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# LAND ACCESS ON PRIVATE LAND FOR MINERAL AND PETROLEUM ACTIVITIES

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A REVIEW OF EXISTING PROVISIONS IN  
AUSTRALIAN STATES/TERRITORIES  
AND  
SELECTED OVERSEAS JURISDICTIONS

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## EXECUTIVE SUMMARY

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Below is a summary of the main points relating to land access in each of the jurisdictions.

### Commonwealth

- The Commonwealth has no constitutional jurisdiction to regulate land access in relation to mineral and petroleum activities. Rather is the ambit of the states/territories.
- Nevertheless, through the *COAG Energy Council* the Commonwealth has established non-regulatory guidance tools for CSG extraction and multiple land use.
- The Commonwealth regulates water use and disposal through Matters of National Environmental Significance under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (the ‘water trigger’), although such regulation is incomplete and does not generally incorporate shale gas and other mineral activities.

### Queensland

- The Crown exercise rights over all minerals and petroleum in Queensland.
- There is a right to take water without a license under Queensland Resources Acts.
- Landowner’s rights relating to land access are divided between preliminary and advanced activities. Preliminary activities require ten days notice of entry. Advanced activities cannot occur without a Conduct and Compensation Agreement (CCA), negotiated under terms set out in the Land Access Code 2016 and stipulated in the Common Provisions Act.
- Compensation is also negotiation under the CCA, and must be set out prior to entry under land (unless a Deferral Agreement is reached).
- Where a CCA cannot be reached, it can be referred to alternative dispute resolution. If parties are still unable to reach an agreement, the matter may be referred to the Land Court for determination.

### New South Wales

- The Crown exercises all rights over petroleum, but only over some minerals. There is a mix of private and Crown ownership of minerals. This has impacted on the regulation of land access.
- The regulation of water in NSW is complex and is regulated by a combination of planning and water laws.
- Landowner’s rights relating to land access for petroleum access are set out under the Petroleum Land Access Code (PLAC).
- The PLAC also requires the negotiation of compensation, which must be agreed must prior to the commencement of activities.
- Where a Land Access agreement (including compensation) cannot be reached, it can be referred to arbitration, with the process set out under the *Land Access Arbitration Procedure*.

### Tasmania

- The Crown exercises all rights over petroleum and minerals not privately owned at the time the *Mineral Resources Development Act 1995* (Tas) came into force.
- The extraction of minerals and petroleum (except coal seam gas) is regulated under the *Mineral Resources Development Act 1995* (Tas).
- Prior to accessing a landowners land, an exploration titleholder has to provide 14 days notice. A production titleholder is required to enter into a Compensation Agreement prior to accessing private land.

- Where a Compensation Agreement cannot be agreed, the Mining Tribunal will make a determination. There are no provisions for alternative dispute resolution.

### **Victoria**

- The Crown exercises rights over all petroleum and minerals.
- The extraction of minerals and CSG is regulated under the *Mineral Resources (Sustainable Development) Act 1990* (Vic). Extraction of petroleum is regulated under the *Petroleum Act 1990* (Vic).
- A Compensation Agreement MAY be entered into for mineral activities, but MUST be entered into for petroleum activities.
- Landowner consent, a Compensation Agreement or a determination by the *Victorian Civil and Administrative Tribunal* (VCAT) is required in order for petroleum activities can occur on private land. Mining activities can occur after notice, except within 100m of a dwelling. There is a right of veto for mining activities on agricultural land in some instances.
- Where a Compensation Agreement cannot be agreed, the VCAT will make a determination. There are no provisions for alternative dispute resolution.

### **South Australia**

- The Crown exercises rights over all petroleum and minerals.
- The extraction of minerals is regulated under the *Mining Act 1971* (SA). Extraction of petroleum is regulated under the *Petroleum and Geothermal Energy Act 2000* (SA).
- An Agreement or notice is required for entry onto land in order for both mining and petroleum activities to occur
- Where an agreement cannot be reached with regard to either land access or compensation, the dispute will be referred to the Warden's Court for determination. There are no provisions for alternative dispute resolution in relation to private land.

### **Western Australia**

- The Crown exercises rights over all petroleum and minerals.
- The extraction of minerals is regulated under the *Mining Act 1978* (WA). Extraction of petroleum is regulated under the *Petroleum and Geothermal Energy Resources Act 1967* (WA).
- Under both Acts, water use is subject to the provisions of the *rights in Water and Irrigation Act 1914* (WA).
- An Agreement or notice is required for entry onto land in order for both mining and petroleum activities to occur.
- Where an agreement cannot be reached with regard to either land access or compensation, the dispute will be referred to the Warden's Court or Magistrates Court for determination.
- There are no provisions for alternative dispute resolution in relation to private land.

### **Northern Territory**

- The Crown exercises ownership rights over all petroleum, but Crown ownership over minerals varies due to land tenure.
- Land tenure is unique in the Northern territory. Private ownership of land is generally confined to cities and towns. Most other land is Crown lease or Aboriginal title.
- The extraction of minerals is regulated under the *Mineral Titles Act 2010* (NT). Extraction of petroleum is regulated under the *Petroleum Act 2011* (NT).
- The right to use water is carved out of the *Water Act* (NT) and instead regulated under minerals and petroleum legislation. There is no requirement to a water license to access water within the title area.

- An Agreement or notice is required for entry onto land in order for both mining and petroleum activities to occur on private land, although such activities are rare.
- Where an agreement cannot be reached, the matter will be determined by the Land, Planning and Mining Tribunal.

### **New Zealand**

- Mining and petroleum activities in New Zealand are regulated under the *Crown Minerals Act 1991* (NZ).
- Under the *Crown Minerals Act 1991* (NZ), ownership of both petroleum and minerals are vested in the Crown
- Water use and disposal is regulated under the *Resource Management Act 1991* (NZ).
- For a minimum impact activity, land access is granted after notice is provided. For all other activities, a land access arrangement is required.
- Compensation is payable for all present and future loss from any activity on the owners land.
- Where an agreement cannot be reached, a determination will be made through arbitration.

### **United Kingdom**

- Crown reservation over minerals only extends to gold, silver coal, oil and gas. All other minerals are privately held.
- Access to surface land is negotiated between the landholder and the licensee. There is no mandated or prescribed requirements for negotiation or compensation
- Access to underground is regulated under the *Infrastructure Act 2015*, and drilling must occur below 300m. This Act also authorizes the Secretary of State to direct companies to make payments to the owners of relevant land, or others, and to give notice of any payments and activities.
- The issue of surface land access has not really been of major concern, and is yet to have developed a functioning framework. This is expected to change given reform related to the findings of the *Task force for Shale Gas*.

### **Canada (Alberta, Manitoba and British Colombia)**

- Crown reservation over minerals and petroleum are extended through the Canadian constitution
- Water regulation is a matter for the provinces
- Access to surface land is negotiated between the landholder and the licensee in all provinces, with some variations.
- There is no ‘template’ land access agreement, although the Canadian Landsman’s lease is uniformly utilized
- All provinces require an agreement for entry and compensation for loss, and is regulated under the relevant Act.
- The calculation of compensation is complex and is generally determined by the Surface Rights Board.
- There is no use of arbitrators due to the existence of the Surface rights Board.

A Summary of the legal framework for ownership, access and compensation for all jurisdictions is found in Appendix 1.



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## BACKGROUND TO THE REPORT

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Increased interest in the development of onshore petroleum<sup>1</sup> resources in Western Australia has prompted a wave of community concern, particularly in relation to the development of unconventional petroleum resources (UPR).

In response to such community concerns the Western Australian Department of Mines and Petroleum (WADMP) commissioned the author of this report to undertake in 2011 a study of the legal framework regulating unconventional petroleum (the ‘Hunter Report’).<sup>2</sup> Acting upon recommendations made in the Hunter Report, legislative reform was undertaken, resulting in the enactment of the *Petroleum and Geothermal Energy Resources (Environment) Regulations Western Australia* (2012) (‘environment regulations’) and *Petroleum and Geothermal Energy Resources (Resource Management and Administration) Regulations Western Australia* (2015) (‘RMA regulations’). Together, these regulations established a much-strengthened legal framework for the exploration for and extraction of UPR.

However, continued opposition to the extraction of shale gas prompted the Western Australian parliament to consider the issue. On 7 August 2013, the Western Australian Parliament’s *Standing Committee on Environment and Public Affairs* resolved to inquire into and report on the *Implications for Western Australia of Hydraulic Fracturing for Unconventional Gas*. The resulting Report,<sup>3</sup> handed down in November 2015, outlines the legal framework for Western Australia, and considered the use of land access and land use.

As a consequence of the Report, the Western Australian Department of Mines and Petroleum (WADMP) established the *Western Australian Land Access Working Group* (‘the Working Group’). The Working Group seeks to undertake a review of existing provisions in Western Australian mining and petroleum legislation in relation to land access arrangements for private land, and to compare these arrangements with other jurisdictions.

This report will provide such a review.

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## SCOPE OF THE REPORT

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This report will consider access to **private land** in twelve jurisdictions, including:

- All Australian states and territories (with the exception of the Australian Capital Territory due to a lack of activity and legal framework);
- New Zealand;
- The United Kingdom (UK); and

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<sup>1</sup> Petroleum here refers to both oil and gas, and will be used in this report to denote both oil and gas exploration

<sup>2</sup> Tina Hunter, Regulation of shale, coal seam and tight gas activities in Australia: an analysis of the capacity of the Petroleum and Geothermal Energy Act 1967 (Western Australia) to regulate onshore gas activities in Western Australia (2011) <http://www.dmp.wa.gov.au/Documents/Petroleum/PD-SBD-NST-116D.pdf>

<sup>3</sup> Western Australia Standing Committee on Environment and Public Affairs (WASCEPA), *Implications for Western Australia of Hydraulic Fracturing for Unconventional Gas* (2015) [http://www.dmp.wa.gov.au/Documents/Petroleum/Report42-HydraulicFracturing\\_UnconventionalGas.pdf](http://www.dmp.wa.gov.au/Documents/Petroleum/Report42-HydraulicFracturing_UnconventionalGas.pdf).

