Allocation, Access and Activity Approvals
How the Recent Reforms to the Mining Act will impact on NSW Explorers

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Resources Legislation Package

- Direct allocation of exploration licences for coal
- Strategic release of coal exploration licences
- Applications, conditions, (and variations) and reporting
- Activity approvals
- Negotiation, mediation and arbitration process for access arrangements
- Costs of access arrangements
- Significant improvements
Resources legislation package

- **Titles Act**
  Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Act 2015 (NSW)

- **Harmonisation Act**
  Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015 (NSW)

- **Land Access Act**
  Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015 (NSW)

Supporting regulations and guidelines have also been released:

- **Mining Amendment Regulation, Petroleum Amendment Regulation** - Mining Amendment (Licences for Operational Allocation Purposes) Regulation 2015 (NSW)

- **Coal Allocation Guidelines** - Guidelines for coal exploration licence applications for operational allocation purposes’

- **Strategic Release Framework** – draft NSW Strategic Release Framework for Coal and Petroleum Exploration
## Commencement status

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Commenced</th>
<th>Still to commence</th>
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<tbody>
<tr>
<td>Titles Act</td>
<td>All sections of the Titles Act commenced on 18 December 2015 except for one minor provision related to opal mining</td>
<td>Section 223 in relation to opal prospecting areas has not commenced</td>
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<tr>
<td>Harmonisation Act</td>
<td>As at 1 March 2016 all sections of the Harmonisation Act have commenced</td>
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<tr>
<td>Land Access Act</td>
<td>Limited sections of the Land Access Act commenced on 18 December 2015 enabling seismic works under either an EL or AL on a road without owner’s consent</td>
<td>Expected 1 July 2016</td>
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'Allocation'

The Titles Act
The Titles Act will see a new system for the allocation, granting, renewal and transfer of mining and petroleum titles in NSW. The major changes are:

- the introduction of ‘controlled release areas’ which will apply to coal
- the replacement of the current scheme for the direct allocation of exploration titles, with ‘operational allocation licences’ which will be permitted only in limited circumstances as prescribed by the regulations
- a ‘competitive selection process’ for the granting of titles
- the creation of a new advisory body to oversee the release of areas for allocation
Controlled release areas

- The entire State of NSW has been declared a ‘controlled release area’ in respect of coal.

- Limited circumstances in which an application for a coal EL can be granted.

- The transitional provisions provide that an application for Minister’s consent in respect of an EL for coal that was made before 18 December 2015 will continue to be dealt with as though the new Titles Act had not commenced.
An application for an EL in respect of coal may only be made:

☐ pursuant to an invitation under the ‘competitive selection process’; OR
☐ for an ‘operational allocation purpose’; OR
☐ by the Secretary on behalf of the Crown

It is no longer possible to apply for an EL for coal with the Minister’s consent – change made to reflect ICAC recommendations

An application that relates to land in a mineral allocation area may not be made, except with the Minister’s consent, in relation to any group of minerals that includes an allocated mineral
Operational allocation licences

The direct allocation of an EL for coal (now referred to as an ‘operational allocation licence’) will be limited to:

- Must be holder of existing EL, AL or ML
- Must be for operational allocation purpose
- Must comply with restrictions/features in regulations
The following are prescribed as ‘operational allocation purposes’: 

- in relation to applications by holders of **ELs or ALs** – the purpose of both developing a better mine design proposal and recovering coal resources that would otherwise be likely to be sterilised, and

- in relation to applications by holders of **MLs**, each of the following:
  - the purpose of extending the life of a mine
  - the purpose of developing a better mine design
  - the purpose of recovering coal resources that would otherwise be likely to be sterilised, or
  - the purpose of obtaining an EL for coal over the subsoil above or below the stratum to which the ML concerned relates or over the surface above the land to which that ML relates.

If holder of ML and adjoining EL/AL, the second category above will apply
With regards to shape and size of the ‘operational allocation licence’:

- an application for an ‘operational allocation purposes’ can only be sought over a **maximum surface area of 33% of the area of the land** to which the existing EL, AL or ML concerned relates, and

- with reference to an EL for a **stratum above or below an existing ML**, the boundary of subsoil or the surface area of the land to which the EL application relates **must not exceed the boundary of the area of land to which the ML concerned relates.**
Guidelines for coal exploration applications for operational allocation purposes

- Final Coal Allocation Guideline released December 2015
- Referred to in section 13C(4) of the Mining Act
- To be considered by Minister in deciding any application for an EL for an operational allocation purpose
- Used by the Coal Resource Operational Allocation Committee who will make recommendations to the Minister for grant or refusal of the application
- Market interest test
Considerations by Coal Resource Operational Allocation Committee

Holder of EL or AL

Holder of ML
Operational allocations to existing mines will be subject to agreed financial contributions. The contribution will be:

- 10 cents per tonne of saleable export coal (with a minimum contribution of at least $500,000); and
- 5 cents per tonne of saleable domestic coal (with a minimum contribution of at least $250,000).

