sup> See:

[http://majorprojects.planning.nsw.gov.au/index.pl?action=search&status\\_id=6&status\\_id=117&status\\_id=116&status\\_id=114](http://majorprojects.planning.nsw.gov.au/index.pl?action=search&status_id=6&status_id=117&status_id=116&status_id=114).

<sup>359</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89F; *Environmental Planning and Assessment Regulation 2000* (NSW), cl 84.

<sup>360</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89F; *Environmental Planning and Assessment Regulation 2000* (NSW), cl 84(2).

<sup>361</sup> See: <http://majorprojects.planning.nsw.gov.au/page/>.

<sup>362</sup> To subscribe to the eBulletin, visit: <http://www.edonsw.org.au/ebulletin>.

## 6. The public can make submissions

During this exhibition period, any person can make a written submission to the Department about the project.<sup>363</sup> It is important for objectors to make written submissions on time as this preserves any objector appeal rights later on. See Chapter 7 for more information on writing submissions and objector appeals (also known as merits appeals).

The Secretary must then either pass the submissions, or a summary of them, to the applicant.<sup>364</sup> The submissions must also be published on the Department's website.<sup>365</sup>

The Secretary may decide to ask the applicant to respond to any issues raised in the submissions.<sup>366</sup> While this does not always happen, it usually does with mines and CSG projects where objections have been raised. This response must also be published on the Department's website.<sup>367</sup>

If the applicant proposes minor changes in response to submissions, the Department will take steps to finalise the assessment, and no further community consultation is required. If the Secretary determines that the amended development application substantially differs from the original application, the amended application and EIS will be placed on public exhibition again for further public comment.<sup>368</sup>

## 7. Decision

The Minister for Planning is the decision-maker for all SSD projects.<sup>369</sup> However, this power has been delegated to the Department of Planning and Environment or the Planning Assessment Commission (PAC) in many cases, except where the SSD project is proposed by a public authority.<sup>370</sup>

When assessing SSD projects, the decision-maker must take a number of things into account, including:<sup>371</sup>

- any environmental planning instrument (such as a local environmental plan or State Environmental Planning Policy) that applies to the land;<sup>372</sup>
- coastal zone management plans;

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<sup>363</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89F(3).

<sup>364</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 85A.

<sup>365</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 85B.

<sup>366</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 85A(2).

<sup>367</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 85B.

<sup>368</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89F.

<sup>369</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89D.

<sup>370</sup> *Environment Planning and Assessment Act 1979* (NSW), s 23; Minister for Planning's instrument of delegation (2011): <http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/Delegated-Decisions>.

<sup>371</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 79C.

<sup>372</sup> Of particular relevance is the SEPP (Mining, Petroleum Production and Extractive Industries) 2007.

- the likely impacts of the development, including environmental impacts on the natural and built environments, social impacts and economic impacts;
- the suitability of the site for the development;
- public submissions; and
- the public interest.

In addition, the decision-maker must also consider:

- The existing uses and planned uses of the land in the vicinity of the development, the impact of the development on these uses, and any ways in which the development could be incompatible with those uses.<sup>373</sup> The decision-maker must then evaluate and compare the public benefit of the development and those other land uses, taking into account any measures that the applicant has proposed to avoid or minimise such incompatibility.<sup>374</sup>
- The impact that the proposed development might have on other mining or CSG operations already existing in the vicinity.<sup>375</sup>
- Whether or not the consent should be issued subject to conditions aimed at ensuring that the development is undertaken in an environmentally responsible manner, such as conditions to minimise the impacts on water, threatened species and greenhouse gas emissions.<sup>376</sup>
- The efficiency of the development in terms of resource recovery and whether any conditions can be attached to the approval to maximise such efficiency.<sup>377</sup>
- Whether or not the consent should be issued subject to conditions that minimise the impact of the development on local transport infrastructure, especially public roads.<sup>378</sup>
- Whether or not the consent should be subject to conditions aimed at ensuring the rehabilitation of land that will be affected by the development.<sup>379</sup>

The decision-maker can approve or refuse the development.<sup>380</sup> If approving the development, the decision-maker can impose conditions,<sup>381</sup> and these conditions are legally binding. Conditions are designed to minimise the adverse impacts of the development. In practice, standard conditions are often attached. The Department of Planning and Environment has published draft model and standard conditions for open cut mining, underground mining

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<sup>373</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 12.

<sup>374</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 12.

<sup>375</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 13.

<sup>376</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 14.

<sup>377</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 15.

<sup>378</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 16.

<sup>379</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17.

<sup>380</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E.

<sup>381</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(1)(a).

and gas production on its website.<sup>382</sup> There are also non-discretionary development standards relating to noise, air quality, ground vibration, and aquifer interference that, if complied with by a coal or CSG company, prevent the decision-maker from requiring more onerous standards for those things.

You should consider what other conditions might be attached to reduce the impact of the development on you, your community and/or the environment and include these in your submission.<sup>383</sup>

See Chapter 7 for more information on conditions and submission writing.

If there is no decision after 90 days, the project is deemed to have been refused.<sup>384</sup>

### ***Are there any restrictions on coal and CSG developments?***

There are a number of restrictions on where coal and CSG developments can occur. See Chapter 4 for more information.

In addition, there are special requirements for coal and CSG developments proposed over 'strategic agricultural land'.<sup>385</sup>

There are two types of strategic agricultural land:

1. Biophysical strategic agricultural land.
2. Critical industry cluster land.

Biophysical strategic agricultural land is land that has been mapped as such by the NSW Government due to the presence of high quality soil and water resources capable of sustaining high levels of productivity on that land.<sup>386</sup> 2.8 million hectares of biophysical strategic agricultural land has been identified and mapped in NSW.<sup>387</sup>

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<sup>382</sup> See draft Standard and Model Conditions for Open Cut and Underground Mining: <http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/State-Significant-Development>

<sup>383</sup> EDO NSW has prepared a fact sheet setting out the types of conditions that are often attached to mining and CSG projects, as well as some that have been successfully added through Court action. See 'Suggesting conditions of approval': [http://www.edonsw.org.au/mining\\_coal\\_seam\\_gas](http://www.edonsw.org.au/mining_coal_seam_gas).

<sup>384</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 113.

<sup>385</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 50A.

<sup>386</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 3. Also see <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Safeguarding-our-Agricultural-Land>.

<sup>387</sup> See: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Safeguarding-our-Agricultural-Land>; and <http://www.planning.nsw.gov.au/~media/Files/DPE/Maps/map-biophysical-sal-across-the-state.ashx>.

Critical industry cluster land is land with a concentration of equine (horse) and viticulture (wine) industries that has been mapped by the NSW Government in the Upper Hunter.<sup>388</sup>

### *Biophysical strategic agricultural land*

All development applications for new coal or CSG development on mapped biophysical strategic agricultural land must be accompanied by either a 'gateway certificate' or a site verification certificate that certifies that the land on which the proposed development is to be carried out is not biophysical strategic agricultural land.<sup>389</sup>

### *Critical industry cluster land*

CSG developments are prohibited on critical industry cluster land.<sup>390</sup>

Coal developments can still happen on this land, but development applications must be accompanied by a gateway certificate.

There is no opportunity to obtain a site verification certificate with regards to critical industry cluster land.

### *Site verification certificates*

A site verification certificate certifies that the land either is or is not biophysical strategic agricultural land. The Secretary of Planning and Environment can issue a site verification certificate at the request of either the landholder or the coal or CSG company.<sup>391</sup>

If the site verification certificate confirms that your land is biophysical strategic agricultural land, the mining or CGS company will need to lodge a gateway certificate with their development application.<sup>392</sup>

If the site verification certificate confirms that the land is *not* biophysical strategic agricultural land, no gateway certificate will be required.<sup>393</sup>

You can apply for a site verification certificate if you have been served with, or have entered into, an access arrangement with a mining or CSG company.<sup>394</sup> See Chapter 3 for more information about access arrangements.

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<sup>388</sup> See: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Critical-Industry-Clusters-in-the-Upper-Hunter>.

<sup>389</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17C.

<sup>390</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 9A(5).

<sup>391</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17C.

<sup>392</sup> NSW Government, Interim protocol for site verification and mapping of biophysical strategic agricultural land: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/~media/ED7BE8EE5FC34A71889FE89CF744D846.ashx>.

<sup>393</sup> NSW Government, Interim protocol for site verification and mapping of biophysical strategic agricultural land: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/~media/ED7BE8EE5FC34A71889FE89CF744D846.ashx>.

<sup>394</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17C(2).

A coal or CSG company can apply for a site verification certificate if they have given prior written notice to the landholder, or have published a notice of intention to apply for the site verification in a newspaper circulating in the local area at least 30 days prior to the application.<sup>395</sup>

### *Gateway certificates*

A gateway certificate is issued by the Mining and Petroleum Gateway Panel following a preliminary assessment of a coal or CSG proposal against criteria relating to agricultural and water impacts. This 'gateway assessment' is an additional step towards achieving development consent that happens prior to the development application being lodged.<sup>396</sup>

The Gateway Panel is appointed by the Minister and is made up of members with expertise agricultural science, hydrogeology or mining and petroleum development.<sup>397</sup>

Applications for gateway certificates are made in writing to the Gateway Panel. The application includes a description of the proposed development and must indicate whether the land is biophysical strategic agricultural land or critical industry cluster land, or both.

Unless the company owns the land that the coal or CSG development is proposed on, the company needs to either give the owner of the land written notice of the application or publish a notice in a newspaper circulating in the area in which the development is to be carried out at least 30 days before the application is made.<sup>398</sup>

The Gateway Panel has 90 days to assess the proposal against a set of criteria, which are.<sup>399</sup>

- In relation to biophysical strategic agricultural land, that the proposed development will not significantly reduce the agricultural productivity the land, based on a consideration of the following:
  - any impacts on the land through surface area disturbance and subsidence,
  - any impacts on soil fertility, effective rooting depth or soil drainage,
  - increases in land surface micro-relief, soil salinity, rock outcrop, slope and surface rockiness or significant changes to soil pH,
  - any impacts on highly productive groundwater,<sup>400</sup>

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<sup>395</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17C(3).

<sup>396</sup> *Environmental Planning and Assessment Regulation 2000* (NSW), cl 50A; SEPP (Mining, Petroleum Production and Extractive Industries) 2007, Part 4AA. Also see: <http://www.mpgp.nsw.gov.au/>.

<sup>397</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17P.

<sup>398</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17F.

<sup>399</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17H.

<sup>400</sup> Within the meaning of the Aquifer Interference Policy.

- any fragmentation of agricultural land uses,
- any reduction in the area of biophysical strategic agricultural land.
- In relation to critical industry cluster land, that the proposed development will not have a significant impact on the relevant critical industry based on a consideration of the following:
  - any impacts on the land through surface area disturbance and subsidence,
  - reduced access to, or impacts on, water resources and agricultural resources,
  - reduced access to support services and infrastructure,
  - reduced access to transport routes,
  - the loss of scenic and landscape values.

The Panel must refer the application to the Minister for Primary Industries and the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) for advice on the impacts of the development on water resources.<sup>401</sup> The IESC is a national independent committee that provides scientific advice to decision-makers on the impact that CSG and large coal mining developments may have on Australia's water resources.<sup>402</sup>

The Panel must take the Minister for Primary Industries' and the IESC's advice into account when assessing the application.<sup>403</sup> In providing this advice, the Minister must have regard to the Aquifer Interference Policy, including minimal impact considerations.<sup>404</sup>

The Panel cannot refuse to issue a gateway certificate; it will either state that the proposed development meets the relevant criteria and issue an unconditional gateway certificate or state that the proposed development does not meet the relevant criteria and issue a conditional certificate.<sup>405</sup>

If a conditional certificate is issued it must include recommendations to address the proposed development's failure to meet the relevant criteria. It can also include a recommendation that specified studies or further studies be undertaken by the applicant regarding the proposed development.<sup>406</sup>

These recommendations must be addressed in the Secretary's Environmental Assessment Requirements (SEARs) discussed above.

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<sup>401</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17G.

<sup>402</sup> See: <http://www.iesc.environment.gov.au/>.

<sup>403</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17G. Advice from the IESC received within 90 days and advice from the Minister received within 70 days of the Panel's referral.

<sup>404</sup> See: <http://www.water.nsw.gov.au/water-management/law-and-policy/key-policies/aquifer-interference>.

<sup>405</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17H.

<sup>406</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 17H.

## **Case study: engaging for better outcomes**

Engagement with mining and CSG issues is often hard work. Here are three examples of where the community has managed to achieve a positive outcome.

### **1. Ashton Coal Mine at Camberwell**

Ashton Coal Operations Pty Limited (ACOL) applied for development consent for an expansion of the Ashton open-cut coal mine near Camberwell in the NSW Hunter Valley.

The NSW Ministry of Health objected to the project on the grounds that it would generate noise and dust problems for the nearby village of Camberwell. A key concern was the cumulative impacts of the mine; that is, the impacts of the proposed mine when added to those of surrounding mines.

The NSW Office of Water was also against the project due to concerns about the pit's impact on water flows, particularly in Glennies Creek and the Hunter River, and its potential to cause long-term salinity issues.

The Planning Assessment Commission (PAC) assessed the project and refused development consent despite the fact that the Department of Planning and Infrastructure recommended that the project be approved. The key reasons for the PAC rejecting the proposal related to health impacts and water impacts. The PAC stated "on balance, the benefits of the project do not outweigh the combined risks from the project's potential impacts on Glennies Creek and its associated water resources and its potential dust and noise emissions".

However, following the submission of a new report on health and water impacts by the NSW Department of Planning, this refusal was reversed, and the PAC granted approval for the expansion to proceed in 2012.

The Hunter Environment Lobby, represented by EDO NSW, appealed this approval in 2013. The group was concerned about the impacts of the mine expansion on the health of nearby residents as a result of dust emissions (PM10 and PM2.5), impacts on Aboriginal heritage, reduced agricultural productivity, threats to key water resources and the economic justification for the project. The case was heard in Sydney, but the Court also attended a site visit in Camberwell, followed by the hearing of objector evidence. The Court also heard expert evidence from hydrologists, economists, air quality experts and archaeologists.

The Court determined that the approval could be granted for the expansion but that it must be subject to adequate conditions. Importantly, the Court determined that no development could be commenced by Ashton Coal until it has acquired 'Rosedale', a property which is located in the proposed mine pit, from its owner Mrs Wendy Bowman. This is because the project had been assessed on the basis that the Mrs Bowman would not be living there during

the life of the project given the severe impacts from the mine on the residence. The Court also imposed a compensation condition for two neighbouring rural properties heavily impacted by the mine, including a dairy farm which has been in the same family since the 1830s, one of the oldest farming families remaining in the Upper Hunter.

The Court also strengthened conditions relating to the management of impacts to biodiversity, blasting conditions and land acquisition. With regards to dust, the Court declined to impose any specific criteria for fine particulate matter (PM2.5) given that current air quality standards for PM2.5 are only advisory. However the Court did strengthen conditions relating to the public's ability to access information on air quality monitoring undertaken by Ashton.

This case study shows Court action can lead to the imposition of more stringent conditions. While the original refusal was reversed, it is important to note that the objection of the two Government agencies was critical to that refusal. It is therefore important to engage not just the decision-maker, but also other government departments whose support can be invaluable in objecting to mine applications.

## ***2. Bickham Coal Mine near Scone***

The PAC recommended that the Planning Minister refuse an application for development consent for the Bickham Coal Mine in the Hunter Valley. The Minister rejected the mine on the grounds that it would have unacceptable impacts on the Pages River, in terms of both contamination and drainage. This in turn was likely to threaten the local thoroughbred industry.

