



Government of **Western Australia**
Department of **Mines and Petroleum**

Land Access Information Paper

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1 Background

The Western Australian Land Access Working Group (LAWG) was established by the Department of Mines and Petroleum (DMP) in response to recommendations of the 2015 report of the Legislative Council Standing Committee on Environment and Public Affairs, following its investigation into hydraulic fracturing and its implications for WA. The LAWG will focus on reviewing and identifying opportunities to improve WA's land access arrangements in the context of onshore petroleum, and mining where relevant.

In Western Australia, different regimes apply to regulate land access for exploring for, and production of, petroleum and minerals. The *Petroleum and Geothermal Energy Resources Act 1967* deals with the grant of titles for petroleum exploration and production, and the *Mining Act 1978* deals with grant of mining tenements.

Each of those Acts specifies circumstances in which consent is required from, and compensation may need to be paid to, owners and occupiers of private land. The private land access regimes reflect historical attempts to strike a balance between the interests of the State, as the ultimate owner of mineral and petroleum resources, and the rights and interests of landholders (particularly agricultural landholders) and industry proponents.

This information paper describes the operation of the differing regimes and compares them, with a view to assisting members of the LAWG in the development of a public discussion paper for release during 2017.

This information paper does not address arrangements for access to land in which native title exists, as these are dealt with comprehensively in the Native Title Act.

This information paper should be read in conjunction with the document entitled "Land Access on Private Land for Mineral and Petroleum Activities" by Professor Tina Hunter, dated February 2017.

2 Definitions and contextual information

2.1 Glossary

In this information paper:

conditional purchase lease means a lease over Crown land granted subject to conditions under section 80 of the *Land Administration Act 1997* with the effect that the subject land must be transferred to the lessee as freehold once the conditions have been met.

Land Administration Act means the *Land Administration Act 1997*.

landholder includes the owner and the occupier of land.

Mining Act means the *Mining Act 1978*.

mining tenement means a prospecting licence, exploration licence, retention licence, mining lease, general purpose lease or miscellaneous licence granted under the Mining Act, and **tenement holder** has a corresponding meaning.

Native Title Act means the *Native Title Act 1993 (Cth)*.

surface rights, in relation to a mining tenement, means rights for the tenement holder to access the top 30 metres of land.

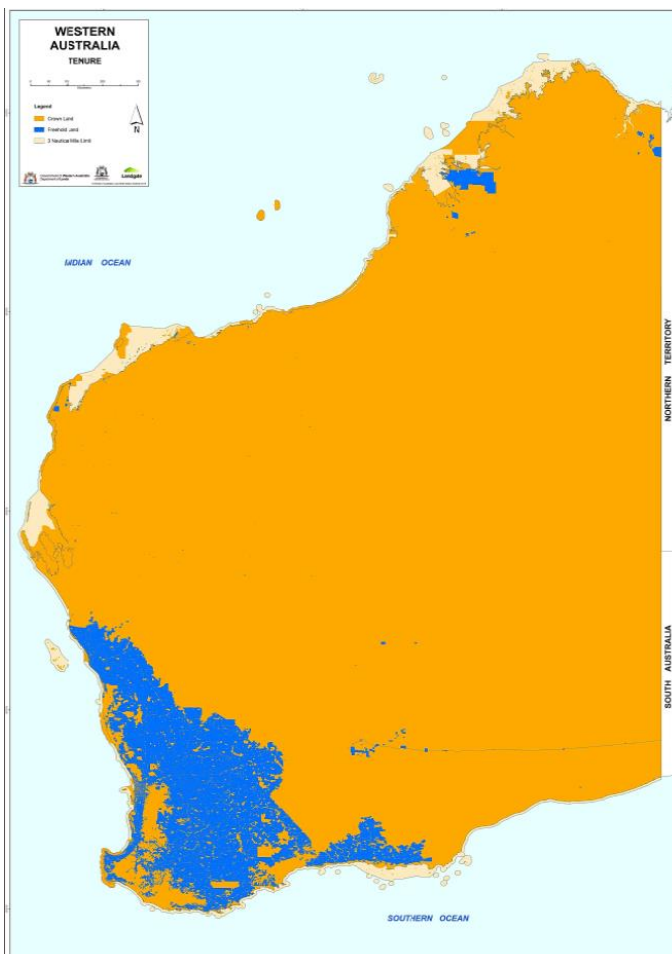
PGER Act means the *Petroleum and Geothermal Energy Resources Act 1967*.