Financial contributions will be payable in instalments with 20% on the grant of development approval and the balance payable in five equal payments on the anniversary of the grant of a subsequent ML.

These contributions may be updated by the Advisory Body for Strategic Release.
The competitive selection process:

- The Minister must publish a notice in the Gazette inviting applications.

- The competitive selection process is determined by the decision maker and *the process for competitive selection can be different for different areas of land and for different controlled release minerals*.

- Minister may determine matters to be considered in competitive selection process and the weight to be given to those matters.

- Applicant may be required to provide an undertaking to pay a specified amount as consideration for the grant of the controlled release prospecting title – the amount to be paid can be a relevant consideration for the decision maker and details of amount may be made public.

- The consideration paid is not refundable in the event that the prospecting title is cancelled.
Required to address ICAC recommendations on reducing opportunities and incentives for corruption

Framework will allow for the controlled, strategic release and competitive allocation of prospecting titles

The Release Guideline identifies that all prospecting titles will have a reserve price, which may take into account costs associated with preparing an area for competitive release, the potential size and quality of the resource, the cost of prospective mining operations, and market conditions.

The Release Guideline identifies that the strategic release for coal and petroleum will be overseen by the Advisory Body for Strategic Release, which will consider geological, social, environmental and economic factors prior to an area being released for competitive tender.
New forms and requirements
Exploration licence application – Form EL 1

- New forms and guidelines introduced in December 2015

- Statement of financial capability – new guideline and template
  - Applicant must possess, or have the ability to secure, the **required funding to meet the anticipated expenditure for the term of the work program**, in addition to commitments and liabilities on all other titles held or pending in NSW

- Particulars of relevant technical advice

- Exploration technical manager acceptance letter

- Prospecting title work program – new guideline

- A statement of corporate, compliance and environmental performance history – new guideline and checklist
Complexities in statements

- Identifying the ‘officers’ of the applicant
- Disclosure of PINs and explanation
- Identifying where officers of applicant (over last 3 years) have previously been officers and whether companies have been wound up etc
- Disclosure of ‘winding up’ etc. of related bodies corporate
- Statement of financial capability
- $$$ and delay
‘Activity Approvals’
Harmonisation Act
Harmonisation Act

The Harmonisation Act changes the regulatory framework governing the administration, compliance and enforcement of mining and petroleum titles. Major changes as a result of the Harmonisation Act include:

- an increase in the maximum term of an EL and AL to **6 years** (from 5 years)
- a more **defined criteria to be applied by the decision maker** when deciding whether to grant, renew, transfer, suspend or cancel a title
- conditions on a title, including a ML, will in effect be able to be **varied for any reason and at any time**, however written notice of the variation will need to be served on the holder
- **consolidated reporting requirements** on an annual basis, including confirmation that conditions of the relevant title has been complied with
- additional requirements to be satisfied before an EL for coal can be **renewed over more than 50%** of the licence area
- broader **investigative and enforcement powers** given to the Minister and inspectors
- introduction of a corporate penalty for provision of **false or misleading information** (maximum penalty of $110,000)
- **increases to penalties** for contravention of conditions of an authorisation to a maximum of $1.1 million for a corporation
- the ability to enter into **enforceable undertakings** where there has been an alleged breach of the Mining Act, similar to other NSW legislation including the POEO Act
Power of decision maker in relation to application

- Applies to applications for the grant, renewal and transfer of authorisations

- The decision maker must take into account in determining whether to grant an application the **need to conserve and protect the environment** in or on the land over which the authorisation is sought.

- The Minister may also take into account:
  - Technical and financial capability
  - Compliance history
  - Work program
  - Controlling power of corporation
Grounds for refusal

1. Applicant, or transferee does not meet specified requirements
2. Failure to pay application fee or consideration (for competitive selection)
3. Failure to lodge relevant information
An authorisation **may be varied** by the relevant decision maker by the attaching of a **new condition, substitution of a condition, amendment of a condition**

An authorisation may be varied **on application by the holder of the authorisation or on the initiative of the relevant decision maker**

An authorisation may be varied **at any time during its currency**, including on its being transferred to another person

**Notice requirements**
‘Activity approval’ required for assessable prospecting operations

- An EL, AL or PEL does not authorise ‘assessable prospecting operation’ unless an activity approval is in place and the relevant conditions of that approval are complied with.