This case study shows that mines can be rejected if they will conflict with existing industries. It is important for such industries to raise any concerns with decision-makers and seek to have such industries prioritised over mining or CSG or protected from adverse impacts.

## ***3. Drayton South Coal Mine at Jerrys Plains***

The PAC refused an application in 2011 for the Drayton South coal mine which was proposed 500m from two thoroughbred stud farms – Darley and Coolmore. The PAC determined that the economic benefits of the project did not outweigh the risk of losing Coolmore and Darley and the potential demise of the equine industry in the area. Of particular relevance to this outcome was that the project did not provide a sufficient buffer to protect Coolmore and Darley from the impacts of mining and did not demonstrate that it would not adversely impact on equine health and the operations of the Coolmore and Darley horse studs.

The mine operator reapplied, this time 900m from the farms. The development was sent to the PAC for review. The PAC recommended the development application be refused but the Department of Planning and Environment recommended it be approved. The Minister for Planning then

referred the application back to the PAC for final determination. The PAC is yet to make a decision.

### ***Does my local environmental plan apply?***

Planning at the local level is governed by local environmental plans (LEPs) and State Environmental Planning Policies (SEPPs) which are both forms of environmental planning instruments (EPIs).

LEPs control what development can go where through a system of zones. SEPPs are planning instruments that can either restrict or facilitate development on certain kinds of land. Some LEPs and SEPPs prohibit mining and CSG activities on certain land, while others allow it.

You'll need to check your LEP to see whether it allows mining and CSG activities to be approved in the zone applying to your land. However, you should note that any zone that permits agriculture or industry (either with or without consent) will automatically allow mining activities to be permitted with consent by virtue of the Mining SEPP.<sup>407</sup>

Where an EPI wholly prohibits mining or CSG activities in a zone or over particular land, consent cannot be granted to that development.<sup>408</sup> Where an EPI only partly prohibits the development, consent can be granted.<sup>409</sup>

To get around this, a development application for SSD that is wholly prohibited by an EPI can be accompanied by a proposal to change the EPI so that the activity can go ahead.<sup>410</sup> This is sometimes called a 'spot rezoning'. The Secretary can also propose changes to a LEP for the purposes of facilitating otherwise prohibited SSD.<sup>411</sup>

Where a LEP needs to be changed to facilitate SSD, only the Planning Assessment Commission (PAC) can approve the amendment.<sup>412</sup> Furthermore, only the PAC can determine a development application for SSD that requires an amendment to a LEP.<sup>413</sup>

Amendments to LEPs (in the form of planning proposals) go on public exhibition and you will have an opportunity to comment on the amendment.<sup>414</sup> To find out when LEPs are on public exhibition, visit the Department of

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<sup>407</sup> SEPP (Mining, Petroleum Production and Extractive Industries) 2007, cl 7.

<sup>408</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(2).

<sup>409</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(3).

<sup>410</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(5).

<sup>411</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(5).

<sup>412</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(6).

<sup>413</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(6).

<sup>414</sup> For more information on commenting on LEPs, see EDO NSW fact sheets 'Local Environmental Plans' and 'Commenting on Draft LEPs':  
[http://www.edonsw.org.au/planning\\_development\\_heritage](http://www.edonsw.org.au/planning_development_heritage).

Planning and Environment LEP Tracker<sup>415</sup> or sign up to receive EDO NSW's eBulletin.<sup>416</sup>

If a mining or CSG company describes their proposed development as something other than a mine or CSG production, for example, as a public utility undertaking, you should raise this as a concern in your submission.

### ***Are any other environmental approvals necessary?***

A project often needs a number of approvals in addition to development consent. These approvals must be obtained from other government agencies such as the Office of Environment and Heritage (OEH), the Environment Protection Authority (EPA) or the Department of Primary Industries – Water (DPI Water). For example, a proposal to build a power station might also require a licence from the EPA to cause pollution and approval from DPI Water to access and take water. Many developments require a permit from OEH to clear native vegetation or to harm threatened species.

With SSD, many of these additional approvals are either unnecessary or subject to a requirement that the approval must be given consistently with the development consent, meaning the other government agency has no discretion to refuse the approval if it is necessary to carry out SSD which has been approved.

The following authorisations are not required for SSD:<sup>417</sup>

- an Aboriginal heritage impact permit;<sup>418</sup>
- a permit to clear native vegetation or State protected land;<sup>419</sup>
- a bush fire safety authority;<sup>420</sup>
- a water use approval,<sup>421</sup> a water management work approval,<sup>422</sup> or an activity approval.<sup>423</sup>

A licence to construct and operate a pipeline<sup>424</sup> and an environment protection licence (a licence that authorises pollution)<sup>425</sup> are two types of approvals that are still required but which *must* be granted consistently with a development consent for SSD.<sup>426</sup> Mining leases and petroleum production leases must also

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<sup>415</sup> See: <http://leptracking.planning.nsw.gov.au/Default.aspx>.

<sup>416</sup> See: <http://www.edo.org.au/edonsw/site/bulletin/bulletin.php>. EDO NSW also has fact sheets on LEPs and how they are made. The fact sheets are available here: <http://www.edo.org.au/edonsw/site/factsheets.php>.

<sup>417</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89J.

<sup>418</sup> Under the *National Parks and Wildlife Act 1974* (NSW), s 90.

<sup>419</sup> Under the *Native Vegetation Act 2003* (NSW), s 12.

<sup>420</sup> Under the *Rural Fires Act 1997* (NSW), s 100B.

<sup>421</sup> Under the *Water Management Act 2000* (NSW), s 89.

<sup>422</sup> Under the *Water Management Act 2000* (NSW), s 90.

<sup>423</sup> Under the *Water Management Act 2000* (NSW), s 91.

<sup>424</sup> Under the *Pipelines Act 1967* (NSW).

<sup>425</sup> Under the *Protection of the Environment Operations Act 1997* (NSW), Ch 3.

<sup>426</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89K.

be granted.<sup>427</sup> This means that if development consent has been granted under the planning system, the Minister for Industry, Resources and Energy must grant the mining or petroleum production lease. However, that Minister can still refuse a mining or petroleum production lease on the ground that the applicant is not a fit and proper person.<sup>428</sup>

### ***Can the project be changed?***

Consent to undertake SSD can be modified which means the applicant can seek to alter the project in some way after consent has been granted.

The applicant has to apply for a modification to the same consent authority that made the original decision.

Modifications can only be granted in certain circumstances, namely:<sup>429</sup>

- if, in the opinion of the consent authority, the modification would have minimal environmental impact;<sup>430</sup>
- if the modification would still result in substantially the same development as was originally approved;<sup>431</sup> or
- to correct a minor error, misdescription or miscalculation.<sup>432</sup>

Whether or not the modification application will be publicly exhibited and opened up for public comment will depend on the modification. Modifications involving the correction of minor errors do not need to be publicly notified and there will be no opportunity for the public to comment.<sup>433</sup> Modifications that will only have a minimal environmental impact may need to be notified if a Development Control Plan applying to the land requires it to be.<sup>434</sup> Other modifications are required to be notified for at least 14 days in the same manner as the original application was notified.<sup>435</sup>

### **The bottom line**

- Development consent is not required for coal and CSG exploration.
- Development consent *is* required for coal mining and CSG production.
- Coal and CSG developments are assessed as State significant development.

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<sup>427</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89K.

<sup>428</sup> *Mining Act 1992* (NSW), s 380A; *Petroleum (Onshore) Act 1991* (NSW), s 24A.

<sup>429</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 96.

<sup>430</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 96(1A); *Environmental Planning and Assessment Regulation 2000* (NSW), cl 117.

<sup>431</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 96(1A); *Environmental Planning and Assessment Regulation 2000* (NSW), cl 118.

<sup>432</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 96(1).

<sup>433</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 96(1), 96(1A); *Environmental Planning and Assessment Regulation 2000* (NSW), cl 119(1).

<sup>434</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 96(1A); *Environmental Planning and Assessment Regulation 2000* (NSW), cl 117.

<sup>435</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 96(2); *Environmental Planning and Assessment Regulation 2000* (NSW), cll 119(1), 119(2).

# Chapter 6 – Commonwealth Approvals

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Some coal and CSG activities will need Commonwealth approval. This is in addition to any approval required at the State level (such as a mining lease or development consent). The approval is granted under the national environmental law – the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The EPBC Act gives effect to our obligations under international conventions and treaties.

## ***What sorts of mining and CSG projects need Commonwealth approval?***

Only ‘controlled actions’ need Commonwealth approval.<sup>436</sup>

A controlled action is an action that is likely to have a *significant impact* on a ‘matter of national environmental significance’.<sup>437</sup>

There are nine matters of national environmental significance. These are also known as ‘triggers’ because they trigger the need for a Commonwealth approval. The matters of national environmental significance are:

- world heritage values of a world heritage area;
- heritage values of a national heritage place;
- ecological values of a Ramsar wetland;
- nationally listed threatened species and ecological communities;
- listed migratory species;
- nuclear activities (including uranium mines);
- Commonwealth marine areas;
- the Great Barrier Reef Marine Park; and
- water resources, in relation to coal seam gas development and large coal mining development.

If an activity is likely to have a significant impact on one of these triggers, it must be referred to the Commonwealth Department of the Environment and Energy for assessment. The decision to approve or refuse the project is made by the Minister for the Environment and Energy.

Many of these triggers are relevant to coal and CSG developments, but the water trigger is particularly relevant. Under the water trigger, if a coal mine or CSG development will have a significant impact on a water resource, such as an aquifer, it will trigger the need for referral to the Minister and approval from before it can proceed.

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<sup>436</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 67.

<sup>437</sup> These are listed in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 12-25.

Due to the nature of coal mining and CSG operations, the water trigger is likely to be activated at the mining/petroleum production stage. However, sometimes exploration activities will trigger the need for a referral.

### ***How can I find triggers in my area?***

The Department of the Environment and Energy website contains detailed information about matters of national environmental significance.<sup>438</sup> The website also allows users to find where triggers exist using the Protected Matters Search Tool.<sup>439</sup> You can use the tool to search maps, enter coordinates or search by Local Government Area. The search will generate a 'Protected Matters Report' that shows all matters of national environmental significance in the selected area.

### ***How will I know if an activity is likely to have a significant impact on a matter of national environmental significance?***

This can be difficult to determine. The environmental assessment that is carried out at the State level (such as the Review of Environmental Factors or the Environmental Impact Statement) should identify any matters of national environmental significance in the area and comment on whether the activity is likely to have a significant impact on them. However, the environmental assessment may miss some triggers or inaccurately conclude that there will be no significant impact. It is therefore important that you know about any triggers on your land or in your region and then try to decide whether the proposal will have a significant impact on them.<sup>440</sup>

The Commonwealth Government has prepared 'significant impact guidelines' to help people decide whether an activity is likely to have a significant impact on a matter of national environmental significance.<sup>441</sup>

### ***What happens if there is likely to be a significant impact?***

The proposal will need to be referred to the Department, and the Minister will have to decide whether it is a controlled action.<sup>442</sup>

### ***How is a project referred to the Commonwealth?***

There are 4 ways that a project can be referred to the Commonwealth:<sup>443</sup>

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<sup>438</sup> See: <https://www.environment.gov.au/epbc/what-is-protected>.

<sup>439</sup> See: <http://www.environment.gov.au/epbc/pmst/index.html>.

<sup>440</sup> Cases have suggested 'significant impact' means an 'impact that is important, notable, or of consequence, having regard to its context or intensity'. E.g. *Booth v Bosworth* (2001) 14 FCR 39; 117 LGERA 168; [2001] FCA 1453. See A. Walker, 'Beware – the feds are coming! Prosecutions under the EPBC Act', *Australian Environment Review* (August 2011), 178-181.

<sup>441</sup> See: <http://www.environment.gov.au/epbc/publications/nes-guidelines.html>.

<sup>442</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 67A.

<sup>443</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 72 sets out the form and content of referral; the *Environment Protection and Biodiversity Conservation*

- The mining or CSG company can refer their proposal themselves, and this is expected of them.<sup>444</sup>
- A State or Territory government or agency that is aware of a proposal and has some responsibilities regarding the proposal can refer it.<sup>445</sup>
- If the Commonwealth Minister for Environment and Energy believes that somebody is about to carry out a controlled action, the Minister can request the person or the State agency responsible for approving it to refer the proposal to him or her.<sup>446</sup>
- A Commonwealth agency<sup>447</sup> that becomes aware of a proposal can refer the matter if it has some administrative role.<sup>448</sup>

Once a referral is received, the Commonwealth Minister for Environment must decide whether or not it is a controlled action.<sup>449</sup>

### ***Can members of the public refer a proposal?***

Members of the public cannot refer projects. However, they can do the following:

- contact the NSW Government agencies with some involvement in the project (such as the Department of Planning and Environment, the Department of Industry, Division of Resources and Energy, the Office of Environment and Heritage or the Department of Primary Industries – Water) and ask them to refer the proposal;
- contact the Commonwealth Minister for Environment and Energy and ask the Minister to ‘call in’ the proposal for assessment;
- report the proposal to the Compliance and Enforcement Branch of the Department of the Environment and Energy.<sup>450</sup>

You will need to be prepared to argue why the proposal should be referred. You should know what triggers are likely to be affected and also how they are likely to be significantly affected as a result of the activity.

### ***Does the public get a say?***

Once a referral has been received by the Minister, it must be published on the Commonwealth Government website.<sup>451</sup> Members of the public will then have 10 business days to comment on whether the action is a ‘controlled action’.<sup>452</sup>

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*Regulations 2000* (Cth) set out further details that must be included in referrals. See cl 4.01 - 4.03, and Sch. 2.

<sup>444</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 68.

<sup>445</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 69.

<sup>446</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 70. If no referral is made within the set time period, the Minister can deem the action to be referred. See: s 70(3).

<sup>447</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 528 defines ‘Commonwealth Agency’.

<sup>448</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 71.

<sup>449</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 75.

<sup>450</sup> See: <http://www.environment.gov.au/epbc/breach.html>.

<sup>451</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 74(2), 170A.

It's important to comment at this stage because if the Minister decides that the proposal is not a controlled action, it will not be possible for the Commonwealth Government to get involved in the proposal (unless some new information arises which would make the Commonwealth reconsider the matter).

When making your comments you should:

- read the referral documents carefully and point out any missing or incorrect information (e.g. any listed threatened species not mentioned);
- attach any evidence or reports that you have which support your comments (e.g. lists of migratory species or threatened species known to be in the area);
- make reference, if possible, to the Guidelines on what amounts to a significant impact;<sup>453</sup> and comment on the type of environmental assessment that you think should follow (see below).

### ***What happens if the activity is a controlled action?***

If the Minister determines that the activity is a controlled action, it cannot go ahead without the Minister's approval. The Commonwealth and NSW governments have signed a bilateral assessment agreement which means that the NSW Government is responsible for assessing projects that are likely to impact matters of national environmental significance.

The NSW Government will assess the project, and as part of its usual State assessment it will undertake an assessment for the Commonwealth Government using its own assessment processes, which have been accredited under the bilateral agreement.<sup>454</sup> This includes the assessment of State significant development applications (which covers mining and CSG production applications) discussed in Chapter 5 and the environmental assessment of exploration activities discussed in Chapter 2. Once the assessment is complete, it will prepare an assessment report, which will be used by Commonwealth Minister in making a determination.