- Canada (Alberta, Manitoba, and British Columbia)

The comparison for each of these jurisdictions will provide a succinct outline of the following (where applicable):

- Overview of legal framework;
- Land, mineral and water rights;
- Water use requirements;
- Landowner rights;
- Interaction protocols between resource companies and landowners;
- Compensation payments and agreements; and
- Dispute resolution framework

In addition, this report will identify existing template compensation agreements available.

Given the scope of this report, it is important to clearly outline what will NOT be covered in this report:

- Access to Crown Land;
- Access to land covered under the Commonwealth and State Native Title Acts;
- Access to land under Aboriginal Land Title Acts;
- Agricultural land use and agricultural interests;
- Competing land interests; and
- Multiple uses of land

Given the vast number of petroleum ‘titles’ that exist under law in the various jurisdictions, there will not be a consideration of the different titles required at different stages of activity. Rather, there will be an assumption that the titleholder holds the correct title/permit/lease/license, and therefore reference will be made to ‘the title’ and ‘the titleholder’.

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## AUSTRALIA

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### OVERVIEW

There is a common perception in Australia that the landowner enjoys an absolute right to determine precisely who may enter or remain on his or her land, and therefore is able to exercise an uncontrolled and virtually unchallengeable discretion to exclude any person from trespassing on that land.<sup>4</sup> Whilst technically correct, this common law position of rights over land and the control a landowner has over his land has been altered by Acts of Australian state and territory parliaments.

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<sup>4</sup> Kevin Gray and Susan Francis Gray, ‘The Idea of Property in Land’ in Susan Bright and John K Dewar (eds) *Land Law: Themes and Perspectives* (Oxford University Press 1998) 15-51 at 16

Australia's system of land, known as the *Doctrine of Tenure*, was incorporated into the Colony of NSW at the time of the proclamation of sovereignty in 1788.<sup>5</sup> Under this system of land, the Crown is the grantor of interests in land.

There are two common forms of interests in land granted by the Crown under the common law system of Australian states and territories: Crown leasehold interest and Freehold (private ownership) interest.

A **Crown leasehold** interest generally is a lease where the Crown, as owner of the land, leases the land for agricultural purposes. These leases (often known as pastoral leases) have been existence since the 19<sup>th</sup> Century. They were introduced as a method of securing payment for the agricultural use of government lands. They are generally either perpetual pastoral leases (ongoing), or long term (up to 99 years). Approximately two thirds of Australian land is held as Crown leasehold.

A **Freehold** (private ownership) interest is an interest in land granted by the Crown that confers ownership of land. It is the closest form of ownership to absolute ownership. Most landowners in Australia presume that they have absolute ownership over their land, and therefore the right to refuse others from coming onto their land. It is this form of landownership that will be considered in this report.

The case *Plenty v Dillon* confirmed in law that a landholder has a right to exclude others from entering their land as a trespasser.<sup>6</sup> Given this concept of trespass to land, landholders mistakenly presume that they have the right to exclude petroleum companies from entering their land. Such a presumption was highlighted in the *Management of the Murray Darling Basin Interim Report*:

For many landholders, despite understanding that they do not own the mineral resources under their land, the realization that they are legally required to give access to their land to gas exploration companies and that those companies could, for example, construct roads, clear drilling sites, build work camps, and, ultimately, construct gas production facilities, came as a profound shock.<sup>7</sup>

However, as a result of the *Doctrine of Tenure*, the fee simple landowner does not enjoy absolute ownership. Rather, he has the right to exclude all others except those whose interest in the land has been granted by the Crown. Under the *Doctrine of Tenure*, the Crown reserves rights over the land, entitling it to claim ownership in the minerals and petroleum that lie on and under freehold land. This right is known as a **Crown reservation** in respect of minerals and petroleum. The land law system in Australia, particularly the concept of Crown reservation, allows separate interests to be held over a single property. This concept, known as *fragmentation of property rights*, means that the land can be owned privately by one person (freehold) and also have a mineral/petroleum title granted over it, allowing the titleholder to explore for and produce minerals and petroleum.

## COMMONWEALTH

Under the Australian Constitution, there is no enumerated power for the Commonwealth to regulate the extraction of minerals and petroleum onshore. As such, the regulation of land access relating to the

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<sup>5</sup> For a discussion of the concept of sovereignty in Australia see *Attorney General of NSW v Brown* (1847) 2 Legge 312.

<sup>6</sup> *Plenty v Dillon* (1991) 171 CLR 635.

<sup>7</sup> Senate Standing Committee on Rural and Regional Affairs and Transport, *Management of the Murray Darling Basin Interim Report: the Impact of Mining Coal Seam Gas on the Management of the Murray Darling Basin*, 30 November, 2011, p 53.

extraction of minerals and petroleum is a matter for individual states under the ambit of the states' and territories' constitutional plenary power to make laws for the 'peace, welfare and good government' of that state or territory.<sup>8</sup> Whilst there is no constitutional capacity to regulate onshore minerals and petroleum activities, the Commonwealth has developed a number of non-regulatory tools through the COAG Energy Council:

1. The development of the [Multiple Land Use Framework](#) by the Land Access Working Group. This framework does not specifically consider land access, rather establishing a nationally consistent methodology to land use development and planning across all jurisdictions, and addresses land use challenges, expectations and opportunities through multiple and sequential land use; and
2. The [National Harmonised Regulatory Framework for Natural Gas from Coal Seams](#), 2013 (the harmonisation framework). This framework provides a suite of leading practice principles, and provides guidance to regulators in the management of gas from coals seams. It does not cover the extraction of gas from shale. The framework is not legally binding, rather 'soft law' in nature. Whilst the harmonization framework does not provide guidance for land access, it does provide extensive guidance in leading practices in the management of water issues arising from the development of CSG (but not shale gas).

The Commonwealth has the capacity to regulate water use and disposal related to onshore mineral and petroleum extraction through the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA). Whilst the EPBCA has as its ambit environmental protection, it does not apply to all mining and petroleum activities. Rather, it only applies where the activity falls into an area where referral for assessment is required under s11 of the EPBCA. This referral will be required where the activity is likely to have a significant impact on a matter of national environmental significance (MNES). Significant impact is defined as

An impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have significant impact depends on the sensitivity, value and quality of the environment which is impacted, and on the intensity, duration, magnitude and geographic extent of the impacts.<sup>9</sup>

Applicable MNES include:

1. Listed threatened species and ecological communities;
2. Migratory species protected under international agreements;
3. World heritage properties; and
4. Water resources in relation to CSG development and large coal mining developments (the 'water trigger').

It is important to note that under the 'water trigger', regulation of the use and disposal of water is confined only to the development of coal mines and CSG and does not encompass the use of water for other forms of mineral and petroleum extraction (including the use of water for shale gas extraction).

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<sup>8</sup> See for example s 2 of the *Constitution Act 1867* (Qld).

<sup>9</sup> Department of Environment, *Significant impact*, GLOSSARY, <http://www.environment.gov.au/epbc/about/glossary.html#significant> .

Under article 34 of the Intergovernmental Agreement on a National Water Initiative (NWI), the use of water for mining and petroleum purposes may require specific arrangements for the use water outside the scope of the NWI, effectively establishing a carve out of water allocation for petroleum and mining activities.

#### SUMMARY:

- The Commonwealth has no constitutional jurisdiction to regulate land access in relation to mineral and petroleum activities. Rather is the ambit of the states/territories.
- Nevertheless, through the *COAG Energy Council* the Commonwealth has established non-regulatory guidance tools for (CSG) extraction and multiple land use.
- The Commonwealth regulates water use and disposal through Matters of National Environmental Significance under the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* (the ‘water trigger’), although such regulation is incomplete and does not generally incorporate shale gas and other mineral activities.

## QUEENSLAND

### *Overview of Legal framework*

Queensland is a well-established mineral extraction jurisdiction. In addition, Queensland has led the development of CSG in Australia. There have been bitter protests and controversy surrounding such development, particularly related to land access. A Land Access Code was initially developed in 2010, and was revised in 2016.

Mineral activities are regulated under the *Mineral Resources Act 1989 (Qld)* (MRA). Crown ownership of minerals is vested in the Crown under s 8(1) of the MRA. Petroleum activities are primarily regulated under the *Petroleum and Gas (Production and Safety) Act 2004(Qld)* (PGPSA), although a small amount of titles are regulated under the *Petroleum Act 1923 (Qld)* (PA) due to legacy issues with native title. Crown ownership in petroleum is vested in the Crown under s 26 of the PGPSA.

Section 18(2) (a) of the PGPSA grants a petroleum titleholder the right to access groundwater within the applicable land. Consequently, the titleholder may take, or interfere with underground water if the taking or interference occurs during authorised activities allowed under the *Water Act 2000 (Qld)*. There is no specific limit as to the volume of water that may be taken during authorised activities.<sup>10</sup> Chapter 3 of the *Water Act 2000 (Qld)* provides the framework for managing the impacts of CSG activities on underground water resources. Where there has been impact to underground water resources, the titleholder is required to ‘Make good’ the impact of petroleum operations through ‘make good’ contractual arrangements.