PGER title includes petroleum or geothermal exploration permits, drilling reservations, access authorities, retention leases and production licences granted under the PGER Act, and **PGER titleholder** has a corresponding meaning.

2.2 Private land

What is “private land” is defined slightly differently in the Mining Act and the PGER Act. Effectively, the definitions include freehold land, and land that is held by way of tenure that includes an option or agreement that the freehold will eventually be acquired.

The following map generally depicts the extent of private land in WA.



3 Petroleum

3.1 Petroleum regulatory framework in Western Australia

Exploration for and exploitation of WA's petroleum and geothermal energy resources is regulated under the PGER Act. The PGER Act applies to all land within Western Australia and some coastal waters. Under PGERA s.9, petroleum, geothermal energy resources and geothermal energy on or below the surface of all land in WA is deemed to be the property of the Crown.

Because petroleum and geothermal energy are of high strategic value to the State, PGER titles take priority over other types of land tenure. Various provisions of the PGER Act address the interaction between PGER titles and other tenure types, including privately held agricultural land.

The other primary source of petroleum resources legislation in WA, the *Petroleum (Submerged Lands) Act 1982* applies to offshore areas, which do not intersect with freehold land, so that Act is not considered further in this background paper. The *Petroleum Pipelines Act 1969* deals with the establishment and operation of petroleum infrastructure, rather than the resource, and is also out of scope.

3.2 Petroleum titles and access to private land under the PGER Act

3.2.1 Titles generally

Petroleum and geothermal exploration permits are released by the State Government following a competitive bidding system known as "acreage release". The acreage release system is administered by reference to graticular blocks, which overlay a variety of types of on-ground tenure.

Once the preferred applicant for an exploration permit has successfully negotiated with native title parties as required by the Native Title Act, an exploration permit is granted to the applicant.

Exploration permits allow their holders to explore for petroleum and carry out related operations and works within the permit area¹ and, also, to apply for a retention lease in respect of, or a production licence in respect of part of, the original permit area².

3.2.2 Access to private land: consent and compensation

PGERA titleholders are subject to consent and compensation requirements in respect of activities on private land.

Consent: PGERA titleholders must have the consent of owners or trustees of certain types of private land before exploring for or carrying out operations for the recovery of

¹ PGER Act s.38

² PGER Act ss.48A and 50

petroleum or geothermal energy³. Consent is required for land within the title area that is⁴:

- **Small parcels – less than 2,000m² – of private land**

(**Note:** “private land” is defined in the PGER Act to include freehold; Crown land subject to a conditional purchase lease; and leases or concessions *other than* pastoral leases, leases for grazing purposes, leases for timber purposes, and leases for the use and benefit of the Aboriginal inhabitants⁵)

- **Land used as a cemetery or burial place**

- **Land located within 150m, measured laterally, from a cemetery or burial place, reservoir, or “substantial improvement”.**

(**Notes:** A “reservoir” includes natural and artificial accumulation of water, spring, dam, bore and artesian well.

What is a “substantial improvement” is undefined, and the Minister can determine whether or not an improvement is substantial).

Compensation: PGERA titleholders are prohibited from commencing operations on private land (defined to include freehold and certain other land, as described above) before paying compensation to, or reaching agreement on compensation payable with, both the owner and the occupier of private land affected by the title⁶. Compensation may be payable to:

- **Both the owner and the occupier of private land within the title**

Note: Any compensation to the owner or occupier of land within the title is to be for deprivation of possession of, or damage to, the surface of the land; damage to improvements to the land; severance of the land from other land in the owner or occupier’s possession; or for rights of way or consequential damages⁷. Compensation is not to allow for the value of minerals, petroleum or geothermal energy resources⁸.

- **Both the owner and the occupier of private land adjoining, or in the vicinity of, the title**

Note: Any compensation to the owner or occupier of adjoining or nearby land is to be for injury to or depreciation of value in private land or improvements to the land, or the use by the titleholder of any right of way⁹.

³ PGER Act s.16

⁴ PGER Act s.16(1a)

⁵ PGER Act s.5

⁶ PGER Act s.20

⁷ PGER Act s.17(2)

⁸ PGER Act s.17(3)

⁹ PGER Act s.18

In either case, if compensation is not agreed within three months, the amount can be determined by the Magistrates Court on application by either party¹⁰.