In preparing the assessment report for a coal or CSG project, the NSW Government, along with the Commonwealth, must obtain advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) on the on the water-related impacts of the

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<sup>452</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 74(3)(b), 75(1A)(b).

<sup>453</sup> *EPBC Significant Impact Guidelines 1.1 - Matters of National Environmental Significance*, October 2009; *EPBC Significant Impact Guidelines 1.2 - Actions on, or impacting upon, Commonwealth land, and actions by Commonwealth agencies* January 2010 available at: <http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf>.

<sup>454</sup> See: <http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/nsw>.

development proposal.<sup>455</sup> The IESC's advice is scientific,<sup>456</sup> and it does not have a decision-making role. The Minister needs to consider this advice in deciding whether to grant approval and, if so, what conditions should be imposed. However, this advice is not binding on the Minister. It is one of many considerations that the Minister must take into account, and it does not need to be followed by the Minister.<sup>457</sup>

The final decision remains with the Commonwealth Minister for the Environment and Energy who will make a decision based on the assessment and recommendation by the NSW Government.

### ***Does the public get a say?***

Because the State's environmental assessment process has been accredited under the bilateral agreement, your chance to have a say is at the development assessment or environmental assessment stage. It is important to include any information you have about matters of national environmental significance in your submission at this stage, as this will be used in preparing the assessment report to the Commonwealth Minister, and there will not be a separate opportunity to make submissions on these matters.

### ***What can the Minister decide?***

If the Minister approves the project, they can attach additional conditions.<sup>458</sup> As with conditions imposed at the State level, these conditions are legally enforceable.<sup>459</sup> Conditions might include:<sup>460</sup>

- a requirement for the mining or CSG company to make a financial contribution to a person or group working to protect matters of national environmental significance that may be impacted by the activity;
- a requirement to pay a bond or guarantee to pay for costs of damage to the site; and
- ongoing monitoring of the site.

The Minister may decide not to approve the development. Where this happens, the development cannot go ahead in its current form and any State approval cannot be acted upon. This is because it is unlawful to take an action that is likely to have a significant impact on a matter of national environmental significance without the Minister's approval.<sup>461</sup> The only way for the

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<sup>455</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 131AB; New South Wales Assessment Bilateral Agreement, cl 6.3. See: <http://www.iesc.environment.gov.au/committee-advice>.

<sup>456</sup> The IESC publishes its advice on its website: <http://www.iesc.environment.gov.au/committee-advice>.

<sup>457</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 136.

<sup>458</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 134.

<sup>459</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 142. It is an offence to breach a condition: ss 142A, 142B.

<sup>460</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 134(3) sets out a detailed list of examples of conditions that can be attached.

<sup>461</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Chapter 2 Part 3.

development to proceed would be for the mining or CSG company to redesign the project, this time ensuring it will not have a significant impact on any matters of national environmental significance.

***What happens if the mining or CSG company commits an offence or breaches the EPBC Act?***

The EPBC Act sets out a number of offences. For example, it is an offence to undertake a controlled action without getting approval from the Minister for the Environment and Energy.<sup>462</sup>

It is also an offence to breach any conditions of consent.

Where the Act has been breached or an offence has been committed, the Minister can take a range of actions, including revoking or suspending the approval.<sup>463</sup> For example, the Minister suspended the approval for the Reef Cove Resort development at Queensland's False Cape when the developer's failure to maintain the site resulted in sediment escaping the site and posing a threat to the Great Barrier Reef Marine Park.<sup>464</sup>

In some cases, members of the public can also take action. See Chapter 7 for more information on taking action.

**The bottom line**

- The EPBC Act protects matters of national environmental significance.
- Some mining and CSG projects will therefore need Commonwealth approval in addition to approval from the State Government.
- You can try to influence the Minister to refuse the project (or impose conditions) on the grounds that it will have a significant impact on a matter of national environmental significance.
- If the Minister refuses the proposal, it cannot go ahead in its current form.

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<sup>462</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 15A, 15C, 17B, 18A, 20A, 22A, 24A, 24C, 24E.

<sup>463</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 144, 145.

<sup>464</sup> See: <http://www.environment.gov.au/epbc/notices/assessments/2003/1179/notice-of-suspension-signed-aug09.pdf>.

# Chapter 7 – Legal Options

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If you are concerned about mining or CSG activities in your area or on your land, there are a number of things you can do. The law provides a number of formal opportunities to set out your concerns. This Chapter outlines some of the practical things you can do to protect yourself and the environment from the impacts of coal and CSG developments.

There are also a range of other actions you could take. For example, you can write letters to the paper and to decision-makers to outline your concerns and raise awareness of the issues. You can also organise petitions, hold public meetings, attend public rallies, meet with mining and CSG companies, meet with your local representatives at the State and local level, call talkback radio and engage in non-violent direct action. You should contact campaigning groups if you are considering any of these actions.

When it comes to advocacy, a varied approach is often the most effective so you should consider using a number of different strategies instead of relying on just one. Regardless of what action you choose to take, it is important to get involved early so all your options are left open.

If you are considering taking any of the legal action discussed in this Chapter, seek legal advice first.

## **Case study: effective engagement**

Boggabri Coal, near Narrabri NSW, sought to expand its operations.

The Maules Creek Community Council (MCCC) contacted Boggabri Coal and asked for funding to respond to the company's environmental assessment. They managed to get \$10,000 and used the money to hire independent experts – including economists, ecologists, hydrologists and soil scientists – to assess the mine's plans for expansion.

The result was a 200-page technical report, which included a detailed economic, social and environmental impact analysis, along with recommendations.<sup>465</sup>

The report's findings were peer-reviewed, and several contributors provided their expertise on a pro bono or discounted basis.

The Planning Assessment Commission ultimately approved the project subject to a number of conditions, some of which were sought by the group.

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<sup>465</sup> The reports can be found on the Maules Creek Community Council website: <http://www.maulescreek.org/home/public-documents><http://www.maulescreek.org/home/public-documents>.

## **1. Incorporate an environmental group**

Individuals often unite on a single issue and when this happens, a group inevitably forms. While community groups are a great way to approach a common problem, you may also wish to consider incorporating the group.

There are a number of benefits to incorporating. Incorporation allows a group to limit the liability of its members, continue to exist regardless of changes in membership, take legal action in the name of the corporation and attract funding more easily.

This means that if your group decides to take legal action down the track to, for example, challenge an approval for a mine, the litigation can happen in the name of the association as opposed to an individual taking the matter alone.

### ***How do I incorporate an association?***

Incorporating an environmental association generally involves 3 steps:<sup>466</sup>

1. Five or more individuals must authorise an application for incorporation.
2. A name must be reserved. This is done by lodging an Application for Reservation of Name (Form A1) with NSW Fair Trading and enclosing the prescribed fee. To find out if a name has already been registered, contact the Registry of Co-operatives & Associations.<sup>467</sup>
3. An Application for Incorporation (Form A2) must be lodged, along with the prescribed fee and documents.<sup>468</sup> The application includes a statement of the association's aims and a copy of the association's proposed constitution.

### ***What are the legal requirements of incorporated associations?***

Incorporation involves some ongoing costs, administrative burdens and legal responsibilities. You should consider carefully whether your group needs to incorporate or whether you can work through an already incorporated group. See Appendix 2 for a list of groups working on mining and CSG issues.

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<sup>466</sup> *Associations Incorporation Act 2009* (NSW), Part 2; NSW Fair Trading. *Incorporating an Association*, available at: [http://www.fairtrading.nsw.gov.au/Cooperatives\\_and\\_associations/Incorporating\\_an\\_association.html](http://www.fairtrading.nsw.gov.au/Cooperatives_and_associations/Incorporating_an_association.html).

<sup>467</sup> On 1800 502 042 or NSW Fair Trading on 13 32 20 and select the Business Registration option.

<sup>468</sup> The application can be lodged at any Fair Trading Centre or by mail to the Registry of Co-operatives & Associations, PO Box 22, Bathurst NSW 2795.

The association needs a constitution. It is possible to adopt the model constitution which is available from NSW Fair Trading and covers all the legal requirements.<sup>469</sup> At the very least, the model constitution is a good place to start.

An association must also have a public officer<sup>470</sup> and a committee.<sup>471</sup> The committee must have at least three members upon incorporation.<sup>472</sup> The total number of the committee depends on the constitution of the association. Most committees have office bearers (president, vice-president, treasurer and secretary) and ordinary members.

An incorporated association is required to meet at least once a year within six months of the end of the financial year.<sup>473</sup> This meeting is usually referred to as the annual general meeting or AGM. Incorporated associations must lodge a financial statement with the Secretary of NSW Fair Trading within one month of the AGM.<sup>474</sup>

## **2. Write submissions**

When the Government wants to know what you think about something, or when it is required to by law, it will usually ask you to write a submission. A submission sets out your point of view and the argument that supports that point of view.

There are a number of formal opportunities for members of the public to write submissions about mining and CSG activities. Many of these have been outlined in other sections of this guide. For example, there is a minimum 30 day submission period when a coal or CSG development is being assessed (see Chapter 5 for more information). There may also be opportunities to write submissions on proposed changes to the laws that regulate mining and CSG extraction. When your local council is updating or changing the local environmental plan (LEP) for your area, you will also be invited to comment by way of written submission.

### ***Why should I write a submission?***

In many cases, writing a submission will be the only formal opportunity you'll have to comment on a proposal. Decision-makers are usually bound to consider public submissions so any points you raise will be taken into account.

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<sup>469</sup> See:

[http://www.fairtrading.nsw.gov.au/ftw/Cooperatives\\_and\\_associations/Incorporating\\_an\\_association/About\\_the\\_constitution.page?](http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Incorporating_an_association/About_the_constitution.page?)

<sup>470</sup> *Associations Incorporation Act 2009* (NSW), s 34.

<sup>471</sup> *Associations Incorporation Act 2009* (NSW), s 28.

<sup>472</sup> *Associations Incorporation Act 2009* (NSW), s 28.

<sup>473</sup> *Associations Incorporation Act 2009* (NSW), s 37.

<sup>474</sup> *Associations Incorporation Act 2009* (NSW), ss 45, 49.

With regards to mining and CSG projects, the submission period is an important opportunity for the public to raise objections or concerns about the environmental, social and economic impacts of the project.

Making a submission is a chance to draw on your expertise, local knowledge and/or experience in order to correct any errors or omissions in the environmental assessment. For example, the environmental assessment may fail to mention an endangered species that you know is present at the site.

A large number of submissions on a proposal will also send a strong message to decision-makers and an issue is likely to be given more weight if it is raised by a large number of people.

It's also important to note that making a submission is necessary in order to be considered an 'objector' under planning law. An objector is a person who has made a submission objecting to a development application during the public exhibition period.<sup>475</sup> Only objectors have the power to challenge a development consent on its merits.<sup>476</sup> See Chapter 5 for more information on development consent. Merits appeals are discussed later in this Chapter.

If you have incorporated an association, lodge a submission in the name of the association as well as each individual member. That way, the association will be recorded as an objector and you may be able to bring a merits appeal under the name of your association.

### ***How do I find out about opportunities to write submissions?***

This can be difficult as there is no single way of telling the public that submissions are being sought. Requests for submissions are often advertised in newspapers and on the website of the government department or local council seeking public comment. In some cases, you will be personally notified that you have an opportunity to comment by way of written submission. The Department of Planning and Environment major project website lists all opportunities to write submissions to State significant development applications.<sup>477</sup>

### ***When do I have to write a submission?***

It depends on the process. Some submission periods are quite short while others are longer. For example, you generally only have 30 days to lodge a submission in response to a proposed State significant development. See Chapter 5 for more information. However, for some government inquiries into new policy or law, there may be a period of several months during which you can make a submission. You only have 10 days to comment on referrals to the Commonwealth Government under the EPBC Act. See Chapter 6 for more information.

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<sup>475</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 4, 98.

<sup>476</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 98.

<sup>477</sup> See: <http://majorprojects.planning.nsw.gov.au/page/on-exhibition/>.

The important thing is to get your submission in on time. If you can't meet the deadline you should ask for an extension.

### ***How do I write an effective submission?***

There is no one formula for writing an effective submission. The aim is to express your point of view as convincingly and persuasively as possible.

It's important that your submission meets the formal requirements.<sup>478</sup> It must be in writing,<sup>479</sup> state the name and contact details of each signatory, be addressed to the correct person (often the Secretary of the relevant government department or the General Manager of the local council) and be lodged in time.<sup>480</sup> If you are responding to a development application, you also need to make it clear whether you are supporting or objecting to the application, and if objecting, set out the grounds of the objection in your submission.<sup>481</sup>

Keep in mind that the applicant is likely to be given a copy of the submissions or a summary of them. Submissions lodged electronically are also commonly published on government websites. While you must include your name and address on your submission, you can request to have your name withheld from publication, but you should not include any personal information in your submission or attachments.

The Maules Creek Community Council has a number of excellent submissions on their website that you can look at for inspiration.<sup>482</sup>

If your submission is about State significant development, you can lodge it online from where the development application is displayed on the Department of Planning and Environment major project website.<sup>483</sup>

Your approach will differ depending on the purpose of your submission. Below, we have outlined the key steps in writing a submission about a proposed mining or CSG project. However, there are other resources available to explain how to write a submission in response to a proposed policy or law.<sup>484</sup>

### ***Obtain information***

The first step is to gather information about the proposal. For a mining or CSG application, an important piece of information will be the development application, along with the Secretary's Environmental Assessment

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<sup>478</sup> See 'Making a submission': <https://www.planningportal.nsw.gov.au/understanding-planning/major-projects>.

<sup>479</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 57, 79, 89F.

<sup>480</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 79, 89F.

<sup>481</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 79(5).

<sup>482</sup> See: <https://www.maulescreek.org/research/>.

<sup>483</sup> See: <http://www.majorprojects.planning.nsw.gov.au/page/on-exhibition/>.

<sup>484</sup> For tips on writing submissions to government inquiries regarding proposed laws, see EDO Victoria's fact sheet at: [http://www.edovic.org.au/law\\_reform/law\\_reform\\_community](http://www.edovic.org.au/law_reform/law_reform_community).

Requirements and the Environmental Impact Statement prepared by the applicant. These will all be available on the Department of Planning and Environment website.<sup>485</sup> You may also need to gather independent scientific information that tells you what impact the proposal will have on the environment, the economy and the local community. Search the internet for any studies that have been done or contact local conservation groups and ask if they have any information. See Appendix 2 for a list of organisations that may be able to provide you with information about CSG and coal mining.

You should also find out who the decision-maker is going to be and find out as much about them as possible so you know what sorts of arguments they might find persuasive.

### *Identify key issues*

Work out what your key concerns are and focus on them. If you try to include everything you can possibly think of in the submission, the good points will get lost in the weaker points and your submission will be less effective. If you have several concerns but only limited time, it might be worth dividing the issues up amongst a group with each of you dealing with one point in detail.

It is a good idea to address the issues that the decision-maker *must* take into account when making their decision. See Chapter 5 for a list of the things the decision-maker must take into account when deciding whether or not to grant development consent. See Chapters 2 and 4 for the things the decision maker must consider when granting an exploration licence or mining/petroleum production lease.

If there are particular aspects of the project that you support, be sure to mention them.

Be clear about what you want the decision-maker to do. For example, do you want the project to be refused or just changed in certain ways? You should consider including some suggested conditions that you'd like to be put in place if the project does get approval.

### *Support with facts*

Include factual information to back up your arguments. Your arguments will be better received if they are supported by evidence and you will have a far greater chance of influencing the decision-maker than if you lodge a submission containing unsubstantiated claims.