Section 334ZP of the MRA entitles a mineral titleholder to take or interfere with groundwater in an area of the license or lease during the course of the carrying out of an authorised activity.

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<sup>10</sup> Petroleum and Gas (Production and Safety) Act 2004 (Qld) s185.

Land access requirements apply to all resource authorities granted, with very few exceptions, and are set out in the:

- *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) (Common Provisions Act);
- *Mineral and Energy Resources (Common Provisions) Regulation 2016* (Qld) (Common Provisions Regulations)
- Land Access Code 2016.

Section 36 of the Common Provisions Act requires all *Resource Acts* to make a Land Access Code:

*A regulation may make 1 or more codes for all (each a land access code) that—*

*(a) states best practice guidelines for communication between the holders of resource authorities and owners and occupiers of land, public land authorities and public road authorities; and*

*(b) imposes on resource authorities mandatory conditions concerning the conduct of authorised activities on land.’*

‘*Resource Acts*’ include the MRA, the PGPSA, the PA, the *Geothermal Energy Act 2010* (Qld) and the *Greenhouse Gas Storage Act 2009* (Qld).

### *Landowners rights relating to resource activities*

The land access framework (and therefore the rights of the landowner) differentiates between *preliminary* and *advanced* activities. *Preliminary* activities are those involving little or no direct impact, such as walking on land, surveying the property or taking soil samples.<sup>11</sup> Where preliminary activities are to be conducted, the resource company is required to provide an entry notice (ten days notice), indicating the land to be entered, the entry period, the activities proposed, when and where the activities are to be carried out, and contact details for the resource titleholder.

*Advanced* activities are those likely to have a significant impact, such as clearing land, constructing a road or drilling and are regulated according to the *Land Access Code 2016* (LAC). The LAC sets out best practice guidelines for communicating and negotiating with landholders (Part 2), and the mandatory conditions for conduct regarding entering a property and carrying out authorised activities on private land (Part 3, ss9-18). All resource tenements are subject to the requirement that the titleholder must comply with the mandatory provisions of the LAC, and s24A of the PGOPSA requires the titleholder to use reasonable endeavours to consult with landowners in relation to land access issues.

Section 502A of the PGPSA enables a titleholder rights of access and to conduct activities on the land that are reasonably necessary for the exercise of the title granted. An access agreement must be entered into with each owner and occupier of the land prior to any access right being exercised by a petroleum tenement holder. The PGPSA Act does not delineate any specific contents of an access agreement, other than to state that it may include a waiver of entry notice and may include a CCA.

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<sup>11</sup> Pursuant to Schedule 2 PGPSA, a ‘preliminary activity’ means an ‘authorised activity that will have no impact, or only a minor impact, on the business or land use activities of any owner or occupier of the land on which the activity is to be carried out.’ Examples include ‘walking the area of the permit or license, driving along an existing road or track in the area, taking soil or water samples, geophysical surveying not involving site preparation, aerial, electrical or environmental surveying and survey pegging.

A titleholder cannot undertake any advanced activities unless they have:

- entered into a conduct and compensation agreement (CCA) with you; or
- entered into a deferral agreement (DA) with you (allowing for a CCA to be agreed to at a later time); or
- applied to the Land Court for a decision about your compensation entitlement.

Section 108 of the PGPSA enables authorised mining activities to be carried out despite the rights of landowner on the land upon which they are exercised. In addition, landowners have limited rights of objection to entry onto private land under the *Resources Acts*. There is no general right to object to the grant of a title under the PGPSA/PA, although there is under s71 the MRA Act. However, under s734B of the PGPSA and s103A of the PA, an owner of land may require an authorised officer of the Minister to call a conference for the purposes of discussing any concerns they have in relation to any actual or proposed activities conducted on their land.

In limited circumstances, a titleholder may carry out an advanced activity without being required to enter into a CCA if one of the following exceptions applies:<sup>12</sup>

- (a) The petroleum authority holder owns the land;
- (b) The holder has a right to enter the land to carry out the activity and the right:
  - (i) Exists other than under the PGPSA); and
  - (ii) Is not under an easement;
- (c) The authority is a pipeline license and an owner's permission under s 399 has been given for the land;<sup>13</sup>
- (d) The authority is a petroleum facility license and an owner's permission has been given for the land;<sup>14</sup>
- (e) Each eligible claimant for the land is:
  - (i) A party to a deferral agreement;<sup>15</sup> or
  - (ii) An applicant or respondent to a Land Court application relating to the land; and
- (f) The entry is to preserve life or property or because of an emergency that exists or may exist.

### *Negotiation of Compensation and dispute resolution*

The negotiation of compensation is tied to the negotiation of a conduct agreement under the LAC. Once advanced activities are to commence, there is a requirement to negotiate a CCA. Under s500 of the PGPSA, a CCA must be entered into with all landowners who are *eligible* to seek compensation for the effects of the activities before the holders or an authority to prospect can enter land within a petroleum authority. The formal negotiation of a CCA commences when the titleholder gives a notice of intention to negotiate a CCA, and the negotiation process ends on the date specified in the notice, which must be at least 20 business days from the date of the notice. Reasonable legal costs associated with the negotiation of a CCA are usually borne by the titleholder.

The PGPSA Act does not restrict the terms or conditions of the CCA. However, a CCA must address the compensation liability that is owed by the titleholder to the landowner for any 'compensatable effect' including:

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<sup>12</sup> Petroleum and Gas (Production and Safety) Act 2004 (Qld) s 500A.

<sup>13</sup> Petroleum and Gas (Production and Safety) Act 2004 (Qld) s 399.

<sup>14</sup> Petroleum and Gas (Production and Safety) Act 2004 (Qld) s 439.

<sup>15</sup> The deferral agreement must comply with the requirements under s 500B of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld).

- Deprivation of the possession of the land's surface;
- Diminution of the land's value;
- Diminution of the use made of the land or any improvement on it;
- Severance of any part of the land from other parts of the land or from other land of the landowner; and
- Any cost, damage or loss arising from the carrying out of authorised activities on the land.

The CCA may cover both monetary and non-monetary forms of compensation, as well as accounting, legal and valuation costs necessarily and reasonably incurred by the landholder in negotiating the agreement.

If CCA is not reached during the negotiation process, the matter may be referred to for an alternative dispute resolution process (ADR), which is usually undertaken by an authorised government officer. The ADR process may include conciliation, mediation or negotiation. If the parties are unable to reach an agreement during the ADR process, the matter may be referred to the Land Court for determination. Usually, the titleholder will not pay the landowner's costs for the ADR or Land Court process.

#### SUMMARY:

- The Crown exercise rights over all minerals and petroleum in Queensland.
- There is a right to take water under Queensland Resources Acts.
- Landowner's rights relating to land access are divided between preliminary and advanced activities. Preliminary activities require ten days notice of entry. Advanced activities cannot occur without a Conduct and Compensation Agreement (CCA), negotiated under terms set out under the Land Access Code 2016 and stipulated in the Common Provisions Act.
- Compensation is also negotiation under the CCA, and must be set out prior to entry under land (unless a Deferral Agreement is reached).
- Where a CCA cannot be reached, it can be referred to alternative dispute resolution. If parties are still unable to reach an agreement, the matter may be referred to the Land Court for determination.

## NEW SOUTH WALES

### *Overview of Legal framework*

NSW is a well-established mineral extraction jurisdiction. It is poised to develop its extensive CSG resources, which has been the subject of bitter public conflict. As a result, there has been extensive legislative reform associated with land access, which entered into force on 1 December 2016.

Mineral resource extraction is regulated under the *Mining Act 1992* (NSW) (Mining Act). Mineral ownership in NSW varies, and may be held either privately or by the Crown, depending on when the grant of land was made. The *Crown Lands Act 1884* (NSW) provided for all grants of land issued under the Act to contain a reservation of minerals. Areas held under private mining agreements under the provisions of the mining act were repealed in 2010 with the commencement of the *Mining Amendment Act 2008* (NSW). Gold and silver, as royal minerals, remain the property of the Crown, regardless of reservations. Regardless of ownership, s5-6 of the Mining Act requires all prospecting or mining in NSW to be conducted under the appropriate authorization. Access arrangements are required under Division 2 of the Mining Act, with s141 outlining matters for which access arrangements must provide for. The *Mining and Petroleum (Land Access) Act 2010* requires all access arrangements to be in writing. To assist this, a [Land Access Arrangement for Mineral Exploration Template](#) has been developed.



Petroleum resource extraction is regulated under the *Petroleum (Onshore) Act 1991* (NSW) (Petroleum Act). All petroleum is reserved for the Crown under s6 of the Petroleum Act, and requires a title in order to explore for or extract petroleum (s7).

General land access arrangements for mining and petroleum activities are regulated under the *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015* (the LAAA) which entered into force on 1 December 2016. The LAAA establishes the rights of landowners in relation to resource activities, and significantly reformed land access to private land under the Mining Act and the Petroleum Act:

- It imposes an obligation on the prospecting titleholder to pay the reasonable costs of a landholder in negotiating, mediating and arbitrating access arrangements, except in very limited circumstances
- It imposes an obligation on the landowner and titleholder to conduct negotiations relating to land access in good faith
- Enables a land access code to be prescribed by Regulation.

The regulation of water use for mining and petroleum activities in NSW is primarily regulated under the Water Management Act 2000 (NSW) (WMA), and applies to the regulation of water licenses, water use approval, controlled activity approval and aquifer inference activity approval. The Water Act 1912 (NSW) applies where equivalent provisions in the WMA have not yet entered into force. Water use is also subject to several planning and environmental instruments, including the Environmental Planning and Assessment Act 1979 (NSW) and the Protection of the Environment Operations Act 1997 (NSW). The water framework applicable to mining and CSG extraction in NSW is summarised in the [Water Regulation Overview](#).