- **The lessee of a pastoral lease, lease for timber purposes, or lease for the use and benefit of Aboriginal inhabitants**

Note: Compensation in respect of leases of this type is for damage to improvements on the land, and consequential damage¹¹. Both the lessee and the titleholder can apply to the Magistrates Court to resolve disputes.

3.3 Petroleum land access in practice

3.3.1 Industry Landholder Template Agreement

In October 2015, representatives of the agricultural sector (WAFarmers, the Pastoralists and Graziers Association of WA and vegetables WA) and the Australian Petroleum Production and Exploration Association (APPEA) released a document entitled “Farming Land Access Agreement Template” (the Petroleum Template Agreement) and an accompanying “Farmer’s Guide to Land Access”. The package of documents is intended as a guide for farmers, graziers and petroleum companies for land access negotiations, “to make negotiations easier and co-existence simpler”.

The agreement template covers, among other things:

- Commitments by the operator and landholder as to the conduct of operations and allowing land access;
- The amount of compensation to be paid following negotiation between the parties;
- A process under which parties will seek independent assessment as to the need for and cost of land remediation;
- A dispute resolution process which escalates to a “mediation panel” including an independent chair and experienced representatives of the agricultural and petroleum industries; and
- A commitment by the operator to pay the landholder’s reasonable costs in receiving legal, financial or technical advice as to and preparing the agreement.

3.3.2 Industry and landholder experience

PGERA land access agreements are private arrangements. DMP is not a party to the arrangements or their negotiation. In order to gather data about the rate of uptake and efficacy of the Petroleum Template Agreement, and other information about industry and landholder perceptions of the negotiation process, DMP is intending to invite

¹⁰ PGER Act s. 17(4) and Regulation 2 of the PGER Regulations 1987

¹¹ PGER Act s.21

resources industry participants and landholders to complete a survey during March/April 2017. Data from that survey will be used as an information source in preparing the public discussion paper.

4 Mining

4.1 Mining regulatory framework in Western Australia

The Mining Act regulates the grant of mining tenements. Under the Mining Act section 9, all gold, silver and other precious metals, and all other minerals in land that was not alienated from the Crown before 1 January 1899, are the property of the Crown.

Raw construction materials, such as limestone, on private land are not minerals within the meaning of the Mining Act. The exploitation of these resources is managed through local government processes and not considered further in this document.

4.2 Mining tenements and access to private land under the Mining Act

4.2.1 Access arrangements generally

Division 3 of Part III of the Mining Act deals with the intersection between mining tenements and private land. As a general principle, private land in WA is “open for mining” and can be subject to the grant of a mining tenement¹².

For the purposes of Division 3 of Part III, “private land” includes freehold, Crown land subject to a conditional purchase lease, and leases or concessions other than pastoral leases, leases for grazing purposes, leases for timber purposes, and leases for the use and benefit of the Aboriginal inhabitants¹³. The provisions of Division 3 of Part III do not apply:

- in relation to mining for minerals other than gold, silver and precious metals on private land alienated before 1 January 1899;
- to private land already the subject of a mining tenement other than a special prospecting lease or special mining lease¹⁴;
- to land specified in the Third Schedule to the Mining Act, which is land near Kalgoorlie the subject of pre-1899 freehold grants known as the “Hampton Lands”¹⁵; or
- if they are excluded in relation to particular land by the operation of a State Agreement.

¹² Mining Act s.27

¹³ Mining Act s.8

¹⁴ Mining Act s.27(1)

¹⁵ Mining Act s.27(2)

4.2.2 Access to private land: consent and compensation

The applicant for a mining tenement with surface rights to private land is required to notify the landholder (as well as the local government and any mortgagee of the land) of the application¹⁶. If the application relates to surface rights over certain types of private land, the applicant must show that consent has been given before the grant can be made¹⁷. If a tenement is granted over private land (not restricted to the consent categories), the tenement holder may need to compensate the landholders. Without consent a tenement can be granted with sub-surface rights only.

Consent: Under section 29 of the Mining Act, a mining tenement including surface rights over certain categories of private land cannot be granted without written consent from both the owner and the occupier.