Also, attach relevant supporting documents, physical evidence and observations and opinions from scientists to support what you're saying. Logbooks, photographs, scientific studies etc. can all be used to add weight to your arguments.

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<sup>485</sup> See: <http://majorprojects.planning.nsw.gov.au/page/>.

### *Use a clear structure and layout*

Use headings and bullet points to ensure your submission is easy to read and understand. Also, put a summary of your key concerns and recommendations on the front page of your submission.

Remember, the decision-maker may receive many submissions so you want yours to be easy to read and well expressed. Write clearly and concisely. A rambling stream of consciousness will not effectively communicate your ideas.

Don't feel pressured to write a long submission. You may be able to say everything you need to in less than a page, or even in bullet points.

### *Write objectively*

Use clear, calm language and maintain a professional style. Overly emotional arguments are usually not as convincing.

### *Follow up*

After you have made your submission, make a follow up phone call to ensure that your submission has been received by the right person and that your concerns are at the forefront of their minds. You might want to request a meeting to discuss your concerns with the decision-maker in person. If you manage to get a meeting, take a one-pager summarising your key points for them to take away with them after the meeting.

## **3. Attend a public hearing or public meeting**

The Planning Assessment Commission (PAC) is an independent planning body that can either advise the Minister for Planning on aspects of a particular project or, in some cases, be the decision-maker. You can find out if a project you're interested in has been referred to the PAC by visiting the PAC's website and searching the PAC register.<sup>486</sup>

The PAC routinely consults the community to help them understand the issues involved in each planning matter. They can do this in two ways – a public hearing or a public meeting.

The distinction between a public hearing and a public meeting is important because if the PAC holds a public hearing, the merits appeal rights of objectors are removed. This means that you will not be able to bring a merits appeal to challenge the project if the PAC approves the project. See the section on challenging development consents below for more information on merits appeals.

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<sup>486</sup> See: <http://www.pac.nsw.gov.au/>

Where the PAC is the decision-maker, it will hold a **public meeting** before determining an application if there has been more than 25 public submissions about the application.

A **public hearing** is only held at the request of the Minister for Planning or the Secretary of the Department of Planning and Environment.<sup>487</sup> Public hearings are common practice for mining and CSG projects. At the time of writing, 39 applications have gone to a PAC public hearing at the request of the Minister or Secretary since the PAC was established in 2008, and 30 of these have been applications for resource projects.<sup>488</sup>

Whether it's a public meeting or a public hearing, appearing before a PAC is a good opportunity to ensure your concerns are being heard.

### ***How do I find out about a PAC meeting?***

The notification requirements are slightly different for public hearings and public meetings, but generally the PAC must give reasonable notice of the hearing or meeting, including in a newspaper and in writing to certain public authorities.<sup>489</sup> Public meetings will also be advertised on the PAC's website.<sup>490</sup>

The notification itself will set out the subject matter of the meeting or hearing and provide details of the time, date and venue.<sup>491</sup> The notice will also provide details on how to make submissions to the PAC, including how to register to address the PAC at the meeting or hearing.

A schedule of presentations is made publicly available before the hearing/meeting. This schedule will list who will be making submissions and the time that they have been allocated. Time limits are enforced strictly.

You may be questioned on your submission at the end of your presentation.

In preparing your presentation, it is important to keep in mind the PAC terms of reference which limit what it can consider. You should also dress formally, be punctual, speak clearly and loudly and practise your submissions to ensure you will meet time constraints.

Public meetings and hearings are not recorded by any electronic devices, where possible, you should provide copies of speech notes or presentations

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<sup>487</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 23D.

<sup>488</sup> See Planning Assessment Commission, PAC Reviews at: <http://www.pac.nsw.gov.au/projects?Keywords=&ProjectLGa=&ProjectStatus=&ProjectType=%7bC8D5A490-AD73-4A62-8880-53243C9B7B29%7d&page=1>.

<sup>489</sup> Planning Assessment Commission, 'Our Processes', available at: <http://www.pac.nsw.gov.au/our-processes>; *Environmental Planning and Assessment Regulation 2000* (NSW), cl 268R.

<sup>490</sup> See 'Upcoming Public Meetings/Hearings': <http://www.pac.nsw.gov.au/>.

<sup>491</sup> Planning Assessment Commission, 'Our Processes', available at: Planning Assessment Commission, 'Procedures for Decision-Making', available at: <http://www.pac.nsw.gov.au/our-processes>; *Environmental Planning and Assessment Regulation 2000* (NSW), cl 268R.

to the Commission Secretariat at or following the hearing.<sup>492</sup> Don't worry if you miss something, your written submission can also be considered by the PAC.

#### **4. Challenge the development consent**

The decision to grant development consent to a coal or CSG project can sometimes be challenged in Court. There are two main types of challenge – merits appeals and judicial review.

##### *Merits appeals*

In a merits appeal you are arguing that the decision-maker should not have made the decision that he or she did.

The Court stands in the shoes of the original decision-maker and can look at all the information that the decision was based on (such as the development application and the environmental assessment), as well as any fresh evidence which has been placed before it.<sup>493</sup>

It is therefore important to have evidence to show why the project should not have been approved as it was. In mining and CSG matters, this is usually evidence to show that the project will have unacceptable social, environmental or economic impacts in the locality or the site is unsuitable for the development.

Merits appeals often begin on site.<sup>494</sup> Local residents are usually able to appear at the beginning of an on-site hearing to address the Judge or Commissioner and give evidence about what impacts the proposal will have on them or their property. Any person who chooses to give evidence can be cross-examined by the other parties' lawyer.<sup>495</sup>

In a merits appeal, the Court usually has the power to make any decision that the original decision-maker (e.g. the PAC) could have made regarding the project, such as granting or refusing development consent.<sup>496</sup> If the Court grants consent, it can attach its own conditions to the consent.<sup>497</sup>

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<sup>492</sup> Planning Assessment Commission, 'Our Processes', available at: Planning Assessment Commission, 'Procedures for Decision-Making', available at: <http://www.pac.nsw.gov.au/our-processes>.

<sup>493</sup> *Land and Environment Court Act 1979* (NSW), ss 38(2), 39(3).

<sup>494</sup> *Land and Environment Court Act 1979* (NSW), ss 34A, 34B.

<sup>495</sup> Land and Environment Court of NSW Practice Note – Class 1 Development Appeals (14 May 2007), available at: [http://www.lec.justice.nsw.gov.au/Documents/pn\\_class\\_1\\_development\\_appeals\\_14\\_may\\_2007.pdf](http://www.lec.justice.nsw.gov.au/Documents/pn_class_1_development_appeals_14_may_2007.pdf).

<sup>496</sup> *Land and Environment Court Act 1979* (NSW), s 39.

<sup>497</sup> *Land and Environment Court Act 1979* (NSW), s 39(6)(b); *Environmental Planning and Assessment Act 1979* (NSW), s 80(1).

Merits appeals are not always available. For example, only certain types of development can be challenged on the merits.<sup>498</sup> Coal and CSG projects that are assessed as State significant development qualify for merits appeal. However, a merits appeal is *not* available if the Planning Assessment Commission (PAC) held a public hearing into the project and this tends to be the case.<sup>499</sup> See above for more information on PAC hearings.

Finally, members of the public can generally only bring merits appeals against development consents if they qualify as an 'objector'.<sup>500</sup> To be classed as an objector you must have written a submission objecting to the project during the formal submission period at the development assessment stage.<sup>501</sup>

An incorporated association can bring a merits appeal, but only if a submission was lodged in the name of the association, making the association an objector. See above for more information on submissions.

You only have 28 days to file a merits appeal from the date you are notified of the decision and this includes when the decision is publicly notified in a newspaper.<sup>502</sup>

If you are unhappy with the outcome of the merits appeal, you may be able to appeal further, but only if there has been an error of law in the way the Judge or Commissioner decided the case.

### **Case study: challenging a mine approval on its merits**

In 2013, EDO NSW represented the Bulga Milbrodale Progress Association in its appeal of an approval to extend the Warkworth open cut coal mine closer to Bulga village.

Controversially, the approval allowed the clearing of a rare and endangered forest that was required to be protected forever as a condition of the mine's existing approval, given in 2003. As well as providing habitat for threatened plants and animals, the forest acts as a buffer between the village of Bulga and the mine.

The Association argued that the mine extension should be refused because the social impacts of the mine extension on Bulga residents would be unacceptable, particularly as a result of increased noise and dust. The

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<sup>498</sup> The main types of development that qualify for merits appeals are State significant development (SSD) and designated development. However, only SSD developments that *would* have been designated developments had they not become SSD will qualify. See: *Environmental Planning and Assessment Act 1979* (NSW), s 98.

<sup>499</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 98(5).

<sup>500</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 98. In exceptional circumstances you could ask the Court to be joined to proceedings that have been brought by someone else when you fail to make an objection. See: *Land and Environment Court Act 1979* (NSW), s 39A.

<sup>501</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 4, 98.

<sup>502</sup> *Environmental Planning and Assessment Act 1979* (NSW), ss 98(1), 101; *Environmental Planning and Assessment Regulation 200* (NSW) cl 124.

Association also presented expert evidence about the economic impacts of the project. This was the first time that environmental economics had been presented before the court in deciding a mining project.

The Land and Environment Court upheld the Association's appeal and refused the project application. The Court concluded that the project would have significant and unacceptable impacts on biodiversity, as well as unacceptable noise and social impacts. The Court considered that the proposed conditions of approval were inadequate and would not allow the project to achieve satisfactory levels of impact on the environment, including the residents and community of Bulga. The Court found that these matters outweighed the substantial economic benefits and positive social impacts of the project on the region, and that the extension project should not go ahead.

#### Mining company appeal

Shortly after the Land and Environment Court's refusal of the project, Warkworth appealed to the NSW Court of Appeal. The Court of Appeal unanimously dismissed Warkworth's appeal, finding no fault with the Land and Environment Court's decision that the economic benefits of the coal mine did not outweigh the significant impacts on Bulga residents and the destruction of rare forests containing endangered plant and animal species. The Court dismissed Warkworth's appeal and ordered Warkworth to pay the Association's costs.

#### New application for the mine extension

In 2015, Warkworth lodged a new, but essentially the same, application for an extension to the mine. The Planning Assessment Commission held a number of public hearings into the application, which means that the community's appeal rights to have the Land and Environment Court rehear the case have been extinguished. The PAC approved the new application in 2015.

### *Judicial review*

Judicial review cases do not consider the substance of the decision. Rather, the Court has to consider whether or not the decision was lawful; that is, whether the correct legal procedure was followed.

The person bringing the case has to show that some legal error was made by the decision-maker when the project was being assessed. Some common legal errors that give rise to judicial review cases include where the decision-maker:

- approved a development on land where developments of that type are prohibited;

- failed to consider all the relevant factors when granting consent;<sup>503</sup>
- took into account something irrelevant when granting consent;
- didn't have the power to approve the development;
- was affected by bias or fraud,
- failed to notify and advertise a development application properly; and
- failed to require an environmental impact statement or a species impact statement prior to making the decision.

These types of cases are of limited application because they rely on a legal error being made as well as sufficient evidence to prove that error. However, unlike merits appeals, they are available for all types of developments and any person can bring a judicial review case. You don't have to be an objector as you do with merits appeals.

If the Court agrees that a legal error has been made it can void the decision and it will be as though the decision was never made. The Court cannot replace the original decision with its own. However, sometimes the Court finds that there was a legal error, but that the error was not significant enough to warrant voiding the decision.

It is also important to note that, even if the Court declares the original approval to be invalid, there is usually nothing to stop a mining or CSG company from reapplying for the approval. The decision-maker could then reconsider the project, this time ensuring that it follows the correct procedures.

You have 3 months to file a judicial review case from the date you are notified of the decision (this includes when the decision is publicly notified in a newspaper).

## **5. Bring a third party civil enforcement case**

If the development goes ahead, the community can still play a role in ensuring that it is being operated lawfully. This type of legal action is known as 'civil enforcement'.

A typical matter might involve a claim that there has been a breach of an environmental or planning law. The Court will be asked to make orders to fix that breach.

Normally, responsibility for bringing these types of cases would fall to the government department responsible for administering the law that is being breached. However, in practice, many government departments are not resourced well enough to allow them to monitor and enforce every mine or CSG development and prosecutions for breaches are not common.

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<sup>503</sup> When granting development consent, the decision-maker must take into account all the matters listed in s 79C of the *Environmental Planning and Assessment Act 1979* (NSW) that are relevant to the project. See Chapter 5 for more information about relevant considerations.

### **Case study: government departments enforcing the law against coal and CSG projects**

In 2008, Coalpac was fined \$200,000 for exceeding the coal production conditions of its development consent.<sup>504</sup> This mine operates at Cullen Bullen near Lithgow in NSW. Original mining lease conditions limited production to 350,000 tonnes of coal per year. The mine exceeded its approval by producing 635,277 tonnes in a year. The case was brought by the Minister for Planning in the Land and Environment Court.<sup>505</sup>

Moolarben Coal Mines was fined \$70,000 after pleading guilty to breaching its approval by clearing native vegetation, including an endangered ecological community, that it was not authorised to clear. The case was brought by the Minister for Planning in the Land and Environment Court.<sup>506</sup>

Moolarben Coal Operations was also fined twice in 2012 (\$105,000 and \$112,000 respectively) after pleading guilty to polluting water<sup>507</sup> after discharging sediment-laden water (comprising soil, mud and clay) from the Ulan Coal Mine into Bora Creek, a tributary of the Goulburn River. The mine was also ordered to publicise that it was guilty of polluting waters by publishing notices in the Sydney Morning Herald and the Mudgee Guardian.<sup>508</sup>

In 2014, Santos was fined \$1,500 by the Environment Protection Authority when it was discovered that an aquifer had been contaminated by a pond holding CSG produced water at Santos' Narrabri gas field operation.<sup>509</sup>

In practice, the Department of Planning and Environment is the primary regulator under development consents for coal. The Department issues monthly reports on its compliance activity.<sup>510</sup> The EPA is the lead regulator of CSG activities in NSW. It is also the regulator for pollution caused by coal and CSG activities. You can search for prosecutions, civil proceedings, and penalty notices on the EPA's public register.<sup>511</sup> As the Department responsible for coal and CSG titles, the Department of Industry also has a role to play in compliance.<sup>512</sup>

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<sup>504</sup> *Minister for Planning v Coalpac Pty Limited* [2008] NSWLEC 271.

<sup>505</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 125.

<sup>506</sup> *Minister for Planning v Moolarben Coal Mines Pty Ltd* [2010] NSWLEC 147.

<sup>507</sup> Under s 120 of the *Protection of the Environment Operations Act 1997* (NSW).

<sup>508</sup> *Environment Protection Authority v Moolarben Coal Operations Pty Ltd* [2012] NSWLEC

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<sup>509</sup> Media Release available at:

<http://www.epa.nsw.gov.au/epamedia/EPAMedia14021802.htm>.

<sup>510</sup> Available at: <http://www.planning.nsw.gov.au/compliance>.

<sup>511</sup> See: <http://www.epa.nsw.gov.au/prpoeo/index.htm>.

<sup>512</sup> See: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/enforcement>.

Many environmental laws allow *any person* who believes the law is being breached to go to Court to enforce that breach and seek a remedy.<sup>513</sup>

If you are concerned about a breach of the national environmental law (that is, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)), you need to first establish that you are a 'person aggrieved' before you can be heard in Court.