### *Landowners rights relating to resource activities*

Section 141 of the Mining Act establishes matters for which access arrangements are to be provided for, but does not set out any mandatory requirements. Landowner rights relating to land access for petroleum activities are set out in the Part 4A of the Petroleum Act, while s69X extends the access arrangements for prospecting titles to production leases. All activities are to be carried out in accordance with a land access arrangement. The LAAA enabled a [Petroleum Land Access Code](#) (PLAC) to be prescribed under s 69DA and 69DB of the Petroleum Act, and clause 16A of the Petroleum (Onshore) Regulation 2016 (petroleum Regulations). There is no equivalent code for mining activities.

The PLAC is divided into three sections:

1. Part A provides introductory provisions, and sets out a summary of the legislative framework for CSG activities in NSW;
2. Part B establishes a best practice framework for titleholders to negotiate land access arrangements with landholders; and
3. Part C prescribes the mandatory conditions for all land access arrangements relating to petroleum activities in NSW. These mandatory provisions are minimum conditions and apply to all land access arrangements for petroleum activities, unless agreed to in writing by all parties.

The titleholder is required under s69E (2)(a) of the Petroleum Act to pay all reasonable costs of the landowner in relation to negotiating the land access arrangement. The maximum amount of reasonable costs payable may be set by order of the Minister, however a titleholder may choose to pay over the capped amount (s 69E (2)(b) of the Petroleum Act).

### *Negotiation of compensation and dispute resolution*

Section 69D(2) of the Petroleum Act stipulates that an access arrangement must specify the compensation that is payable to each landowner. The titleholder and landowner must agree on the amount of compensation payable in respect of access and conducting petroleum activities under a land access arrangement.

If a land access agreement is unable to be reached by the end of 28 days after the titleholder notifies the landowner of the titleholder's intention to obtain a land access (including compensation) arrangement, the titleholder may, by further notice, agree to the appointment of an arbitrator under s 69F of the Petroleum Act.

Arbitration is required to address any disputes relating to land access arising under the Mining Act and or the Petroleum Act. The arbitration procedure for all land access arrangements is set out in the [Land Access Arbitration Procedure](#) (LAAP). The arbitration procedure will include negotiation, mediation, conciliation and arbitration in accordance with the LAAP and ss69F – 69M of the Petroleum Act. Under s69NA of the Petroleum Act the Arbitrator will determine the assignation of costs associated with arbitration.

#### SUMMARY

- The Crown exercises all rights over petroleum, but only over some minerals. There is a mix of private and Crown ownership of minerals. This has impacted on the regulation of land access.
- The regulation of water in NSW is complex and is regulated by a combination of planning and water laws.
- Landowner's rights relating to land access for petroleum access are set out under the Petroleum Land Access Code (PLAC).
- The PLAC also requires the negotiation of compensation, which must be agreed must prior to the commencement of activities.
- Where a Land Access agreement (including compensation) cannot be reached, it can be referred to arbitration, with the process set out under the *Land Access Arbitration Procedure*.

## TASMANIA

### *Overview of Legal framework*

Tasmania is a well-established mining jurisdiction. Mining activities are regulated under the *Mineral Resources Development Act 1995* (Tas) (MRDA). Under s 6 (1) of the MRDA, all minerals held in private ownership prior to the commencement of the MRDA continue to belong to the private owner, and any minerals not held in private ownership are vested in the Crown - s6 (2). In practice, the Crown owns most minerals in Tasmania, given that private property only comprises one quarter of all land in Tasmania.

Historically, there has been very little petroleum activity onshore. Petroleum activities are also regulated under the MRDA.<sup>16</sup> Under s 6 (4) of the MRDA, petroleum (which is defined in s3 as all hydrocarbons in liquid or gaseous state, but excludes coal seam gas) is owned by the State. A five-year moratorium on hydraulic fracturing was established in 2015.

Section 168 of the MRDA enables a titleholder to use surface water sufficient for drilling where drilling is part of a work program. The drilling of groundwater bores and entitlement/use of groundwater is regulated under the *Water Management Act 1999* (Tas).

### *Landowners rights relating to resource activities*

Under Tasmanian law prevents private landowners do not have a right to prevent mining operations on their land, although under s 15(1) of the MRDA, owners of land within a proposed exploration area can object to the grant of an exploration license over their land. This objection to exploration will not always prevent the exploration license from being granted, as the Minister has the power to authorise mining or exploration activities despite a landowner's objections.<sup>17</sup>

Whilst an exploration license can be granted despite objections from an affected landowner, access to private land to actually carry out exploration activities is subject to further restrictions. There is a requirement for notice to enter privately owned land must be given, in writing, at least 14 days prior to entry.<sup>18</sup> In addition, no exploration activities can occur within 100m of any dwelling, building, well or water body without the consent of the owner and landowners are not required to be obliged to grant such consent.<sup>19</sup>

Once consent for production has been granted under the MRDA, a titleholder can only enter onto private land to undertake the activity if there is a negotiated compensation agreement in place,<sup>20</sup> or, if a compensation agreement cannot be reached, the Mining Tribunal has made a compensation determination.<sup>21</sup> Once a compensation agreement has been concluded the landholder cannot refuse the company access.

### *Negotiation of compensation and dispute resolution*

The MRDA provides for compensation under s144-146 .The Compensation Agreement is required to be in place for production of minerals and petroleum, but is not required to undertake activities under an exploration title outlines. The agreement not only determines the amount of compensation payable, but also includes:

- A description of the location, area and commencement date of the mining activity;
- The agreed entry and exit points from the land for mining activities;
- The number and types of vehicles, plant and equipment involved; and

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<sup>16</sup> The definition of mining activities under the s 3 of the MRDA includes exploration for and extraction of petroleum.

<sup>17</sup> Mineral Resources Tasmania, *Mineral Exploration Code of Practice* (2010) p 10.

<sup>18</sup> *Mineral Resources Development Act 1995* (Tas), s23.

<sup>19</sup> *Mineral Resources Development Act 1995* (Tas), s79.

<sup>20</sup> *Mineral Resources Development Act 1995* (Tas), s84(1)(c).

<sup>21</sup> *Mineral Resources Development Act 1995* (Tas), s128.

- A description of the facilities and sanitary arrangements to be provided on the land.<sup>22</sup>

A landowner may refuse to negotiate a compensation agreement or object to a compensation determination being made. If such a refusal occurs, the Mining Tribunal will issue a compensation determination. There are no provisions for alternative dispute resolution processes in Tasmania in relation to land access and compensation.

Once the determination is made, the titleholder can enter private land to carry out mining activities, despite the landowner's objection.

#### SUMMARY

- The Crown exercises all rights over petroleum and minerals not privately owned at the time the *Mineral Resources Development Act 1995* (Tas) came into force.
- The extraction of minerals and petroleum (except coal seam gas) is regulated under the *Mineral Resources Development Act 1995* (Tas).
- Prior to accessing a landowner's land, an exploration titleholder has to provide 14 days notice. A production titleholder is required to enter into a Compensation Agreement prior to accessing private land.
- Where a Compensation Agreement cannot be agreed, the Mining Tribunal will make a determination. There are no provisions for alternative dispute resolution.

## VICTORIA

### *Overview of Legal framework*

The extraction of mineral resources and CSG is regulated under the *Mineral Resources (Sustainable Development) Act 1990* (Vic) (MRSDA). The extraction of minerals in Victoria is undertaken in a manner that is compatible with the economic, social and environmental objectives of the state.<sup>23</sup> Under s9 of the MRSDA, ownership of all minerals lies with the Crown, unless subject to a minerals exemption.

Petroleum extraction (except CSG) is administered under the *Petroleum Act 1998* (Vic) (Petroleum Act). The crown retains rights of ownership over petroleum resources under s14 of the Petroleum Act.

The *Water Act 1989* (Vic) requires a water license for the commercial use of water from waterways, springs, soaks and dams,<sup>24</sup> as well as to authorize construction or alteration of a waterway (including dams),<sup>25</sup> including on private land. The taking of ground water is subject to interstate groundwater agreements.<sup>26</sup>

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<sup>22</sup> *Mineral Resources Development Act 1995* (Tas), s145.

<sup>23</sup> *Mineral Resources (Sustainable Development) Act 1990* (Vic),

<sup>24</sup> *Water Act 1989* (Vic), s51.

<sup>25</sup> *Water Act 1989* (Vic), s64.

<sup>26</sup> *Water Act 1989* (Vic), s6.

*Landowners rights relating to resource activities*

Under s45 of the MRSDA mining activities cannot occur within 100m of a dwelling without landowners consent. If the titleholder wants to explore within 100m of a dwelling and the landowner refuses permission, the titleholder can refer the issue for review/decision to the Minister. Outside of this, landowners do not have a right to veto activities. Section 26B of the MRSDA enables the landowner of agricultural land to apply to the Minister to have that land excised from a title area (for the purposes of both exploration and extraction) where the license holder consents or the Minister decides that there is greater economic benefit to Victoria in continuing to use the land as agricultural land than in carrying out the work proposed in the license area.

With respect to petroleum activities, the titleholder cannot undertake any petroleum activities on private land without

1. the consent of the landowner; or
2. having entered into a compensation agreement with the landowner; or
3. the amount of compensation payable to the landowner has been determined by the *Victorian Civil and Administrative Tribunal (VCAT)*.<sup>27</sup>

There is no standardized land access agreement for minerals or petroleum in Victoria. Rather, the conditions of access are stipulated as part of the conditions of the operation plan in accordance with s161 of the Petroleum Act 1998 or the Authority to enter land under s38AB of the MRSDA and the Work Plan under s40 of the MRSDA. The MRSDA provides a power to make a code of practice for any part of the Act, and therefore may make a land access code if so required.