- An **assessable prospecting operation** means any prospecting operation that is not exempt development within the meaning of the *Environmental Planning and Assessment Act 1979* (NSW).

- A condition of an activity approval is to be **treated as a condition of a licence**.

- An activity approval **may be cancelled** by the decision maker following appropriate notice.
Confidentiality of annual reports

- Annual reports lodged with the Secretary must not be disclosed during the period for which the authority to which the report relates is in force unless:
  - (a) in the case of a report lodged on or after 1 June 2016—5 years have passed since the lodgment of the report, or
  - (b) in the case of a report lodged before 1 June 2016—5 years have passed since that date.

**Examples:**
- Report lodged 1 January 2015, confidentiality lifted on 1 June 2021
- Report lodged 1 July 2016, confidentiality lifted on 1 July 2021

- Clause does not apply if authority ceases to be in force
Enforcement and penalties

- Broader investigative powers
- Enforceable undertakings available
- New PIN offences
- Increased penalties
'Access'

Land Access Act
The Land Access Act will result in:

- a more streamlined processes for carrying out seismic surveys
- a requirement for parties to undergo mediation prior to arbitration
- the ability for both parties to be legally represented during mediation and arbitration
- a requirement for the title holder to pay the landholder’s reasonable legal costs of the negotiation (leading up to mediation/arbitration) and the mediation and arbitration up to a specified fee cap
- an express obligation on both title holders and landholders to negotiate an access arrangement in good faith. If a landholder acts unreasonably and fails to negotiate in good faith there is a possibility that their costs will not be covered by the title holder during mediation, arbitration and Land and Environment Court proceedings
- a structured and rigorous selection process for the appointment of members to the formal Arbitration Panel by the Minister
- an access code being prescribed which may include mandatory provisions and non-binding guidelines about how a title holder can carry out activities on the land
- material changes to the definition of ‘significant improvement’ under the Mining Act
Process to obtain access arrangement

Negotiate
- Holder of prospecting title provides notice to landholder
- Titleholder and landholder attempt to negotiate access arrangement

Mediate
- If agreement cannot be reached, arbitrator to be appointed to mediate between parties

Arbitrate
- If agreement cannot be reached at mediation, the arbitrator is to conduct a hearing and make a determination

Court
- Party may seek a review and proceed to Land and Environment Court for determination
The holder of the prospecting title **must pay the reasonable costs** of the landholder of the land concerned in participating in **negotiating** the access arrangement.

The **maximum amount of reasonable costs** payable by the holder of the prospecting title is the amount set out by the Minister by order published in the Gazette (note: yet to be published).

No cap on landholder’s costs in LEC proceedings that must be paid by explorer.
Practical protections for explorers

Negotiate in good faith

Act reasonably
Engagement of experts

- Explorer required to pay landholder’s cost of engaging experts as part of negotiation, mediation and arbitration process

- No limit or controls on the number or type of experts that may be engaged

- Leave from arbitrator should be required before expert evidence can be relied upon (to be confirmed in Arbitration Procedures)
**New definition of significant improvement**

**significant improvement** on land, in relation to an authorisation or an access arrangement, means a work or structure that:

(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 authorisation or the access arrangement without hindrance to the full and unencumbered operation or functionality of the work or structure, and

(e) cannot reasonably be relocated or substituted without material detriment to the landholder,

and includes any work or structure prescribed by the regulations for the purposes of this definition, but does not include any work or structure excluded from this definition by the regulations.
Costs of significant improvement dispute

- The landholder’s costs of a ‘significant improvement’ dispute in the Land and Environment Court to be borne in full by the explorer or applicant for a mining lease

- No test of reasonableness and no cap

- Explorer still required to pay landholder costs even if explorer is successful in the proceedings

- Costs and delay
Other issues

- **Lack of timeframes** in Land Access Act, Draft Arbitration Regulation and Draft Arbitration Procedures

- Potential for **access code**

- Draft Arbitration Procedure provides for the **preparation of baseline reports**

- **Low impact exploration activities**
  - No streamlined or expedited process
  - will apply to low impact exploration activities such as geological mapping, sampling and coring using handheld equipment in the same way that it will apply to intensive drilling programs
  - cost of obtaining access arrangement for low impact activities has the potential to be disproportionate with the nature of the activities

- A **considerably more onerous land access regime** compared to other resource rich jurisdictions such as Queensland and Western Australia
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