An 'person aggrieved' is an individual whose interests are adversely affected by the decision,<sup>514</sup> or who has been engaged in activities to protect the environment during the previous two years.<sup>515</sup> It is also possible for an organisation (incorporated in Australia) to take action if the organisation's interests are affected or if, during the previous two years, it has had the protection of the environment as one of its objects and purposes and been engaged in environmental protection.<sup>516</sup>

Upon becoming aware of a breach, you should first notify the government department responsible for administering the relevant law. See Appendix 3 to help you identify the right department. If the department chooses not to take any action, you should speak to a lawyer about your rights to do so.

The responsibility is on the person bringing the case to point to a particular environmental law that should have been complied with,<sup>517</sup> and then to present evidence to show that it has not been complied with.<sup>518</sup>

Typical civil enforcement proceedings regarding coal or CSG activities might involve:

- a claim that the company is operating outside its development consent or without development consent;<sup>519</sup>
- a claim that the company is not complying with its conditions of development consent;<sup>520</sup>
- a claim that a company is polluting without a required licence or in excess of what the licence allows;<sup>521</sup> or
- a claim that the company has cleared native vegetation without a required permit, or in excess of what the permit allows.<sup>522</sup>

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<sup>513</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 123; *Protection of the Environment Operations Act 1997* (NSW), ss 252, 253; *Native Vegetation Act 2003* (NSW), s.; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475(1). Note, the *Mining Act 1992* (NSW) and the *Petroleum (Onshore) Act 1991* (NSW) do not have these sorts of provisions but the provisions of other Acts can be used to enforce a number of breaches that are made by mining and CSG companies.

<sup>514</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 3(4).

<sup>515</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475(6). An individual can take action on behalf of an unincorporated association.

<sup>516</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475(7).

<sup>517</sup> This is known as the 'burden of proof'.

<sup>518</sup> In civil enforcement cases, the 'standard of proof is 'on the balance of probabilities': *Evidence Act 1995* (NSW), s 140.

<sup>519</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 76A.

<sup>520</sup> *Environmental Planning and Assessment Act 1979* (NSW), s 89E(1), 80A(1).

<sup>521</sup> *Protection of the Environment Operations Act 1997* (NSW), s 64.

The remedies available include:<sup>523</sup>

- a declaration – a legally binding statement by the Court that a law has been breached;
- an injunction – an order to stop somebody from doing something, e.g. from carrying out further work on a site. These can be granted on a temporary or permanent basis;
- demolition or removal orders; and
- a remediation order – an order directing a person to carry out remediation work on a site, such as replanting trees or cleaning up pollution.

If a person doesn't comply with an order in time, they could be found in contempt of Court and liable for a fine, sequestration of property or even imprisonment.<sup>524</sup> The penalty is up to the Court.<sup>525</sup> It is important to show the Court not only the breach of the environmental law, but also the harm caused.

Most environmental laws also have criminal penalties but criminal prosecutions are usually brought by the government department responsible for that law. Members of the public can sometimes bring a criminal prosecution but these cases are more difficult to prove and the right to bring them is usually restricted.<sup>526</sup>

### **Case study: civil enforcement of pollution laws**

EDO NSW acted for the Blue Mountains Conservation Society (BMCS) in a case against Delta Electricity. BMCS argued that Delta was causing more water pollution than its pollution licence allowed at the Wallerawang Power Station near Lithgow. Water quality testing indicated that the power station was introducing salts and metals into the Tortuous Water Course which runs into Sydney's drinking water supply via the Cocks River.

The results of the water quality testing were provided to the then Department of Environment, Climate Change and Water (whose regulatory functions in relation to pollution now sit with the Environment Protection Authority) but the Department failed to do anything about it. The BMCS then filed civil enforcement proceedings in the Land and Environment Court seeking orders to stop Delta polluting.

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<sup>522</sup> *Native Vegetation Act 2003* (NSW), s 12.

<sup>523</sup> *Land and Environment Court Act 1979* (NSW), Part 3.

<sup>524</sup> *Land and Environment Court Rules 2007* (NSW), Rule 4.5.

<sup>525</sup> *Land and Environment Court Act 1979* (NSW), s. 23.

<sup>526</sup> For example, a member of the public can apply to the Land and Environment Court to bring a prosecution for a pollution offence but only if they can demonstrate that the Environment Protection Authority has not taken action to control the harm to the environment caused by the alleged offence or to prevent the continuance or recurrence of the alleged offence (within 90 days of being asked to do so), and only if the Court grants leave. See *Protection of the Environment Operations Act 1997* (NSW), s 219.

Delta tried unsuccessfully to have the case dismissed by the Court. Following that, the parties agreed to resolve the issues through mediation.

At the mediation, Delta Electricity acknowledged that it had polluted the water and that unless there is express authorisation under its licence to discharge pollutants, any such discharge is unlawful. Delta also made an undertaking to develop infrastructure so as to cease discharging contaminants into the river.

## 6. Compensation and land valuation cases

Landholders can appeal to the Land and Environment Court for an assessment of compensation where 'compensable loss' has been suffered as a result of exploration or mining/petroleum production activities.<sup>527</sup> See Chapters 2 and 4 for more information on compensation. Where compensation for damage caused by mining subsidence has been determined by the Mines Subsidence Board and the landholder is dissatisfied with the outcome, the decision can also be challenged in the Land and Environment Court.<sup>528</sup>

It is important to determine the true value of your property as this value has potential implications should you wish to sell your land to a mining or CSG company. The NSW Valuer-General is required to ascertain the land value of each parcel of land in NSW every year.<sup>529</sup> Notices of Valuation are usually issued every three to four years according to the council revaluation schedule. You can also search for land values online at any time.<sup>530</sup> You can challenge the value of your land if you are dissatisfied with the Valuer-General's determination.<sup>531</sup> You must appeal within 60 days of the date of issue of the notification of the Valuer-General's determination.<sup>532</sup>

Whether you are challenging a compensation or valuation decision, the Land and Environment Court may do one of the following:

- confirm or revoke the decision;
- make a decision in place of the original decision; or
- refer the matter back to the original decision-maker for determination in accordance with the Court's finding or decision.

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<sup>527</sup> Such appeals are heard in Class 8 of the Court's jurisdiction. See: *Land and Environment Court Act 1979* (NSW), s 21C.

<sup>528</sup> *Land and Environment Court Act 1979* (NSW), s 19.

<sup>529</sup> Except for Crown land and land in the Western Division. *Valuation of Land Act 1916* (NSW), s 14A.

<sup>530</sup> See: [http://www.valuergeneral.nsw.gov.au/land\\_values/land\\_value\\_search](http://www.valuergeneral.nsw.gov.au/land_values/land_value_search).

<sup>531</sup> *Valuation of Land Act 1916* (NSW), s 37(1). These appeals are heard in Class 3 of the Court's jurisdiction. See: *Land and Environment Court Act 1979* (NSW), s 19.

<sup>532</sup> *Valuation of Land Act 1916* (NSW), s 38(1).

## 7. Other disputes with mining and CSG companies

The Land and Environment Court can hear a range of disputes that can arise between a landholder and a mining or CSG company, including:<sup>533</sup>

- disputes relating to access arrangements;
- disputes about exploration or mining activities coming too close to dwelling-houses, gardens and improvements;
- boundary disputes;
- disputes about a right of way, right of access to water or right of entry;
- allegations of trespass or damage to land; and
- disputes about the management of land subject to mining or CSG title.

## 8. Bring a claim in nuisance

Mining and CSG activities can affect neighbouring properties with noise, dust, vibrations and light, and these things may amount to a nuisance. You may be able to bring a case to stop the harm or be compensated for it. These kinds of claims are rare in relation to mining and CSG activities, but there are some examples (see case study below).

A nuisance occurs when someone substantially and unreasonably interferes with or disturbs someone else's ordinary and reasonable use and enjoyment of their land.<sup>534</sup> This interference can occur without direct entry onto the affected person's land.<sup>535</sup> In order to establish a nuisance against a mining or CSG company you will need to prove:

- the company knew or ought to have known of the nuisance;
- the interference or damage to your property from the nuisance was reasonably foreseeable; and
- the company did not take reasonable action or steps to end the nuisance.<sup>536</sup>

Whether the interference is substantial and unreasonable is a question of fact and will be determined by reference to all the circumstances of the case. However, the Court tends to balance the right of an occupier to use their land freely with that of their neighbour to enjoy the use of their land without interference.<sup>537</sup> There are a number of considerations that may be relevant to whether interference is unreasonable, including:

- The effect of the interference – how does the nuisance affect your use and enjoyment of the land? For example, are you required to close windows, are you prevented from going outside, does it interfere with your sleep, are you suffering health impacts?

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<sup>533</sup> *Mining Act 1992* (NSW), s 293; *Petroleum (Onshore) Act 1991* (NSW), s 115.

<sup>534</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 896-7, per Lord Atkin.

<sup>535</sup> Where there is direct entry onto someone's land, the cause of action is trespass.

<sup>536</sup> *Robson v Leischke* [2008] NSWLEC 152 per Preston CJ.

<sup>537</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 per Lord Wright.

- The locality – what is the nature and character of the area? The Court will consider what standard of comfort a person dwelling in a particular locality may reasonably expect.<sup>538</sup>
- The sensitivity of the complainant – the company will not be responsible for interference that occurs solely because of the unusually sensitive character of the property or person making the complaint.<sup>539</sup>
- The ordinary use of the land - it will not be substantial interference if the company is using the land for its common and ordinary usages and the interference is no more than the average person in the neighbourhood may reasonably expect in the circumstances.<sup>540</sup>
- The character of the interference - for example, noise must be unusual or excessive. The courts have considered the different pitch or insistency of noise as relevant.
- Duration and time of interference - such as whether it occurs during or after normal business hours.<sup>541</sup> If the interference is temporary and short-lived it is more likely to be regarded as reasonable.

These are several defences to a claim in nuisance, but the most relevant are:

- You voluntarily assumed the risk or consented to the nuisance.<sup>542</sup> For example, if you knew there would be a danger to your property and showed a willingness to accept the danger. This could be relevant to people who sign an access arrangement to allow a mining or CSG company to access their land to carry out exploration activities.
- If the nuisance was created by a third party and the company had no knowledge of it, it may be possible to use the defence of 'an act of third party'.<sup>543</sup> For example, the mining or CSG company may not be liable for a nuisance caused by a contractor if that contractor was acting outside their authority.
- Where the nuisance is an inevitable result of an activity that has statutory authority.<sup>544</sup> For example, if the damage caused to your property is an inevitable result of an activity that is authorised under law, the defence of statutory authority may apply and no nuisance will be established. However, if the damage is not inevitable, but merely a consequence of the way the company decided to carry out its activities, the defence of statutory authority would generally not apply.<sup>545</sup>

Much depends on the facts of each case so you should seek legal advice on your particular circumstances.

<sup>538</sup> *Dunstan v King* [1948] VLR 269 at 272 per Barry J.

<sup>539</sup> *Rapier v London Tramways Co* [1893] 2 Ch 588 at 600.

<sup>540</sup> *Bamford v Turnley* (1862) 3 B & S 66 at 83-4, per Bramwell B.

<sup>541</sup> *Andreae v Selfridge & Co Ltd* [1938] Ch 1; [1937] 3 All ER 255.

<sup>542</sup> *Kiddle v City Business Properties Ltd* [1942] 1 KB 269 at 274-5; *Lyttelton Times Co Ltd v Warners Ltd* [1907] AC 476 at 481.

<sup>543</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 904.

<sup>544</sup> *Managers of Metropolitan Asylum District v Hill* [1881] LR 6 App Cas 193 at 212.

<sup>545</sup> *Lester-Travers v City of Frankston* [1970] VR 2.

The remedies commonly granted by the Court include:

- an injunction to prevent the nuisance from continuing;<sup>546</sup> or
- damages as compensation for the loss of the use or enjoyment of the land, as well as for annoyance, inconvenience and discomfort caused by the nuisance. Damages may also be granted for any personal injury suffered as a result of the nuisance.

It may also be possible to bring an action in public nuisance which is a nuisance that endangers the health, property or comfort of the public generally. However, these claims are much more difficult to prove.

Another option might be a claim in negligence. To succeed with a negligence claim, you would have to show that the mining or CSG company:

- owed you a duty of care; and
- breached that duty of care causing you harm; and
- the harm was reasonably foreseeable.

As with public nuisance cases, these cases can be difficult to win.

#### **Case study: successful nuisance claim**

BHP Steel mined under the Cataract River gorge causing subsidence that damaged parts of the land in the gorge. Cracks appeared in nearby rock pools which drained as a result. The subsidence also created a gas leak and increased the risk of rock falls in some parts on the gorge.

In response, a group of private landholders sought compensation under the *Mining Act*. The landholders also claimed damages for private nuisance, public nuisance, negligence and trespass to land as well as an injunction to stop BHP Steel from mining in the area.

The Mining Warden awarded varying damages for loss of property value to the landholders.<sup>547</sup> The Mining Warden also found that the mining had created a nuisance and awarded an amount of \$8,000 for each property affected for the loss of enjoyment and use of the land.

The Warden didn't agree that the mining company trespassed on land as BHP Steel had a legal right under the mining lease to mine coal. He also found that BHP Steel was not liable for negligence.

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<sup>546</sup> Note that injunctions can only be obtained from the NSW Supreme Court.

<sup>547</sup> *Mining Act 1992* (NSW), s 265. See the case study in Chapter 4 for more information on the compensation aspect of this case.

## **9. Selling your land to the mining or CSG company**

The idea of selling your land to a mining or CSG company may not appeal to you but it is important to know that the company may have an obligation to offer to buy your land if the operations have an unreasonable impact on your life. Keep in mind that the company may be the only prospective buyer once the mine or CSG project is approved so you need to know if they will buy your property should you decide you cannot tolerate your new neighbour.

There is no law that says the company needs to buy your land, However, it may be a condition of consent that the company purchases your property upon your request if certain limits that have been placed on emissions of noise, dust, etc. are surpassed. If it is a condition of consent, then legally they have to purchase your property if you request it.

Acquisition conditions are a standard condition for open cut and underground coal mining, but not for CSG.<sup>548</sup>

You'll need to argue for this sort of condition to be attached to any development consent when you write your submission. If the condition is attached, you'll need to be able to show that the limits are being exceeded. This could require you to engage an expert to test the relevant levels and could incur an out of pocket expense.

Under the law, the company only has to pay you the current market value of the land.<sup>549</sup> The market value of your land may fall when a mining or CSG company enters an area (even at the exploration stage), and this may ultimately affect how much money you receive from the company.

In addition to seeking a condition of consent that the company buy your property under certain circumstances, you should also try to ensure that your land is valued by the Valuer-General and that the value is calculated as if the land was unaffected by mining or CSG.

The condition of consent could also require the company to pay reasonable compensation for your relocation, legal and expert advice, and disturbance to your life.

### ***How much will legal action cost me?***

#### **1. Merits appeals**

In a merits appeal, you will usually only have to pay your own legal costs and these can vary depending on how much you want to spend on legal

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<sup>548</sup> See draft Standard and Model Conditions for Open Cut and Underground Mining, Standard and Model Conditions for Mining and Extractive Industry (Petrochemical and Gas Production): <http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Systems/State-Significant-Development>

<sup>549</sup> *Mining Act 1992* (NSW), s 272.

representation and experts.<sup>550</sup> Experts can be expensive but you may be able to negotiate reduced fees if there are significant environmental and public interest issues. The Court can order you to pay the other side's costs if you act unreasonably during the proceedings or bring a case that has no real chance of success.<sup>551</sup> This rarely happens, but it is a possibility.<sup>552</sup>

## 2. Judicial review and civil enforcement cases

Usually the loser is ordered to pay the winner's costs as well as their own. However, the Court can decide not to order a losing party to pay the other sides' costs if the case was brought in the public interest (e.g. for the purpose of protecting the environment).<sup>553</sup>

The two main things the Court can do are:

1. order that the losing party doesn't have to pay the winning side's costs; or
2. make a maximum costs order, setting a cap upfront on how much the losing party will have to pay the other side.