*Negotiation of compensation and dispute resolution*

Compensation for mineral activities is paid subject to Part 8 of the MRSDA, and includes loss or damage (including future loss), deprivation of possession of any part of the land, damage to the surface of the land, damage to improvements, structures, etc., severance of the land, loss of amenity, loss of opportunity, and decreased market value.<sup>28</sup> The parties may enter into a written agreement,<sup>29</sup> but are not required to do so.

Under s128 of the Petroleum Act the titleholder must enter into a compensation agreement with the landowner as condition to proceed with any petroleum activities. The compensation is payable for loss or damage (including future loss), deprivation of possession of any part of the land, damage to the surface of the land, damage to improvements, structures, severance of the land, loss of amenity, loss of opportunity, and decreased market value, in accordance with s129 of the Petroleum Act.

If no compensation agreement can be reached between the titleholder and the owner under the MRSDA or the Petroleum Act, the matter is referred to VCAT or the Victorian Supreme Court.<sup>30</sup> The determination then becomes the compensation agreement, thereby enabling the titleholder to proceed.

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<sup>27</sup> *Petroleum Act 1998 (Vic)*, s134.

<sup>28</sup> *Mineral Resources (Sustainable Development) Act 1990 (Vic)*, s85.

<sup>29</sup> *Mineral Resources (Sustainable Development) Act 1990 (Vic)*, s87.

<sup>30</sup> *Mineral Resources (Sustainable Development) Act 1990 (Vic)*, s88, *Petroleum Act 1998 (Vic)*, s136.

### SUMMARY

- The Crown exercises rights over all petroleum and minerals.
- The extraction of minerals and CSG is regulated under the *Mineral Resources (Sustainable Development) Act 1990* (Vic). Extraction of petroleum is regulated under the *Petroleum Act 1990* (Vic).
- A Compensation Agreement MAY be entered into for mineral activities, but MUST be entered into for petroleum activities.
- Landowner consent, a Compensation Agreement or a determination by the VCAT is required in order for petroleum activities can occur on private land. Mining activities can occur after notice, except within 100m of a dwelling. There is a right of veto for mining activities on agricultural land in some instances.
- Where a Compensation Agreement cannot be reached between the parties, the VCAT will make a determination. There are no provisions for alternative dispute resolution.

## SOUTH AUSTRALIA

### *Overview of Legal framework*

The extraction of mineral resources is regulated under the *Mining Act 1971* (SA) (the Mining Act). Under s16 of the Mining Act, ownership of all minerals is reserved for the Crown.

Petroleum activities are administered under the *Petroleum and Geothermal Energy Act 2000* (SA) (PGEA). Property in petroleum is vested in the Crown under s4 of the PGEA.

Water extraction and use for mining and petroleum activities is regulated under the *Natural Resources Management Act 2004* (SA) (NRMA). Within *Prescribed Water Resource Areas* (where water resources are at risk), all water use requires a legal authorization (usually a water license).<sup>31</sup> A water authorization is not required outside *Prescribed Water Resource Areas*, although there is a duty to adhere to the principles in the relevant regional NRMA plan, there is no significant impact to water-dependent ecosystems due to operations, the quality/quantity of water supply to existing users is maintained, and there is no ongoing net liability to the SA government. Mining titleholders are also responsible for sourcing their own water consistent with Action 48 of the *Water for Good Plan*.

### *Landowners rights relating to resource activities*

Titleholder entry onto private land to undertake mining activities in accordance with the provisions of the title is authorised under s57 of the Mining Act. This entry can only occur where is an agreement between the titleholder and the landowner (s58). A notice period of 21 days is required prior to entry onto the land.<sup>32</sup> If there is no agreement, the landowner has the right to object to entry onto the land or the use of the land for mining operations within 3 months of the notice to the Warden's Court,<sup>33</sup> which will make a determination.

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<sup>31</sup> *Natural Resources Management Act 2004* (SA) s124, s127, s128.

<sup>32</sup> *Mining Act 1971* (SA), s58A.

<sup>33</sup> *Mining Act 1971* (SA), s58A.

The PGEA enables titleholders to enter land to undertake activities, but also recognises landowner rights. Regulation 22 of the *Petroleum and Geothermal Energy Regulations* (SA) establishes obligations for titleholders to meet and consult with landowners, and to provide information for informed decision-making about the impact of the activity on the land

Under s60 of the PGEA, a titleholder is entitled to enter any land for authorised activities. This entry must not occur until a prescribed notice is given to the landholder 21 days before entry.<sup>34</sup> Once given, no further notice is required unless the activities differ significantly in nature or extent from those described in the previous notice.<sup>35</sup> Where entry is disputed, a landowner may lodge a notice of objection within 14 days of a titleholders notice to enter, the Minister may attempt to mediate, or the dispute will be sent to the Warden’s Court for resolution.<sup>36</sup>

### *Negotiation of compensation and dispute resolution*

The landowner is entitled to compensation for mining activities pursuant to s61 of the Mining Act. Compensation shall be paid for any economic loss, hardship and inconvenience suffered as a consequence of the mining activities. In determining compensation, consideration is given to damage to the land, loss of productivity/profits, and costs incurred in connection to any negotiation or dispute related to land access or mining activities. The amount of the compensation is to be agreed between the titleholder and the landowner. Where agreement as to the amount of compensation cannot be reached, the Mine Warden’s Court will determine the amount of compensation payable.

Section 63 of the PGEA establishes a landowner’s right to compensation from a titleholder, and includes deprivation or impairment of the use and enjoyment of the land; damage to the land (not including damage that has been made good by the licensee); damage to, or disturbance of, any business or other activity lawfully conducted on the land; consequential loss suffered or incurred by the owner on account of the licensee entering the land and carrying out regulated activities under the PGEA.

Under the PGEA, if a landowner objects to the titleholder’s entry, the landowner can lodge a notice of objection indicating a dispute has arisen. The relevant Minister may mediate the dispute to arrive at ‘mutually satisfactory terms’ to carry out authorised petroleum activities.<sup>37</sup> Where a dispute is not resolved, the titleholder or owner may apply to the Warden’s Court for a resolution of the dispute. The Warden’s Court will then determine the terms on which the titleholder may enter and carry out regulated activities on the land.<sup>38</sup>

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<sup>34</sup> *Petroleum and Geothermal Energy Act* s 61.

<sup>35</sup> *Petroleum and Geothermal Energy Act* s 61

<sup>36</sup> *Petroleum and Geothermal Energy Act* s 61

<sup>37</sup> *Petroleum and Geothermal Energy Act* s 62(4)

<sup>38</sup> *Petroleum and Geothermal Energy Act* s 62(6)

### SUMMARY

- The Crown exercises rights over all petroleum and minerals.
- The extraction of minerals is regulated under the *Mining Act 1971* (SA). Extraction of petroleum is regulated under the *Petroleum and Geothermal Energy Act 2000* (SA).
- An Agreement or notice is required for entry onto land in order for both mining and petroleum activities to occur.
- Where an agreement cannot be reached with regard to either land access or compensation, the dispute will be referred to the Warden's Court for determination.
- There are no provisions for alternative dispute resolution in relation to private land.

## WESTERN AUSTRALIA

### *Overview of legal framework*

Mineral extraction in Western Australia is regulated under the *Mining Act 1978* (WA). According to s9(1)(a) of the Mining Act, all gold silver and precious metal on or below the ground is the property of the Crown. In addition, all other minerals on or below the surface not under private ownership prior to 1 January 1899 are also the property of the Crown.<sup>39</sup> In practicality, this means that most minerals are the property of the Crown.

Under both the Mining Act (s8) and PGERA (s5) private land means any land other than Commonwealth land, and includes a lease or concession other than a Crown lease.

Petroleum extraction is regulated under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) (PGERA) in Western Australia. Pursuant to s10 of PGERA, in Western Australia the Crown owns all of the petroleum under the land,<sup>40</sup> and has the right grant a title to a titleholder) to explore for and/or produce petroleum.

For the purposes of mining activities under the mining act, a titleholder has the right to take and divert water subject to the *Rights in Water and Irrigation Act 1914* (WA), and in conjunction with the relevant provisions in the Mining Act for each title type. Similarly, s 7(3) of PGERA requires that the taking or use of water for the purposes of any petroleum activity under a title be subject to the *Rights in Water and Irrigation Act 1914* (WA) (RIWI).

### *Landowners rights relating to resource activities*

Section 29 of the Mining Act authorizes the granting of a title over private land, subject to certain limitations,<sup>41</sup> and the right of the titleholder to enter the land. For some activities, the titleholder is required under s31 to provide a copy of the title granted (the permit) to the landholder on the first occasion that the titleholder enters the land after the issue of the permit in order to enter the land. The

<sup>39</sup> Mining Act 1978 (WA), s9(1)(b).

<sup>40</sup> *Petroleum and Geothermal Energy Resources Energy Act 1967* (WA), s9

<sup>41</sup> *Petroleum and Geothermal Energy Resources Energy Act 1967* (WA), s29(2).



Mining Act 1978 requires the written consent of both the owners and occupiers of the land before an exploration or mining tenement can be granted on land regularly used for agricultural purposes including cropping and grazing. This consent only applies to land down to 30 metres below the natural surface of that private land.