Consent from the landholders is required before the grant of a mining tenement including surface rights over land that:

- is in genuine and regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation or is land in use for agricultural purposes, or is within 100 metres of such land;
- is the site of a cemetery or burial ground, or is within 100 metres of such land;
- is the site of a dam, bore, well or spring, or is within 100 metres of such land;
- has erected on it a substantial improvement, or is within 100 metres of such land; or
- is a separate parcel of land with an area of 2,000 m² or less.

If a landholder refuses to consent to the inclusion of surface rights over land in any of those categories, the surface rights cannot be included in the tenement¹⁸ and there is no legal recourse for the applicant.

Compensation: A mining tenement holder cannot commence mining on any private land unless compensation has been paid, or agreed on, with the landholders¹⁹. The parameters for compensation are set out in Part VII of the Mining Act. As minerals belong to the Crown, compensation cannot take into account the value of any minerals on the land²⁰. Compensation can be made in consideration of loss and damage incurred, or likely to be incurred, by the landholders resulting from the mining²¹, including compensation for any of the following:

¹⁶ Mining Act s.33

¹⁷ Mining Act s.33(1b)

¹⁸ Mining Act s.29(2)

¹⁹ Mining Act s.35

²⁰ Mining Act s.123(1)

²¹ Mining Act s.123(2)

- deprivation of possession or use of the land, or its severance from other land of the landholder;
- damage to the land;
- loss of or restriction to rights of way, easements or other rights;
- loss of or damage to improvements;
- social disruption;
- a range of types of loss and costs, in relation to land under cultivation;
- the landholder's reasonable expenses incurred in reducing or controlling damage from mining²².

In the absence of agreement between the parties, compensation can be determined by the warden's court²³.

In circumstances where a mining tenement includes only subsurface private land, the tenement holder may apply to amend the mining tenement to include the surface of the private land after grant, only with the consent of the private land owner and occupier. The private land owner and occupier, and any mortgagee, has a right to be heard in relation to, and have 21 days to object to, such an application.

While a mining tenement is current over subsurface private land, the surface of that private land is not open to mining to any other person other than the mining tenement holder.

Consent and compensation arrangements can be effectively bypassed if the mining proponents purchases private land outright.

4.2.3 Access to private land: sampling and marking-out

The Mining Act²⁴ prevents any person other than the owner of private land entering on the land for the purposes of sampling for minerals or marking out a mining tenement unless the person holds a permit to do so²⁵ and has provided a copy of the permit to the occupier of the land²⁶.

²² Mining Act s.123(5)

²³ Mining Act s.123(3)

²⁴ Mining Act s.28

²⁵ Mining Act s.30

²⁶ Mining Act s.31

4.3 Mining land access in practice

4.3.1 Operational context – mineralisation

Most mining activity in WA occurs on Crown land and pastoral leases, with less mining activity on private land.

Around 10 per cent of mining tenure in Western Australia is either wholly or partly over freehold land, which is the major component of “private land” as defined under the Mining Act and the PGER Act. The geology of private land in this area is generally not considered to be highly prospective for minerals compared to other mineral-rich regions such as the Goldfields and the Pilbara. However, these lands do host significant mineral sands, silica sand and bauxite deposits.

4.3.2 Economic considerations

Because less mining activity overall occurs on private land, and that land is generally confined to less prospective for minerals, a working assumption is that the private landholder consent provisions may be of limited significance in the minerals industry.

However, as refusal or consent to access land is privately negotiated, DMP has no robust evidence on which to base an understanding of how much land has been historically affected by failure to obtain private landholder consent, or what the opportunity cost to the State of the refusal arrangements might be.

It is understood that private landholders have exercised their right not to consent in some areas of the State, and this may have resulted in pressure on the Government to intervene, exploration and mining operations not occurring, and the sterilisation of resources.

Similarly, as DMP is not party to compensation arrangements, and there is no standard formula for calculating compensation, DMP has no evidence about the costs to industry or to landholders of compensation arrangements.

From the State’s perspective, if exploration is prohibited on certain private landholdings, less geological information is known for an area. This may adversely impact on future land use planning and the State’s awareness of its potentially strategic resources. It can also result in the sterilisation of resources with incompatible development and land uses. However, it is difficult to appreciate the opportunity cost of this change when the undiscovered mineral potential of private land is not well understood due to reduced access for mineral exploration.