These sorts of orders are rare, and are used mainly to protect people who bring cases in the public interest and to ensure court costs do not prevent such cases from being heard.

On the other hand, sometimes the Court can make an order that the person or group bringing the case provide 'security for costs'. That means they have to show up front that they can afford to pay the other sides' costs if they lose. These sorts of orders prevent cases being brought by people or groups who are planning to go bankrupt or wind up if they lose. Like maximum costs orders, they are rarely made.

### Case study: maximum costs order and security for costs

The facts of this case are discussed in the case study on bringing civil enforcement proceedings to enforce pollution laws (above).

EDO NSW successfully obtained a maximum costs order to cap the costs that the Blue Mountains Conservation Society (BMCS) would have to pay to Delta

<sup>550</sup> *Land and Environment Court Rules 2007* (NSW), r 3.7(2).

<sup>551</sup> *Land and Environment Court Rules 2007* (NSW), r 3.7(3).

<sup>552</sup> In *Hunter Environment Lobby Inc v Minister for Planning (No 3)* [2012] NSWLEC 102, Ulan Coal Mines sought its costs because the Hunter Environment Lobby changed its position (what it was arguing) during the proceedings. As this was a merits appeal in Class 1 of the Court's jurisdiction, the Court was being asked to depart from the usual order as to costs. The Court rejected Ulan's application for costs on the grounds that the Hunter Environment Lobby did not act unreasonably leading up to or in the conduct of the proceedings. The Court ordered that Ulan pay the Hunter Environment Lobby's costs of the costs hearing. Judgment available at: <http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=158421>

<sup>553</sup> *Land and Environment Court Rules 2007* (NSW), r 4.2(1); *Oshlack v Richmond River Council* [1998] 193 CLR 72.

Electricity if they lost. The cap was set at \$20,000. The BMCS could not afford to continue with the case unless its costs liability was limited.

The Land and Environment Court made the order on the basis that the case was brought in the public interest, was likely to raise novel questions of law and that the BMCS could not continue with the case unless an order capping costs was made.

The Court also ordered BMCS to provide security for Delta's costs in the amount of \$20,000.

This order allowed BMCS to proceed with their case against Delta Electricity.

### **3. Compensation/valuation cases**

If you are appealing a determination of compensation by the Mine Subsidence Board,<sup>554</sup> or the valuation of your property by the Valuer-General (for the purposes of rates or Land Tax), you will usually only have to pay your costs, not those of the other side.<sup>555</sup> The Court may order you to pay the other side's costs if you act unreasonably during the proceedings or bring a case that has no real chance of success.<sup>556</sup>

Disputes about other types of compensation, including the compensation landholders are entitled to under access arrangements or compensation agreements are heard in another section of the Land and Environment Court (see point 4 below). For more information on compensation, see Chapters 2 and 4.

### **4. Other disputes about mining/CSG activities**

Most disputes about mining and CSG activities are heard in the Land and Environment Court of NSW which has a special section dedicated to hearing such disputes.<sup>557</sup>

If you are raising a question of law, it is likely that the Court will order you to pay the other side's costs if you lose, especially where you cannot show that the proceedings were brought in the public interest.<sup>558</sup> But as with all cases before it, the Court has discretion to make whatever orders as to costs that it thinks appropriate in the circumstances.

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<sup>554</sup> Under the *Mine Subsidence Compensation Act 1961* (NSW).

<sup>555</sup> *Land and Environment Court Rules 2007* (NSW), r 3.7(2).

<sup>556</sup> *Land and Environment Court Rules 2007* (NSW), r 3.7(3).

<sup>557</sup> This is known as Class 8 of the Land and Environment Court. See:

[http://www.lec.justice.nsw.gov.au/Pages/types\\_of\\_disputes/class\\_8/class\\_8.aspx](http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_8/class_8.aspx).

<sup>558</sup> See: *Caroona Coal Action Group Inc. v Coal Mines Australia Pty Ltd and Minister for Mineral Resources* (No. 3) [2010] NSWLEC 59. Available at: <http://www.lawlink.nsw.gov.au/lecjudgments/2010nswlec.nsf/61f584670edbfba2ca2570d40081f438/920f04844a5dc932ca25770d000766a8?OpenDocument>

In disputes about access arrangements, each party is likely to have to pay their own costs.<sup>559</sup> See Chapter 3 for more information on access arrangements.

## **5. Claims in nuisance**

The cost of a nuisance claim is difficult to determine as much will depend on the Court in which the claim is heard. The Court that the claim is heard in will depend on the amount of damages that are being sought. Small claims (less than \$10,000) are heard in the Small Claims Division of the Local Court. The District Court hears claims that don't exceed \$20,000. The Supreme Court will hear claims above \$20,000 or claims where an injunction is requested. The Court costs increase with the hierarchy of the Court.

### ***How do I make complaints about coal or CSG operations?***

If you can show that you or your property is being negatively affected by exploration or mining/production operations, you should make a complaint. It is more likely for something to be done about complaints if they are linked to things that the company is required to do under their approval, and if there is evidence to back them up. For example, a mining lease can be cancelled if the leaseholder breaks the law or fails to comply with the conditions attached to the lease.<sup>560</sup>

In 2011, the NSW Government closed the Werris Creek Coal Mine for four days after allegations were made about unsafe work practices at the mine, including claims of work being done too close to blast holes and insufficient training.

The Department of Industry, Division of Resources and Energy website contains information about making complaints about mining and CSG activities.<sup>561</sup>

See Appendix 3 for a list of who to direct your complaints to.

See Appendix 4 for some tips on making complaints.

### ***How do I find information?***

Most of the information you need will be publicly available. You just need to know where to look.

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<sup>559</sup> *Mining Act 1992* (NSW), s 155(6); *Petroleum (Onshore) Act 1991* (NSW), s 69R.

<sup>560</sup> *Mining Act 1992* (NSW), s 125.

<sup>561</sup> Available at: <http://www.resources.nsw.gov.au/environment/complaints-and-incident-reporting>

## **1. Making an access to information application**

If you can't find something you are looking for, you should contact the Government agency that you think will have the information. If that doesn't work you can make an access to information application (GIPA application).<sup>562</sup>

EDO NSW has a fact sheet on making GIPA applications.<sup>563</sup>

## **2. Getting information from the mining or CSG company**

Throughout both the exploration and mining/production phases of a project, the company is expected to engage with the local community and keep that community informed about what is going on. Effective community engagement is often a condition of consent and the Department of Industry, Resources and Energy has prepared Guidelines to set out the consultation requirements.<sup>564</sup>

Companies often engage with communities through public meetings and community newsletters. In addition, they are required to publish their annual reports and quarterly reports (when they are carrying out activities) online.

Often, the company will appoint a community liaison officer to act as the face of the company and manage community inquiries and concerns.

Sometimes companies establish community advisory committees to allow ongoing discussions with the community. These committees can be formalised into Community Consultative Committees (CCCs). In fact, establishing a CCC is often a condition of consent imposed by the Minister for Planning (or the Planning Assessment Commission). CCCs consist of an independent chairperson who is appointed by the Secretary of the Department of Planning and Environment, along with representatives from the local community, including any community groups, the local government and the company.

A CCC provides a forum for open discussion between representatives of the company, the community, the council and other stakeholders on issues directly relating to the company's operations, environmental performance and community relations, and to keep the community informed on these matters. CCCs are a good way to obtain information from the company as they must provide things such as the mining operations plan and any other management plans, the results of environmental monitoring, annual environmental management reports, audit reports (including audits required as a condition of approval), and reports on community concerns or complaints and company

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<sup>562</sup> Under the *Government Information (Public Access) Act 2010* (NSW).

<sup>563</sup> See 'Access to Information': [http://www.edonsw.org.au/hys\\_fact\\_sheets](http://www.edonsw.org.au/hys_fact_sheets) or call EDO NSW on 02 9262 6989.

<sup>564</sup> See: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/enforcement/community-consultation-guidelines>.

response. Minutes of CCC meetings must be made available on the company's website within four weeks.<sup>565</sup>

The Department of Planning and Environment has produced Community Consultative Committee Guidelines to help explain the role of CCCs and set rules for how they should operate.<sup>566</sup> The Guidelines also contain dispute resolution procedures and guidance on how to handle conflicts of interest. Sometimes, it is a condition of development consent that the company complies with the CCC Guidelines and if this is the case, the Guidelines will be binding on the company. You should check the conditions of consent to see if this is the case.

### **3. Finding exploration licences and mining/petroleum production leases and any relevant conditions**

You can use the online tool 'Common Ground'<sup>567</sup> to identify exploration licences and mining/production leases and applications that have been issued in your region and the holder of those titles.<sup>568</sup>

You can use the online tool 'DIGS'<sup>569</sup> to search for exploration licences and mining/production leases. You can also find the conditions attached to an exploration licence using the online 'DIGS' program.<sup>570</sup> You can use any search term on DIGS – you may wish to use the title number as a start. If you do not know the title number or other specifications for the documents you are after, you can begin your search with the location of the project. If the document you are looking for is not on DIGS or if you need help using the tool you can email the Department of Industry for assistance.<sup>571</sup>

### **4. Finding development consents/conditions**

These are available on the website of the decision-maker, i.e. the Department of Planning and Environment website.<sup>572</sup>

When searching the Department of Planning and Environment website, you need to search the 'notices of determination'. These are organised into the year the consent was granted but you can also use the search function to search the name of the project or the relevant local government area. Once you find the project, click on it and look for the 'determination'. If the project

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<sup>565</sup> This is a requirement under the Community Consultative Committees Guidelines for State Significant Projects. Available at: <http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Community-Consultative-Committees>.

<sup>566</sup> See: <http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Community-Consultative-Committees>.

<sup>567</sup> See: <http://commonground.nsw.gov.au/#/>

<sup>568</sup> See: <http://www.dpi.nsw.gov.au/minerals/titles/online-services/tasmap>.

<sup>569</sup> See: <https://search.geoscience.nsw.gov.au/>.

<sup>570</sup> Available at: <http://digsopen.minerals.nsw.gov.au/>.

<sup>571</sup> Email [titles.services@industry.nsw.gov.au](mailto:titles.services@industry.nsw.gov.au). See: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/current-titles-reports-applications-and-services/titles-services>.

<sup>572</sup> See: <http://majorprojects.planning.nsw.gov.au/page/determinations/>.

was approved, there should be an 'approval instrument' which lists any conditions of consent.

## **5. Finding pollution licences and other permits**

Most licences and permits that are issued by government departments are publicly available.

- Environment protection licences (also known as pollution licences) are available from the EPA website.<sup>573</sup>
- Clearing approvals are listed on the Office of Environment and Heritage website.<sup>574</sup>
- Approvals relating to water use are listed on the DPI Water website.<sup>575</sup>

It is common for mining and CSG companies to prepare plans to outline how they intend to meet the conditions of a development consent. These can include Environmental Management Strategies, Rehabilitation Plans, Water Management Plans, Noise Management Plans, Vegetation Clearing Plans and Air Quality Management Plans. These plans can form part of the conditions of consent and it is often a condition that the mining or CSG company publish these plans. If you cannot find these documents, and they are required to be published online, you should notify the responsible government department that their conditions of approval are not being met or make a GIPA application to the relevant department.

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<sup>573</sup> See: <http://www.epa.nsw.gov.au/prpoeo/index.htm>.

<sup>574</sup> See: <http://www.environment.nsw.gov.au/vegetation/approvedclearing.htm>.

<sup>575</sup> See: <http://www.water.nsw.gov.au/Water-Licensing/Approvals/default.aspx>.

# Glossary

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**Arbitration**

A process for settling disputes where an independent third person (the arbitrator) hears each side and then tries to help the parties reach an agreement. If this can't be done, the arbitrator makes a binding decision

**Colliery**

A coal mine, including all associated buildings and equipment

**Controlled Action**

An action that the Commonwealth Minister for the Environment and Energy has declared will have a significant impact on a matter of national environmental significance and will therefore need to be assessed and approved under the EPBC Act before it can proceed

**Damages**

The money awarded to a person who brings a case before the court as a remedy for their complaint.

**Ecologically Sustainable Development**

A concept enshrined in a number of environmental laws that seeks to integrate environmental considerations into decision-making. ESD includes a number of principles:

1. Precautionary Principle: if there is risk of irreversible environmental harm, lack of full scientific certainty should not be used as a reason to postpone measures to prevent that harm;
2. Intergenerational equity: Recognises that each generation inherits the Earth from previous generations and has an obligation to pass it on to future generations in reasonable condition;
3. The conservation of biodiversity and ecological integrity; and
4. Improved valuation, pricing and incentive mechanisms such as the

principle that the polluter should pay for the costs of cleaning the pollution.

**Environmentally Sensitive Area of State Significance**

Includes coastal waters, coastal wetlands and littoral rainforest mapped by a SEPP, aquatic reserves, Ramsar wetlands, land of high Aboriginal cultural significance or high biodiversity significance (as identified in a Local Environmental Plan), State Conservation Areas, land on the State Heritage Register, land reserved or dedicated under the *Crown Lands Act 1989* (NSW) for the preservation of flora, fauna, geological formations or for other environmental protection purposes, or land identified as critical habitat.

**Error of Law**

Where a decision-maker has interpreted or applied the law incorrectly

**Extractive Materials**

Sand, gravel, clay, turf, soil, rock, stone or similar substances

**Fracking**

Hydraulic fracturing: a technique in which a mixture of water, sand and chemicals is forced down a well (or similar) in order break open the coal seam and release more coal seam gas

**Judicial Review**

Where a court reviews a decision that has been made by a government or a lower court to see if it was legally made

**Maximum Costs Order**

A Court order that caps or limits the amount of money the losing side will have to pay the winning side in litigation

**Merits Review**

Where a court examines a decision on its merits with a view to either upholding, varying or overturning the decision and making a fresh decision of its own

## **Mine Subsidence**

Where the land above underground mining sinks. This can cause damage to natural and man-made features on the surface of the land

## **Minerals**

Elements or chemical compounds that are normally crystalline and that have been formed as a result of geological processes. The *Mining Act 1992* (NSW) applies to the following minerals: agate, antimony, apatite, arsenic, asbestos, barite, bauxite, bentonite (including fuller's earth), beryllium minerals, bismuth, borates, cadmium, caesium, calcite, chalcedony, chert, chlorite, chromite, clay/shale, coal, cobalt, columbium, copper, corundum, cryolite, diamond, diatomite, dimension stone, dolomite, emerald, emery, feldspathic material, fluorite, galena, garnet, geothermal energy, germanium, gold, graphite, gypsum, halite (including solar salt), ilmenite, indium, iron minerals, jade, kaolin, lead, leucoxene, limestone, lithium, magnesite, magnesium salts, manganese, marble, marine aggregate, mercury, mica, mineral pigments, molybdenite, monazite, nephrite, nickel, niobium, oil shale, olivine, opal, ores of silicon, peat, perlite, phosphates, platinum group minerals, platinum, potassium minerals, potassium salts, pyrophyllite, quartz crystal, quartzite, rare earth minerals, reef quartz, rhodonite, rubidium, ruby, rutile, sapphire, scandium and its ores, selenium, serpentine, sillimanite-group minerals, silver, sodium salts, staurolite, strontium minerals, structural clay, sulphur, talc, tantalum, thorium, tin, topaz, tourmaline, tungsten and its ores, turquoise, uranium, vanadium, vermiculite, wollastonite, zeolites, zinc, zircon, zirconia.