Mining operations cannot commence prior to the parties reaching a compensation agreement or an agreement is determined by the court determination of compensation for the landowner.<sup>42</sup>

Under section 10 of the PGERA, titleholders have a legal right to access to the property, subject to the provisions outlined in sections 16-20 of the PGERA. Sections 14 and 15 of PGERA provide the titleholder with the right to enter the title area, upon the approval and consent of the Minister. Section 16(1) of the PGERA requires a titleholder to gain the written permission of the landowner prior to entry into the title area where the property is less than 2000m<sup>2</sup> in area, burial grounds and cemeteries, and within 150m of reservoirs or substantial improvements.

Under s20 of PGERA the titleholder must not commence operations on private land until compensation between the titleholder and the landowner are agreed. Whilst the landowner cannot deny a titleholder access to the land, (except land referred to in s16 of PGERA), the titleholder must first obtain consent in writing and negotiate a compensation agreement.

### *Negotiation of compensation and dispute resolution*

Compensation requirements in respect of mining activities are set out in PART VII of the Mining Act. Section 123 entitles the landowner to compensation for loss and damage suffered or likely to be suffered as a result of the mining activities.<sup>43</sup> The amount of such compensation is determined by agreement of the parties. However if an agreement cannot be reached, then the Warden's Court shall determine the amount of compensation to be paid by the titleholder,<sup>44</sup> taking into account matters outlined in s124

With respect to petroleum activities, s17 of PGERA entitles the landowner to an amount of compensation to be paid by the titleholder for the right to occupy the land, deprivation of possession of the surface of the land (in part or full), damage to the surface of the land or any improvements on the land, severance of the land from other land of the owner, loss of rights-of-way, and all consequential damages. In addition, if land adjoining or in the vicinity of the title area is injured or depreciated in value by the titleholder's activities, the owner of the damaged land is entitled to compensation for all loss and damage sustained.<sup>45</sup> The compensation amount is ascertained in accordance with section 17 of the PGERA. In the first instance the landholder and the titleholder should negotiate the amount of compensation to be paid. However, where the parties are unable to agree on the amount of compensation to be paid, either the landowner or the titleholder has the right to apply to the nearest Magistrates Court to determine the amount of compensation<sup>46</sup> Until the amount of compensation has been tendered or agreed upon, the titleholder is unable to commence any operations upon the private land (s 20(1) of PGERA).

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<sup>42</sup> *Petroleum and Geothermal Energy Resources Energy Act 1967 (WA)*, s35.

<sup>43</sup> The details of such loss is set out in s123(4) of the *Mining Act 1978 (WA)*.

<sup>44</sup> *Mining Act 18978 (WA)*, s123(3).

<sup>45</sup> *Petroleum and Geothermal Energy Resources Energy Act 1967 (WA)*, s18.

<sup>46</sup> *Petroleum and Geothermal Energy Resources Energy Act 1967 (WA)*, s17(4)

### SUMMARY

- The Crown exercises rights over all petroleum and minerals.
- The extraction of minerals is regulated under the *Mining Act 1978* (WA). Extraction of petroleum is regulated under the *Petroleum and Geothermal Energy Resources Act 1967* (WA).
- Under both Acts, water use is subject to the provisions of the *rights in Water and Irrigation Act 1914* (WA)
- An Agreement or notice is required for entry onto land in order for both mining and petroleum activities to occur
- Where an agreement cannot be reached with regard to either land access or compensation, the dispute will be referred to the Warden’s Court or Magistrates Court for determination.
- There are no provisions for alternative dispute resolution in relation to private land.

## NORTHERN TERRITORY

### *Overview of Legal framework*

In the Northern Territory NT, most private land is restricted to cities and towns. Outside of urban areas around half of all land is aboriginal title land, and the other half is Crown land. Access to land in the NT is regulated pursuant to the *Mineral Titles Act 2010* (NT) (MTA), and access to land to undertake a petroleum activity is regulated under the *Petroleum Act 2011* (NT). Under s6 of the Petroleum Act, property in petroleum is vested in the Crown. The MTA does not make a Crown reservation over minerals in the NT.

Under s7 of the *Water Act* (NT), mining and petroleum activities are exempt from the restrictions regarding the taking of water and the control of pollution in a mining area under ss15 and 16 respectively of the Water Act. Pursuant to ss81-82 the MTA, a titleholder has the right to take or divert water, sink a well or bore, and take water from a bore to use in connection with authorised activities that occur on the title land. Under the s29 2(d) of the Petroleum Act, an exploration permit confers the right to use the water resources within the title area for any approved purpose. The rights conferred under a production licence under section 56 of the Petroleum Act include a general right to use water resources for activities connected to approved works programmes (s29(2)(d)).

### *Landowners rights relating to resource activities*

Each application for the grant of a mineral title must include a list of landowners and the applicant must serve notice of the application on any landowners within 14 days of making an application.<sup>47</sup> Following the service of the notice, the titleholder is required to provide evidence of the service to the Minister within 14 days of the date of service.<sup>48</sup> Pursuant to s17 of the MTA, a person may enter land to conduct preliminary exploration in accordance with Part 2 of the MRTA. Under s21 of the MTA landowner

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<sup>47</sup> *Mineral Titles Act 2010* (NT) s66

<sup>48</sup> *Mineral Titles Act 2010* (NT) s66(4)

consent is required in relation to preliminary activities on private land, and where consent is granted the landowner may impose reasonable conditions in the entry and use of the land. The landowner may not withhold consent for preliminary activities and any dispute may be referred to the Land, Planning and Mining Tribunal (LPMT).

Regarding petroleum activities, whilst a titleholder is required to initiate and maintain regular contact with the landowner, there are no specific provisions setting out land access arrangements for private land. Rather, it is a matter for private negotiations between the affected parties. Mandatory land access requirements are limited to requirements on aboriginal and pastoral lease land. To assist in land access negotiations the NT government has developed the *Onshore Oil and Gas Guiding Principles*

### *Negotiation of compensation and dispute resolution*

Under s107 of the MTA, a landowner is entitled to compensation from a titleholder if the land or improvements on the land are damaged due to activities conducted under the mineral title. A titleholder and landowner may enter into written agreement concerning the compensation payable. If the compensation cannot be agreed, a claimant may apply to the Tribunal for a determination.<sup>109</sup>

Where there is a dispute relating to access and compensation, an agreement can be reached by mediation or, if not possible, by the decision of the Tribunal subject to the power of the Minister to make a decision in the interests of the Territory in the absence of agreement.<sup>49</sup>

#### SUMMARY

- The Crown exercises rights over all petroleum, but crown control varies over minerals due to land tenure.
- Land tenure is unique in the Northern territory. Private ownership of land is generally confined to cities and towns. Most other land is Crown lease or Aboriginal title.
- The extraction of minerals is regulated under the *Mineral Titles Act 2010* (NT). Extraction of petroleum is regulated under the *Petroleum Act 2011* (NT).
- The right to use water is carved out of the *Water Act* (NT) and instead regulated under minerals and petroleum legislation. There is no requirement to a water license to access water within the title area.
- An Agreement or notice is required for entry onto land in order for both mining and petroleum activities to occur on private land, although such activities are rare.
- Where an agreement cannot be reached, the matter will be determined by the Land, Planning and Mining Tribunal.

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<sup>49</sup> *Petroleum Act 2011* (NT) Part 11A.

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## OVERSEAS JURISDICTIONS

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### NEW ZEALAND

#### *Overview of Legal framework*

In New Zealand, both mining and petroleum activities are regulated under the *Crown Minerals Act 1991* (NZ) (CMA). Ownership of petroleum is vested in the crown under s10 of the CMA, while ownership in minerals is vested in the crown pursuant to s11 of the CMA. As such, mining and petroleum activities in New Zealand will be considered as a single activity and not differentiated.

The use of water for mining and petroleum activities is regulated under the *Resource Management Act 1991* (NZ). Pursuant to s13 (beds of lakes and rivers) and 14 (water) the titleholder cannot take water without a resource consent, or if permitted under a regional plan.

#### *Landowners rights relating to resource activities*

Under s49 (2) of the CMA, a titleholder has the right to enter onto the land to undertake a minimum impact activity without written consent provided at least 10 working days notice has been given.<sup>50</sup> Minimum impact activity is defined in s2 of the CMA.

Land access for mining and petroleum is regulated under ss53-80 of the CMA. The granting of a title to a titleholder for mining and petroleum activities, other than minimal impact activities, does not grant an automatic right of access to the land.<sup>51</sup> For petroleum activities, pursuant to s53 of the CMA access to land can only be gained after an access agreement has made. An access agreement must be made between the titleholder and the landowner within 60 days from the commencement of negotiations. If an agreement cannot be reached, an arbitrator, in accordance with s55 and 66 of the CMA will determine an agreement. Access to land for mineral activities is reached in accordance with s54 of the CMA. Similar to the conditions for petroleum, and agreement must be made within 60 days of negotiations commencing, or an arbitrator will determine access arrangements. Once arrangements are made the agreement is binding on the landowner (s83) who must comply with the conditions of access (s77). The agreement also binds all successors in title (s83).

#### *Negotiation of compensation and dispute resolution*

Compensation for activities carried out by a titleholder on a landowner's land is regulated under s76 of the CMA. Compensation is paid for all losses (including future loss, and includes reasonable costs in relation to legal and valuer's fees, loss of income, and losses associated with compliance/monitoring

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<sup>50</sup> *Crown Minerals Act 1991* (NZ), s49(3).

<sup>51</sup> *Crown Minerals Act 1991* (NZ), s47.

associated with the access arrangements.<sup>52</sup> The factors to be taken into account when assessing the amount of compensation are laid out in s76(2) of the CMA. Similar to land access arrangements, where agreement cannot be reached between the titleholder and the landowner, an arbitrator can determine the amount of compensation pursuant to s76 of the CMA.