4.3.3 Guidance material

In 1999, following agricultural and resources industry consultation, the then Department of Workplace Relations and Small Business and the Great Southern Development Commission developed a “Code of Conduct for the Owners of Farming Properties and Persons Exploring or Mining on Private (Agricultural) Land in the Central Great

Southern” (“the Code of Conduct”) and an accompanying “Guide for the Owners of Farming Properties in relation to Exploring and Mining on Private (Agricultural) Land in the Central Great Southern”. The Code of Conduct incorporates a proposed land access agreement.

DMP has prepared a Guidance Note to assist private landholders and mineral proponents in understanding their rights under the Mining Act. This brochure can be obtained from: http://www.dmp.wa.gov.au/Documents/Minerals/Minerals-Information-brochures-private_land_provisions-4.pdf

5 Comparison of key Mining Act and PGER Act provisions

	Mining Act	PGER Act
What is “private land”?	Freehold granted after 1899	Freehold
	Crown land subject to a conditional purchase lease	
	Leases or concessions other than pastoral leases, leases for grazing purposes, leases for timber purposes, and leases for the use and benefit of the Aboriginal inhabitants	
Who must give consent?	Owner and occupier	
To what is consent given?	Grant of a mining tenement including surface rights	Entry onto land for exploring for or carrying out operations for the recovery of petroleum or geothermal energy
What type of land does consent requirement apply to?	Parcels of less than 2,000m ² of private land;	
	Land that is the site of a cemetery or burial ground or within 100m of such land;	Land used as a cemetery or burial place or within 150m of such land
	Land that is the site of a dam, bore, well or spring, or land that is within 100m of such land;	Land located within 150m of a reservoir (including a natural and artificial accumulation of water, spring, dam, bore and artesian well)
	Land on which there is a substantial improvement, or land that is within 100m of such land	Land located within 150m of a substantial improvement
	Land in genuine and regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation or is land under cultivation – that is, being used for agricultural purposes, or land within 100m of such land	
What if consent is not granted	Surface rights to the private land cannot be included	PGERA titleholder cannot enter that part of the title for exploring or carrying out operations
To whom is compensation payable?	Landholder	Landholder Landholder of land adjoining or in vicinity

		of PGERA title Lessee of pastoral lease, timber lease, lease for use and benefit of Aboriginal inhabitants
What land is compensation payable in relation to	Private land	
What is compensation payable for – for landholders directly affected	Deprivation of possession or use of the land	
	Damage to the land	
	Loss of or damage to improvements	
	Severance of the land from other land of the landholder	
	Loss of rights of way, easements etc.	
		Consideration for rights of way provided
	Social disruption	
	Various costs relating to agricultural land	
Reasonable expenses in reducing/controlling damage		
What is compensation not available for – for landholders directly affected	The value of any minerals on the land	The value of any minerals, petroleum or geothermal energy resources [17(3)].
What is compensation available for – for adjoining/nearby landholders	Section 123(5)	Injury to or depreciation of value in private land or improvements to the land Use by the PGERA titleholder of any right of way

While the Mining Act provides considerable power to agricultural landholders, by effectively providing a right of refusal to surface rights on private land being included in a mining tenement, the protection given to agricultural landholders under the PGER Act is more limited. In both instances, compensation is payable to landholders of all private land, agricultural and otherwise.

Western Australia is the only State providing landowners with refusal rights of the kind contemplated by the Mining Act. All other States provide some sort of mechanism that will allow mining to occur, subject to controls and compensation. Arrangements in other jurisdictions are described in detail in Appendix 1.

Historically, there have been attempts to remove or modify the Mining Act private land refusal provisions. When originally enacted (but before its proclamation) the Mining Act

did not provide for refusal rights. It was only through lobbying by farming industry organisations that refusal rights were included. By contrast, petroleum legislation is aimed at (among other things) ensuring energy security for the State, and those considerations have arguably outweighed concerns around private landholders' rights.

Another reason for the development of different systems is the potentially greater physical land disturbance from a mining project. It is generally expected that there is a much smaller footprint from petroleum activities compared to minerals extraction.

In general, petroleum and geothermal exploration activities can be reasonably accommodated with agriculture. For example, seismic studies are transient with minimal impact. Drilling is more intrusive, taking anywhere from one week to three months, but can potentially be done between cropping.

At a production stage, a well-head takes up approximately 12-60 square metres so is less disruptive in terms of agricultural pursuits than mining development. However, shale and tight gas development may have a slightly larger impact with more wellheads per acre than a conventional gas development.