**Petroleum**

Any naturally occurring hydrocarbon that is found beneath the earth's surface. Coal seam gas is a form of petroleum

**Secondary Landholder**

A person who has a registered interest in the land but does not have an exclusive right to possession of the land, for example mortgagees not in possession or easement holders

**Valuer-General**

State official who values properties for rating purposes

# Appendix 1 – Access Arrangement Checklist

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This checklist suggests some points to consider when negotiating an access arrangement. This list is not exhaustive and does not constitute legal advice. You should contact a lawyer for further assistance.

You should also refer to the exploration licence and ensure that any conditions attached to those the licence are incorporated into your access arrangement.

## 1. Background Information

- ☐ Parties to the arrangement
- ☐ Details of exploration licence/s giving rise to the arrangement
- ☐ Term of the arrangement (will it expire with the exploration licence or cover future activities should a mining or petroleum production lease be granted?)
- ☐ Details of the Environmental Assessment
- ☐ Laws that apply

## 2. Baseline Data

Will tests be done to establish the condition of the property prior to exploration?

- ☐ Value of the property
- ☐ Location of boundaries, fence lines, significant improvements, tracks, roads, dams, bores, creeks etc.
- ☐ Extent and condition of natural features, including soil, pastures, native vegetation, threatened species
- ☐ Extent and condition of any crops and orchards
- ☐ Location and extent of aquifers and surface water, including quality, quantity and flow regimes
- ☐ Quantity, location and condition of stock
- ☐ Ambient noise levels
- ☐ Air quality

If so, what experts are needed to collect the baseline data and who will select those experts?

- ☐ Valuer-General or another valuer
- ☐ Surveyor
- ☐ Agronomist
- ☐ Ecologist
- ☐ Hydrogeologist and or hydrologist
- ☐ Water quality expert
- ☐ Noise expert
- ☐ Air quality expert

## 3. Access

- ☐ Conditions of access (e.g. the baseline data being collected, insurances being in place etc.)

- ☐ Notice of access (e.g. 1 week, 48 hours)
  - ☐ Period of access (start and finish dates)
  - ☐ Days of week (e.g. Monday to Friday)
  - ☐ Daily hours (start time and finish time)
  - ☐ Periods when access is not permitted (e.g. wet weather, public holidays, special events etc.)
  - ☐ Log books to monitor workers on site
  - ☐ Speed limits
  - ☐ Area of exploration (including maps)
- Under the law, exploration can't happen:
- Within 200m of your house
  - Within 50m of your garden (coal) or garden, orchard or vineyard (CSG)
  - Over any significant improvement

Without your consent.

- ☐ Access points and paths
- ☐ Conditions on use of gates and existing paths
- ☐ Vehicles to be used and maximum number of movements per day
- ☐ Easements or rights of way required?

#### **4. Exploration activities**

- ☐ Details of exploration (e.g. how many drill holes, where will they be (map), how deep will they be, what will be their diameter?)
- ☐ Chemicals to be used
- ☐ Equipment to be used
- ☐ Number of personnel (including maximum on property at one time)
- ☐ Location of temporary work camps (if any)
- ☐ Identification of personnel
- ☐ Use of water
- ☐ Clearing of native vegetation
- ☐ Hazard reduction plan
- ☐ Chemical storage
- ☐ Removal and management of waste
- ☐ Monitoring and reporting, mitigation and rehabilitation

#### **5. Environmental and property protection**

- ☐ General duty of licence holder to protect the environment
- ☐ Water, soil and air not to be polluted or contaminated
- ☐ Limits on noise
- ☐ Limits on dust
- ☐ Procedures for preventing the spread of weeds etc. from wheels of vehicles
- ☐ Restriction on use of carcinogenic chemicals and BTEX chemicals
- ☐ Duty to inform the landholder of all chemicals to be used
- ☐ Management of cuttings left over from drilling
- ☐ Process for reporting and handling spills
- ☐ Gates to be closed at all times
- ☐ Speed limits
- ☐ Limits on number of vehicle movements per day

- ☐ Drill holes and rigs to be fenced to a particular standard
- ☐ Process for reporting and dealing with injured stock or wildlife
- ☐ Evacuation plan and emergency procedures
- ☐ Smoking/alcohol permitted on site?
- ☐ Monitoring and reporting, mitigation and rehabilitation

## **6. Compensation (this can also be in a stand-alone agreement)**

You are entitled to compensation for compensable loss, which may include:

- ☐ Damage to the surface of land
- ☐ Damage to crops, trees, grasses and other vegetation
- ☐ Damage to buildings, structures and works
- ☐ Deprivation of possession of land or the ability to use the land
- ☐ Severance of the land from other land of the landholder
- ☐ Surface rights of way and easements
- ☐ Destruction of stock
- ☐ Damage consequential to any of the above

You could also seek compensation for:

- ☐ Limitations on the use of the property during the access periods
- ☐ Damage to quality or quantity of surface water or groundwater
- ☐ Damage to soil
- ☐ Damage to landholder health
- ☐ Use of water
- ☐ Dust and noise pollution
- ☐ Use of access paths
- ☐ Inconvenience

## **7. Costs**

- ☐ Landholder's legal costs to be paid by mining/gas company<sup>576</sup>
- ☐ Costs of experts, monitoring and rehabilitation
- ☐ Costs of dispute resolution under the access arrangement
- ☐ Costs of all insurances

## **8. Default and dispute resolution**

- ☐ Litigation or Alternative Dispute Resolution?
- ☐ Process for resolving disputes
- ☐ Effect of breach (e.g. denial of access until breach remedied)
- ☐ Appointment of expert to determine breaches and disputes
- ☐ Legal representatives or agents to be used?

## **9. Indemnity, insurance and WH&S**

- ☐ Licence holder to indemnify the landholder
- ☐ Licence holder to hold certain insurances (public liability insurance, workers

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<sup>576</sup> The law requires this to be included in an access arrangement if the landholder requests it. See: *Mining Act 1992* (NSW) s 148(C1); *Petroleum (Onshore) Act 1991* (NSW), s 69KC(1).

- compensation etc.)
- ☐ Licence holder to comply with WH&S legislation while on the property
- ☐ Induction of licence holder's employees, contractors and visitors with respect to the access arrangement and the landholder's operations

## **10. Security and warranties**

- ☐ Licence holder to enter undertaking in favour of landholder for certain amount
- ☐ Licence holder to make certain warranties (e.g that licence holder is solvent and has power to enter into the access arrangement)

## **11. Communications**

- ☐ Contact person for landholder and licence holder
- ☐ Method of communication (email, letter, phone)
- ☐ Requirements for keeping the landholder informed of work progress and results of exploration

## **12. Termination**

- ☐ Date of termination (e.g. date exploration licence expires)
- ☐ Other terminating events (e.g. death of landholder, mining or CSG company is wound up)
- ☐ Termination by agreement of the parties

# Appendix 2 – Contacts and Information

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## Community Groups

There are a host of groups at the national, State, regional and local level who can provide campaigning advice on mining and CSG issues. The major national and State groups can put you in touch with groups operating at a regional and local level.

### 1. National

Australian Conservation Foundation	<a href="http://www.acfonline.org.au/default.asp">http://www.acfonline.org.au/default.asp</a>
Australian Student Environment Network	<a href="http://asen.org.au/">http://asen.org.au/</a>
Australia Youth Climate Coalition	<a href="http://www.beyondzeroemissions.org/">http://www.beyondzeroemissions.org/</a>
Climate Action Network Australia	<a href="http://cana.net.au/">http://cana.net.au/</a>
Doctors for the Environment	<a href="http://dea.org.au/">http://dea.org.au/</a>
Friends of the Earth	<a href="http://www.foe.org.au/">http://www.foe.org.au/</a>
GetUp!	<a href="http://www.getup.org.au/">http://www.getup.org.au/</a>
Great Artesian Basin Protection Group Inc.	<a href="http://www.gabpg.org.au/">http://www.gabpg.org.au/</a>
Greenpeace Australia	<a href="http://www.greenpeace.org/australia/en/">http://www.greenpeace.org/australia/en/</a>
Mineral Policy Institute	<a href="http://www.mpi.org.au/">http://www.mpi.org.au/</a>
The Wilderness Society	<a href="http://www.wilderness.org.au/">http://www.wilderness.org.au/</a>

### 2. State Wide

Colong Foundation for the Wilderness	<a href="http://www.colongwilderness.org.au/">http://www.colongwilderness.org.au/</a>
Minewatch NSW Inc	<a href="http://www.miningcoal.com.au/tags/minewatch">http://www.miningcoal.com.au/tags/minewatch</a>
National Parks Association of NSW	<a href="http://www.npansw.org.au/">http://www.npansw.org.au/</a>
Nature Conservation Council of NSW	<a href="http://www.nccnsw.org.au/">http://www.nccnsw.org.au/</a>
NSW Artesian Bore Water Users Association	<a href="http://www.artesianaction.com.au">http://www.artesianaction.com.au</a>
NSW Farmers Association	<a href="http://www.nswfarmers.org.au/">http://www.nswfarmers.org.au/</a>
Rivers SOS	<a href="http://riverssos.org.au/">http://riverssos.org.au/</a>
Total Environment Centre	<a href="http://www.tec.org.au/">http://www.tec.org.au/</a>

## Government Agencies

Department of Planning and Environment	<a href="http://www.planning.nsw.gov.au/">http://www.planning.nsw.gov.au/</a>  <b>Information Centre</b>  23-33 Bridge Street, Sydney NSW 2000 GPO Box 39, Sydney NSW 2001 Tel: (02) 9228 6333 Fax: (02) 9228 6555 Email: <a href="mailto:information@planning.nsw.gov.au">information@planning.nsw.gov.au</a>
Planning Assessment Commission	<a href="http://www.pac.nsw.gov.au/">http://www.pac.nsw.gov.au/</a>  Tel: (02) 9383 2100 Fax: (02) 9299 9835 Email: <a href="mailto:pac@pac.nsw.gov.au">pac@pac.nsw.gov.au</a>
Department of Industry   Division of Resources and Energy	<a href="http://www.trade.nsw.gov.au/">http://www.trade.nsw.gov.au/</a> Tel: (02) 9338 6600 Fax: (02) 9338 6950  <a href="http://www.resources.nsw.gov.au/">http://www.resources.nsw.gov.au/</a>  <b>Minerals &amp; Petroleum</b> Tel: (02) 4931 6666 Information line: 1300 736 122 Email: <a href="mailto:minres.webcoordinator@dpi.nsw.gov.au">minres.webcoordinator@dpi.nsw.gov.au</a>  <b>Mine Subsidence Board</b> Information: 02 4908 4300
Office of Environment and Heritage	<a href="http://www.environment.nsw.gov.au/">http://www.environment.nsw.gov.au/</a>  Tel: (02) 9995 5000 Fax: (02) 9995 5999 Email: <a href="mailto:info@environment.nsw.gov.au">info@environment.nsw.gov.au</a>
Environment Protection Authority	<a href="http://www.environment.nsw.gov.au/epa/">http://www.environment.nsw.gov.au/epa/</a>  Tel: 131 555 Email: <a href="mailto:info@environment.nsw.gov.au">info@environment.nsw.gov.au</a>
Department of Primary Industries – Water	<a href="http://www.water.nsw.gov.au/Home/default.aspx">http://www.water.nsw.gov.au/Home/default.aspx</a>  Tel: (02) 8281 7777

	Fax: (02) 8281 7799 Email: <a href="mailto:information@water.nsw.gov.au">information@water.nsw.gov.au</a>
NSW Ministry of Health	<a href="http://www.health.nsw.gov.au/">http://www.health.nsw.gov.au/</a>  Tel: (02) 9391 9000 Fax: (02) 9391 9101
Department of Environment and Energy	<a href="http://www.environment.gov.au/">http://www.environment.gov.au/</a>  Tel: (02) 6274 1111 Community Information Unit: 1800 803 772

### Industry Associations

NSW Minerals Council	<a href="http://www.nswmining.com.au/">http://www.nswmining.com.au/</a>  Tel: (02) 9274 1400 Fax: (02) 9274 1455 Email: <a href="mailto:information@nswmin.com.au">information@nswmin.com.au</a>
Minerals Council of Australia	<a href="http://www.minerals.org.au/">http://www.minerals.org.au/</a>
Australian Petroleum Production and Exploration Association	<a href="http://www.appea.com.au/">http://www.appea.com.au/</a>  Tel: (02) 6247 0960 Fax: (02) 6247 0548 Email: <a href="mailto:appea@appea.com.au">appea@appea.com.au</a>

# Appendix 3 – Complaint Directory

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Issue	Who do I contact?	How?
Proper process not followed in granting a licence or lease	Department of Industry – Division of Resources and Energy	1300 736 122
Proper process not followed in granting a development consent	The relevant decision-maker.  This is likely to be the Department of Planning and Environment (or the PAC).	1300 305 695  02 9383 2100
Non-compliance with conditions of licences/leases	<b>Coal</b> Department of Industry – Division of Resources and Energy  <b>CSG</b> EPA for all compliance issues	1300 736 122  131 555
Non-compliance with conditions of development consent	The responsible agency.  <b>Coal</b> Department of Planning and Environment  <b>CSG</b> EPA for all compliance issues	1300 305 695  131 555
Mining or CSG	Department of	02 4931 6590

company breaching an environmental approval or causing environmental damage	<p>Industry – Division of Resources and Energy</p> <p><b>Coal</b> For breaches of environmental approvals – depends on the approval that is being breached.</p> <p>NSW Office of Water for water licences etc. 1800 633 362</p> <p>NSW Office of Environment and Heritage for clearing permits, permits to harm threatened species, and permits to harm Aboriginal heritage, etc. 131 555</p> <p>EPA for pollution. 131 555</p> <p><b>CSG</b> EPA for all compliance issues 131 555</p>	
Health concerns	NSW Health	02 9391 9000
Help with an access arrangement	<p>EDO NSW Advice Line 1800 626 239 or 02 9262 6989</p> <p>The Law Society of NSW referral service 1800 422 713 or 02 9926 0300 <a href="http://www.lawsociety.com.au/community/findingalawyer/index.htm">http://www.lawsociety.com.au/community/findingalawyer/index.htm</a></p>	
<p>Compensation</p> <p>If you have a compensation agreement in place, first refer to that agreement for dispute resolution procedures.</p>	<p>EDO NSW Advice Line 1800 626 239 or 02 9262 6989</p> <p>A private solicitor See Appendix 2 for list of private solicitors</p> <p>The Law Society of NSW referral service 1800 422 713 or 02 9926 0300 <a href="http://www.lawsociety.com.au/community/findingalawyer/index.htm">http://www.lawsociety.com.au/community/findingalawyer/index.htm</a></p>	

Mine subsidence damage	Subsidence Advisory NSW	1800 248 083 or <a href="http://www.subsidenceadvisory.nsw.gov.au/">http://www.subsidenceadvisory.nsw.gov.au/</a>
Nuisance claims	EDO NSW Advice Line  A private solicitor  The Law Society of NSW referral service	1800 626 239 or 02 9262 6989  See Appendix 2 for list of private solicitors  1800 422 713 or 02 9926 0300 <a href="http://www.lawsociety.com.au/community/findingalawyer/index.htm">http://www.lawsociety.com.au/community/findingalawyer/index.htm</a>
Referral of a project to the Commonwealth Government (for mining impacts on matters of national environmental significance)  Or  Controlled action proceeding without Commonwealth Government approval	Commonwealth Department of the Environment and Energy	1800 110 395 or 02 6274 1372 <a href="mailto:compliance@environment.gov.au">compliance@environment.gov.au</a>
Government department responsible for enforcing the law won't take any action	EDO NSW Advice Line  A private solicitor  The Law Society of NSW referral service	1800 626 239 or 02 9262 6989  See Appendix 2 for list of private solicitors  1800 422 713 or 02 9926 0300 <a href="http://www.lawsociety.com.au/community/findingalawyer/index.htm">http://www.lawsociety.com.au/community/findingalawyer/index.htm</a>

# Appendix 4 – Making Complaints

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When a mine or CSG development is operating in your neighbourhood, you may be impacted by noise, vibrations, dust, odours, light etc. It is likely that there are conditions attached to the exploration licence, mining/petroleum production lease or development consent that are designed to limit these impacts. However, sometimes these conditions are breached by the company.