For both access arrangements and calculation of an agreed sum of compensation, where a dispute between the landowner and the titleholder occurs, an arbitrator rather than a court determines the matter.

#### SUMMARY

- Mining and petroleum activities in New Zealand are regulated under the *Crown Minerals Act 1991* (NZ).
- Under the *Crown Minerals Act 1991* (NZ), ownership of both petroleum and minerals are vested in the Crown
- Water use and disposal is regulated under the *Resource Management Act 1991* (NZ).
- For a minimum impact activity, land access is granted after notice is provided. For all other activities, a land access arrangement is required.
- Compensation is payable for all present and future loss from any activity on the owners land.
- Where an agreement cannot be reached, a determination will be made through arbitration.

## UNITED KINGDOM

### *Overview of legal framework*

Under the common law of England and Wales, the landowner owns all mines and minerals underneath the soil of a land. Minerals are defined in the Town and Country Planning Act 1990 as ‘all substances of a kind ordinarily worked for removal by underground or surface working, except that it does not include peat cut for purposes other than for sale’. There is a presumption that the surface owner of the land owns all the minerals in the underlying strata, with the exception of gold and silver. The royal prerogative to the royal metals of gold and silver was declared in *R v. Earl of Northumberland*<sup>53</sup> (known as the *Case of Mines*) when Queen Elizabeth I was concerned about Crown revenue at a time of conflict, particularly with Spain.

This common law position regarding ownership of minerals in the UK (which presumably included petroleum) was altered by statute in 1934, when ownership of oil and gas onshore in the United Kingdom was vested in the Crown by the *Petroleum (Production) Act 1934*. Under section 1(1) of this Act, ‘*the property in petroleum existing in its natural condition in strata in Great Britain is hereby vested in His Majesty, and His Majesty shale have the exclusive right of searching and boring for and getting such petroleum.*’

Crown ownership of petroleum that was granted under the 1934 Act was retained under the *Petroleum Act 1998*, and which granted the crown the exclusive onshore and offshore right of ‘*searching and boring for*

<sup>52</sup> *Crown Minerals Act 1991* (NZ), s76(1).

<sup>53</sup> *R v Earl of Northumberland* (1568) 1 Plowden 310.

*and getting petroleum*’, which continues today. This right does not extend to other minerals with the exception of coal, which has been owned by the Coal Authority since 1994.

Under section 7(1) of the *Petroleum Act 1998* (UK), the *Mines (Working Facilities and Support) Act 1966* applies in England, Wales and Scotland to enable a licensee to acquire ancillary rights to assist with the development of the PEDL. Such ancillary rights include access rights that encompass entry onto the land to undertake drilling operations, and drilling under the land.

Access to and use of water is governed by the *Water Act 2014*. This access and use is part of the Environment approval that is required before drilling can occur. The permissioning, volume and conditions of access vary according to location and water source (surface versus groundwater). There is yet to be a clear policy or Legal framework regarding water access and use for shale gas extraction due to the infant nature of the industry (confined to two exploration wells in 2012, with two exploration wells approved in late 2016).

### *Landowners rights relating to resource activities*

Given that all minerals, with the exception of oil, gas, coal, and royal metals are privately owned, access to drill for minerals is not regulated under legislation, and is instead subject to negotiated agreement by the landowner and landholder.

In order to undertake any shale gas activities, it is essential that the license holder (of a Petroleum Exploration and Development (PEDL) license) secure access to the land, both on the surface and underground.

#### Surface Access

The right of a PEDL license holder to enter onto private land to undertake drilling operations are obtained by private negotiation. However, the permission to enter onto private land can also be granted by the court if it is not reasonably practicable to obtain them by private negotiation.

Aside from securing permission to enter onto private land to undertake shale drilling operations, companies are required to inform local residents on an affected area of their intention to undertake hydraulic fracturing activities prior to seeking planning permission.<sup>54</sup> Planning permission is also required to drill on land, and is regulated subject to the *Town and Country Planning Act 1990, (UK)* and is required prior to the Department of Energy and Climate Change (DECC) granting consent for drilling or production. The decision to allow drilling is made in accordance with the [National Planning Policy Framework](#) (NPPF) and the National Planning Practice Guidance (NPPG).

Recognising community concerns in relation to the impacts of shale gas on the community as well as the land, the United Kingdom Onshore Operators Group (UKOOG) launched the Shale [Community Engagement Charter](#) (the Charter) in June 2013, with a revision in 2015. The Charter outline steps the industry will take to address concerns around safety, noise, dust, truck movements and other environmental issues, as well as how titleholders will communicate and engage with the community in all

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<sup>54</sup> DECC, Onshore oil and gas regulation in the UK: regulation and best practice, Wales, December 2013 [accessed 16 February 2015].

areas of concern. Under the Charter, the UKOOG seeks to identify and proactively address local issues and concerns, facilitate sustainable development of extractive resources, and achieve an appropriate balance between safe energy production and community need. Based on these objectives, the Charter promises to engage with individuals and organisations in the community from an early stage, to provide compensation to the local community at a rate of £100,000 per well site where HF takes place. Furthermore, the Charter promises to share the proceeds of production at a rate of 1% of revenue, split 2/3:1/3 between local community and county level. In addition to the industry-based Charter, the Office of Unconventional Gas and Oil is responsible for ensuring that the local communities benefit from shale gas development in the area.

It is important to note that community engagement and surface access may alter as a result of the implementation of the findings of the final report of the *Task Force for Shale Gas*.

### **Underground Access**

Under the system of landownership, license holders do not have an automatic right to drill under landowners' property, and require prior permission to undertake such drilling. If permission is refused, then license holders can apply through the Secretary of State and courts to gain access. However, this has been seen as cumbersome, with land access seen as a real barrier to the development of shale gas.

The issue of surface land access has paled in comparison to that of underground access. The need to reform the land access regime was seen as critical after the landmark case of *Star Energy Weald Basin Ltd & Anor v. Bocado SA*,<sup>55</sup> which found that Star Energy had committed trespass to land by drilling and installing pipelines under Bocado's land, even though the wells were 950 – 2800 feet below the surface. The decision affirmed the view that the landowner owns the land and that any activity under a landholder's land, whatever the depth, will constitute trespass. Therefore, in order to avoid committing trespass, the license holder is required to come to an agreement with the landholder or apply to a court for an ancillary right pursuant to the *Petroleum Act 1998* and the *Mines (Working Facilities and Support) Act 1966*.

Access reform was effected by the *Infrastructure Act 2015*, which grants the right to use deep-level onshore land below 300m to exploit petroleum and geothermal energy (s43). The 'use' includes drilling, boring, fracturing, installing and maintaining infrastructure, passing any substance through the land, and keeping or removing any substance put into deep-level land or infrastructure in deep-level land (s44).

Similar to surface access, it is possible that further regulatory reform to underground access may occur as a result of the implementation of the findings of the final report of the *Task Force for Shale Gas*.

### *Negotiation of compensation and dispute resolution*

For surface land access the interested parties, through private negotiation, negotiate compensation. There are no mandated requirements for this negotiation, levels of compensation, or dispute resolution. Where access consent is unreasonably withheld, there is the capacity to gain access through the court.

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<sup>55</sup> *Star Energy Weald Basin Ltd & Anor v. Bocado SA* [2010] UKSC 35.

Section 45 of the *Infrastructure Act 2015* authorizes the Secretary of State to direct relevant companies to make payments to owners of relevant land or other persons for the benefit of areas in which the relevant land is situated.<sup>56</sup> Furthermore, the company is required to give notice of any payments and activities.

#### SUMMARY

- Crown reservation over minerals only extends to gold, silver coal, oil and gas. All other minerals are privately held.
- Access to surface land is negotiated between the landholder and the licensee. There is no mandated or prescribed requirements for negotiation or compensation
- Access to underground is regulated under the *Infrastructure Act 2015*, and drilling must occur below 300m. This Act also authorizes the Secretary of State to direct companies to make payments to the owners of relevant land, or others, and to give notice of any payments and activities.
- The issue of surface land access has not really been of major concern, and is yet to have developed a functioning framework. This is expected to change given reform related to the findings of the *Task force for Shale Gas*.

#### CANADA

The legal framework for land access and compensation for mining and petroleum activities between a landowner and titleholder is complex as a result of landownership structure and indigenous land rights. In addition, many of the requirements for access and compensation exist at federal rather than province level as such, the following examination will be divided into minerals and petroleum, and each of the provinces considered within those divisions.

#### Minerals

Pursuant to the *Constitution Act, 1867*, ownership of mines and minerals is vested in the provinces where they are found, subject to any other interests or trusts.<sup>57</sup> In interpreting which minerals are included in a Crown reservation, the legislation is only one factor to be considered. The specific grant may use the words “mines and minerals” in broader terms than the legislation.<sup>58</sup> A reservation of mineral rights to the Crown is not invalidated by the fact that the Crown grant is subject to certain placer mining leases.<sup>59</sup>

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<sup>56</sup> *Infrastructure Act 2015*, s 45.

<sup>57</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 109.

<sup>58</sup> *Canada Cement Lafarge Ltd. v. Manitoba*, [1990] M.J. No. 565.

<sup>59</sup> *Absorbent Products Ltd. v. 623819 B.C. Ltd.*, [2007] B.C.J. No. 425.