It is important to firstly know what the limits are and keep detailed records of instances where they are exceeded. You should then use this information to make complaints.

It can sometimes be difficult to know when certain levels are being exceeded. You may need to ask the mining or CSG company to provide the results from any monitoring they undertake. It's important to ask for the actual results, not just whether or not the set levels have been complied with. The instruments used to monitor noise and dust can do printouts straight away so this data should be always available. If possible, seek to have a requirement included in the conditions of consent that requires the company to provide you with the raw data, not just reports.

In addition to the information provided here, the Department of Industry has detailed information on making complaints on its website.<sup>577</sup>

## **1. Items required:**

- a) The relevant approvals (licences, leases, development consents) and the consent conditions of the mine or CSG development so you know what the controls are. There may be conditions attached to the exploration licence or mining/production lease itself as well as the development consent (if there is one).
- b) Portable noise monitor (you can buy these from electronic outlets such as Dick Smith) to help you identify breaches of noise controls.
- c) Camera.
- d) Exercise book.

## **2. Notes to place inside the front cover of your exercise book:**

- a) Date
- b) Time

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<sup>577</sup> See: <http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/enforcement/incident-reporting>.

- c) Weather conditions (wind, etc.)
- d) Type of hazard (blasting, air quality, noise, light, smell), including the source of the hazard.
- e) Effects of the hazard on you, your family and your property
- f) Contact details of who to complain to (the mine/CSG company, the Office of Environment and Heritage, the Environment Protection Authority, the Department of Planning and Environment, the Department of Industry – Resources and Energy, etc.).
- g) Details of the mine or CSG development including name of the company, the location, the lease or licence number and development application number.

### **3. Procedure:**

- a) Record the hazard in your book (what, when, where) including photographs if relevant (for example, if your noise monitor says the mine is exceeding noise constraints, take a photo of the reading).
- b) Report the hazard to the mine or CSG company via their environmental hotline.
- c) Report the hazard to the Environment Protection Authority – phone 131 555 – and ask for a reference number (write this next to your entry in the exercise book). Note, this is a 24 hour service but only gives reference numbers in office hours (9am – 5pm).
- d) Report the hazard to the Department of Planning and Environment via the NSW Planning compliance officer in your area. If you don't know who this person is, contact head office on 02 9228 6111.
- e) Report the hazard to the Department of Industry – Resources and Energy by contacting the relevant frontline staff<sup>578</sup> or emailing [minres.environment@industry.nsw.gov.au](mailto:minres.environment@industry.nsw.gov.au). If environmental damage is being caused, contact the Division of Resource and Energy's Environmental Sustainability Unit on 02 4931 6605.
- f) Record in your book who you spoke to and what they said.
- g) Follow up with all those you reported to about what compliance actions have been taken.

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<sup>578</sup> See: <http://www.resources.nsw.gov.au/environment/contacts>

## Appendix 5 – Online Resources

Issue	Organisation	Resource
Background	EDO NSW	<ul style="list-style-type: none"> <li>Briefing note on the Mining and Petroleum Legislation Amendment Package 2015 (NSW)  <a href="http://www.edonsw.org.au/mining_and_petr_oleum_legislation_amendment_package_2015">http://www.edonsw.org.au/mining_and_petr_oleum_legislation_amendment_package_2015</a></li> <li>Submission on the Environmental Impact Assessment Improvement Project – Environmental impact assessment for major projects  <a href="http://www.edonsw.org.au/eia_improvement_project_environmental_impact_assessment_for_major_projects">http://www.edonsw.org.au/eia_improvement_project_environmental_impact_assessment_for_major_projects</a></li> <li>Submission on Community Consultative Committee Guidelines for State Significant Projects  <a href="http://www.edonsw.org.au/community_consultative_committee_guidelines_state_significant_projects">http://www.edonsw.org.au/community_consultative_committee_guidelines_state_significant_projects</a></li> </ul>
	Department of Industry – Division of Resources and Energy	<ul style="list-style-type: none"> <li>Common Ground minerals and petroleum mapping tool  <a href="http://commonground.nsw.gov.au/#/">http://commonground.nsw.gov.au/#/</a></li> <li>Information about mining and energy in NSW for landholders and the community  <a href="http://www.resourcesandenergy.nsw.gov.au/landholders-and-community">http://www.resourcesandenergy.nsw.gov.au/landholders-and-community</a></li> <li>Information about coal and minerals exploration  <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/mining-and-exploration-in-nsw/coal-and-mineral-titles">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/mining-and-exploration-in-nsw/coal-and-mineral-titles</a></li> <li>Information about petroleum titles  <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/mining-and-exploration-in-">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/applications-and-approvals/mining-and-exploration-in-</a></li> </ul>

	<p>Subsidence Advisory NSW</p> <p>Department of Planning and Environment</p> <p>The Australia Institute</p> <p>Geoscience Australia</p>	<p><a href="#">nsw/about-petroleum-titles</a></p> <ul style="list-style-type: none"> <li>• <a href="http://subsidenceadvisory.nsw.gov.au/">http://subsidenceadvisory.nsw.gov.au/</a></li> <li>• <a href="http://www.planning.nsw.gov.au/">http://www.planning.nsw.gov.au/</a></li> <li>• Major projects website <a href="http://majorprojects.planning.nsw.gov.au/">http://majorprojects.planning.nsw.gov.au/</a></li> <li>• Mining and Resources <a href="http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources">http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources</a></li> <li>• Mining the Truth: The rhetoric and reality of the commodities boom <a href="http://www.tai.org.au/node/1777">http://www.tai.org.au/node/1777</a></li> <li>• Minerals <a href="http://www.ga.gov.au/scientific-topics/minerals">http://www.ga.gov.au/scientific-topics/minerals</a></li> <li>• Coal <a href="http://www.ga.gov.au/aera/coal">http://www.ga.gov.au/aera/coal</a></li> <li>• Gas <a href="http://www.ga.gov.au/aera/gas">http://www.ga.gov.au/aera/gas</a></li> <li>• Energy <a href="http://www.ga.gov.au/scientific-topics/energy">http://www.ga.gov.au/scientific-topics/energy</a></li> <li>• Groundwater <a href="http://www.ga.gov.au/scientific-topics/water/groundwater">http://www.ga.gov.au/scientific-topics/water/groundwater</a></li> </ul>
Scientific Papers	Centre for Water in the Minerals Industry, Sustainable Minerals Institute, The University of Queensland	<ul style="list-style-type: none"> <li>• Assessment of impacts of the proposed coal seam gas operations on surface and groundwater systems in the Murray-Darling Basin <a href="http://www.environment.gov.au/epbc/notice/s/assessments/pubs/coal-seam-gas-operations-impacts.pdf">http://www.environment.gov.au/epbc/notice/s/assessments/pubs/coal-seam-gas-operations-impacts.pdf</a></li> </ul>

	Geoscience Australia	<ul style="list-style-type: none"> <li>Summary of Advice in Relation to the Potential Impacts of Coal Seam Gas Extraction in the Surat and Bowen Basins, Queensland</li> </ul> <p><a href="http://www.environment.gov.au/epbc/notice/s/pubs/gladstone-ga-report.pdf">http://www.environment.gov.au/epbc/notice/s/pubs/gladstone-ga-report.pdf</a></p>
Policies and Guidelines relating to mining and CSG	<p>Department of Industry – Resources and Energy</p> <p>Department of Planning and Environment</p>	<ul style="list-style-type: none"> <li>Environmental policies, guidelines, forms and templates <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/rules-and-forms/pgf">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/rules-and-forms/pgf</a></li> <li>Environmental Codes of Practice <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/rules-and-forms/pgf/codes-of-practice2">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/rules-and-forms/pgf/codes-of-practice2</a></li> <li>Mining and Resources Policy <a href="http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources">http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources</a></li> <li>Integrated Mining Policy <a href="http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Integrated-Mining-Policy">http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Integrated-Mining-Policy</a></li> <li>Community Consultative Committee Guidelines <a href="http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Community-Consultative-Committees">http://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Community-Consultative-Committees</a></li> <li>Gateway Assessment and Site Verification <a href="http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Gateway-Assessment-and-Site-Verification">http://www.planning.nsw.gov.au/Policy-and-Legislation/Mining-and-Resources/Gateway-Assessment-and-Site-Verification</a></li> </ul>
Finding NSW Legislation	NSW Government	<ul style="list-style-type: none"> <li>NSW Legislation Website <a href="http://www.legislation.nsw.gov.au/">http://www.legislation.nsw.gov.au/</a> Browse 'In Force' and then search for legislation based on the first letter of the Act. The <i>Mining Act</i> is under M and the <i>Petroleum (Onshore) Act</i> is under P. Planning law is under E for <i>Environmental</i></li> </ul>

		<i>Planning and Assessment Act.</i>
Maps showing coal, mineral and CSG titles and applications and environmental data	Department of Industry – Resources and Energy	<ul style="list-style-type: none"> <li>Common Ground minerals and petroleum mapping tool <a href="http://commonground.nsw.gov.au/#/">http://commonground.nsw.gov.au/#/</a></li> <li>SEED: The NSW Environmental Data Portal <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/programs-and-initiatives/nsw-environmental-data-portal">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/programs-and-initiatives/nsw-environmental-data-portal</a></li> </ul>
Exploration licence information and geoscience data	Department of Industry – Resources and Energy	MinView <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/geoscience-information/services/online-services/minview">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/geoscience-information/services/online-services/minview</a>
Development applications	Department of Planning and Environment	<ul style="list-style-type: none"> <li>Major projects website <a href="http://majorprojects.planning.nsw.gov.au/">http://majorprojects.planning.nsw.gov.au/</a></li> </ul>
Titles and conditions, reporting, mine plans, etc.	Department of Industry – Resources and Energy	<ul style="list-style-type: none"> <li>DiGS <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/geoscience-information/services/online-services/digital-imaging-of-geological-system">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/geoscience-information/services/online-services/digital-imaging-of-geological-system</a></li> </ul>
Conditions of development consent	Department of Planning and Environment	<ul style="list-style-type: none"> <li>Major projects website <a href="http://majorprojects.planning.nsw.gov.au/page/determinations/">http://majorprojects.planning.nsw.gov.au/page/determinations/</a></li> </ul>
EPBC Act – matters of national environmental significance	Commonwealth Department of the Environment and Energy	<ul style="list-style-type: none"> <li>Protected matters search tool <a href="http://www.environment.gov.au/epbc/pmst/">http://www.environment.gov.au/epbc/pmst/</a></li> <li>Project referrals <a href="http://epbcnotices.environment.gov.au/publicnoticesreferrals/">http://epbcnotices.environment.gov.au/publicnoticesreferrals/</a></li> </ul>
Access Arrangements	Department of Industry – Resources and Energy	<ul style="list-style-type: none"> <li>Land access arrangements for mineral exploration <a href="http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/minerals-and-coal/template-for-land-access">http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/minerals-and-coal/template-for-land-access</a></li> <li>Land access for coal seam gas <a href="http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/coal-seam-gas/the-facts/land-access">http://www.resourcesandenergy.nsw.gov.au/landholders-and-community/coal-seam-gas/the-facts/land-access</a></li> </ul>

Complaints and reporting for mining and CSG activities	Department of Industry – Resources and Energy	<ul style="list-style-type: none"> <li>Reporting an alleged breach or incident <a href="http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/enforcement/incident-reporting">http://www.resourcesandenergy.nsw.gov.au/miners-and-explorers/enforcement/incident-reporting</a></li> </ul>
Legal fact sheets on planning, pollution, natural resources, biodiversity, heritage and Aboriginal law	EDO NSW	<ul style="list-style-type: none"> <li>Fact Sheets <a href="http://www.edonsw.org.au/legal_help">http://www.edonsw.org.au/legal_help</a></li> </ul>
Technical fact sheets on air quality and water quality	EDO NSW	<ul style="list-style-type: none"> <li>Water quality assessment <a href="http://www.edonsw.org.au/water_management">http://www.edonsw.org.au/water_management</a></li> <li>Understanding groundwater <a href="http://www.edonsw.org.au/water_management">http://www.edonsw.org.au/water_management</a></li> <li>Air quality- Dust monitoring <a href="http://www.edonsw.org.au/pollution">http://www.edonsw.org.au/pollution</a></li> </ul>
Court cases about coal and CSG	NSW Land and Environment Court and NSW Court of Appeal  Mining Wardens Court	<ul style="list-style-type: none"> <li>Caselaw NSW <a href="http://www.caselaw.nsw.gov.au/">http://www.caselaw.nsw.gov.au/</a></li> <li>Mining Warden's Court decisions <a href="http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_8/Mining-matters-the-process/MiningMattershelpfulmaterials/Mining_Warden's_Court_decisions/mining_wardens_court_decisions.aspx">http://www.lec.justice.nsw.gov.au/Pages/types_of_disputes/class_8/Mining-matters-the-process/MiningMattershelpfulmaterials/Mining_Warden's_Court_decisions/mining_wardens_court_decisions.aspx</a></li> </ul>
Investigation of CSG breaches	EPA	<ul style="list-style-type: none"> <li>Recent and current investigations <a href="http://www.epa.nsw.gov.au/licensing/investigations.htm">http://www.epa.nsw.gov.au/licensing/investigations.htm</a></li> </ul>
Planning and development	Department of Planning and	<ul style="list-style-type: none"> <li>Compliance reports <a href="http://www.planning.nsw.gov.au/Assess-">http://www.planning.nsw.gov.au/Assess-</a></li> </ul>

compliance	Environment	<a href="#">and-Regulate/Compliance-functions/Compliance-reports</a>
PAC Decisions and Hearings	NSW Planning Assessment Commission	<ul style="list-style-type: none"> <li>• <a href="http://www.pac.nsw.gov.au/">http://www.pac.nsw.gov.au/</a></li> </ul>
Free Legal Advice	EDO NSW	<ul style="list-style-type: none"> <li>• Advice Line 1800 626 239 <a href="http://www.edonsw.org.au/legal_advice">http://www.edonsw.org.au/legal_advice</a></li> </ul>
Going to court	NSW Land and Environment Court	<ul style="list-style-type: none"> <li>• Your legal problem is about ... <a href="http://www.lec.justice.nsw.gov.au/">http://www.lec.justice.nsw.gov.au/</a></li> </ul>