### *Access and compensation*

In Alberta, British Columbia and Manitoba consent of the owner and occupant of the surface land or an order of the Surface Rights Board or Mining Board must be obtained in order to exercise a right of entry for the removal of minerals or to conduct mining operations.<sup>60</sup>

In Alberta and Manitoba, where consent of the owner and titleholder cannot be obtained, the Surface Rights Board or Mining Board may grant a right of entry order.<sup>61</sup> The Board is required to give reasons for its decision.<sup>62</sup> The sufficiency of the reasons is addressed by the Federal Court of Appeal as follows:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.<sup>63</sup>

However, the insufficiency of reasons does not automatically render the tribunal's conclusion unreasonable.<sup>64</sup>

Compensation must be paid where a titleholder causes injury or damage to the surface area. Compensation is not limited to loss or damage to land or improvements, but may be awarded to compensate the owner for “inconvenience”,<sup>65</sup> for frustration of the owner's legitimate development plans, or loss of aesthetic enjoyment.<sup>66</sup> The principles governing the determination of compensation for expropriation do not apply in determining compensation payable for entry under mineral statutes.

In Alberta and Manitoba, compensation may be determined by the *Mining Board* or the *Surface Rights Board*. In British Columbia, a Surface Rights Board determines compensation issues if the chief gold commissioner is unable to do so.<sup>67</sup>

### **Alberta**

Unless ministerial permission is obtained, mining work must be authorized by the *Mines and Minerals Act* or an “agreement”.<sup>68</sup> An agreement is an instrument issued pursuant to the Act that grants rights in respect of a mineral or subsurface reservoir.<sup>69,70</sup> The Minister may cancel the agreement if there is a

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<sup>60</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 12(1) (AB); *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, s. 19 (BC); and (MB) *Mines and Minerals Act*, C.C.S.M. c. M162, s. 154(1).

<sup>61</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 15 (AB); *Mines and Minerals Act*, C.C.S.M. c. M162, s. 155(1) and (MB) *Surface Rights Act*, C.C.S.M. c. S235, s. 16(1) (MB).

<sup>62</sup> *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.*, [2008] A.J. No. 30.

<sup>63</sup> *VIA Rail Canada Inc. v. Lemonde*, [2000] F.C.J. No. 1685 at para. 22.

<sup>64</sup> *Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.*, [2008] A.J. No. 30.

<sup>65</sup> *Gardi v. Bow River Resources Ltd.*, [1973] B.C.J. No. 856. In this case, compensation was payable for 40 hours' work necessitated by the entry of neighbouring cattle on to the owner's land after the miner's entry and subsequent disruption of the grazing of the owner's cattle.

<sup>66</sup> *Cofrin v. Bicchieri*, [1977] B.C.J. No. 1082.

<sup>67</sup> *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, s. 19(3) and (4) (BC).

<sup>68</sup> *Mines and Minerals Act*, R.S.A. 2000, c. M-17, s. 54(1) and (5) (AB).

<sup>69</sup> *Mines and Minerals Act*, R.S.A. 2000, c. M-17, s. 1(1) (AB).

<sup>70</sup> *Mines and Minerals Act*, R.S.A. 2000, c. M-17, ss. 5(1)(e) (AB).

breach or failure to comply with the Act or regulations.<sup>71</sup> When an agreement expires or is surrendered or cancelled, the ownership of any mine or quarry becomes vested in the Crown.<sup>72</sup> Further, consent is not required to survey or examine the surface land, but a reasonable attempt to give notice must be made, and compensation must be paid for any damage caused.<sup>73</sup> A secondary mineral lease may be issued for five years, renewable for a term of five years, permitting the lessee to recover minerals by way of surface operations. With some exceptions, an entry fee is payable on private land, and the appropriate Board will order compensation based on factors enumerated in the legislation.<sup>74</sup> These factors will not normally include a consideration of previous compensation agreements in the area where such agreements were bolstered by unusually high “signing bonuses”. This is because compensation is meant to ensure that the landowner is made whole, and not to enrich to a degree that is unfair to the titleholder.<sup>75</sup> Where compensation is not paid, the titleholder's rights under a right of entry order may be terminated, and the compensation may be paid by the government, which amount constitutes a debt owing to the Crown.<sup>76</sup>

Where compensation is payable on a periodic basis, provision is made for review of the rate of compensation. A titleholder must provide notice within 30 days after the fourth anniversary of the right of entry order advising the other party of the right to have the compensation reviewed. If the titleholder fails to provide the notice, the other party may, within a reasonable time after the failure, provide notice that it intends to seek a compensation review.<sup>77</sup> A “reasonable time” is a question of fact, depending on all the circumstances. One year into the next compensation period may be considered a reasonable time, and two years may be reasonable depending on the circumstances. However, where the notice is given four years into the next five-year compensation period, or where the compensation period has already expired, no review may be allowed.<sup>78</sup> Provision is also made for the termination of right of entry orders.<sup>79</sup> After a right of entry order has been terminated, an owner is no longer entitled to apply for past compensation reviews.

### **Manitoba**

In Manitoba, an owner of mining lands is entitled to compensation for damage done to mineral exploration workings or claim posts, line posts, tags or surveyed boundary markers delineating mining lands.<sup>80</sup> A titleholder may enter into an agreement with a landowner to pay compensation for any damage or likely damage to the land. Such an agreement may be registered against the land, and affords a complete answer to any action for damages or for an injunction respecting a matter for which compensation has been made.<sup>81</sup>

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<sup>71</sup> *Mines and Minerals Act*, R.S.A. 2000, c. M-17, ss. 5(1)(e) (AB); Mines and Minerals Administration Regulation, Alta. Reg. 262/97, s. 20 (AB).

<sup>72</sup> *Mines and Minerals Act*, R.S.A. 2000, c. M-17, s. 32(1) (AB).

<sup>73</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 14 (AB).

<sup>74</sup><sup>74</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 19, 21 and 25 (AB).

<sup>75</sup> *MacArthur v. Blue Mountain Energy Ltd.*, [2006] A.J. No. 831.

<sup>76</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 36 (AB).

<sup>77</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 27 (AB).

<sup>78</sup> *Fishing Lake Metis Settlement v. Metis Settlements Appeal Tribunal Land Access Panel*, [2003] A.J. No. 563.

<sup>79</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 28 (AB).

<sup>80</sup> *Mines and Minerals Act*, C.C.S.M. c. M162, s. 153(1) (MB).

<sup>81</sup> *Mining and Metallurgy Compensation Act*, C.C.S.M. c. M190, Part III (MB).

## British Columbia

In British Columbia, subject to exceptions where prescribed terms and conditions are met, no mining activity may be done until the titleholder obtains a permit under the *Mines Act*.<sup>82</sup> In some cases, the holder of a mining lease may acquire the surface rights from the government. Notice must be given before any mining activity may be commenced on private land. The *Mining Right of Way Act* permits the titleholder to use an existing road on private land for mining purposes, which include exploration, development and transportation.<sup>83</sup> However, in order for the Act to apply, the road in question must have been built under a statutory enactment susceptible to some measure of statutory regulation. Accordingly, a private roadway that was not built under a statute is not subject to such use.<sup>84</sup>

### *Petroleum*

Pursuant to the *Constitution Act, 1867*, ownership of petroleum is also vested in the provinces where they are found, subject to any other interests or trusts.<sup>85</sup> The National Energy Board (“NEB”) was established in 1959 by the Parliament of Canada as an independent federal agency to regulate international and interprovincial aspects of the oil, gas and electric utility industries. The governing legislation is the *National Energy Board Act*.<sup>86</sup>

Since 1993, the government of the province of Alberta and the federal government have established a framework for conducting joint panel reviews through the Canada-Alberta Agreement on Environmental Assessment Cooperation. This agreement guides federal-provincial cooperation for the environmental assessment of major resource development projects in Alberta that require both federal and provincial environmental approvals, permits and licenses, and incorporates water rights.

The freehold petroleum and natural gas lease is the document which governs the relationship between a freehold owner of mineral rights and a party contracting to exploit and develop the petroleum and natural gas and related substances owned by the freehold owner. The standard freehold petroleum and natural gas lease in use in the oil and gas industry in Canada is the Canadian Association of Petroleum Landmen (CAPL) lease, which enjoys almost universal acceptance in the industry.

### *Right of Entry Order and compensation*

## Alberta

The scheme of the *Surface Rights Act* (Alberta)<sup>87</sup> precludes an titleholder<sup>88</sup> from a right of entry with respect to the surface of any land for the removal of minerals or drilling operations until the titleholder has obtained the consent of the owner and the occupant<sup>89</sup> of the surface of the land or has become entitled to a right of entry by reason of an order of the Surface Rights Board. Where the surface of the land is

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<sup>82</sup> *Mines Act*, R.S.B.C. 1996, c. 293, s. 10 (BC); *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, s. 14(2) (BC).

<sup>83</sup> *Mining Right of Way Act*, R.S.B.C. 1996, c. 294, s. 10 (BC).

<sup>84</sup> *Imasco Minerals Inc. v. Vonk*, [2009] B.C.J. No. 430/

<sup>85</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 109.

<sup>86</sup> R.S.C. 1985, c. N-7 (CAN).

<sup>87</sup> R.S.A. 2000, c. S-24 (AB).

<sup>88</sup> R.S.A. 2000, c. S-24 (AB).

<sup>89</sup> *Surface Rights Act* R.S.A. 2000, c. S-24, s. 1(g) (AB).

required by the titleholder for an approved purpose, and the titleholder cannot acquire the consent of the owner and occupant, the titleholder can apply to the Surface Rights Board for a Right of Entry Order.<sup>90</sup> When granted, the right of entry order vests in the titleholder the exclusive right, title and interest in the surface of the land in respect of which the order is granted.<sup>91</sup> The Surface Rights Board is directed to give notice to the titleholder and each respondent of a date of a hearing to be held to determine the amount of compensation payable and the persons to whom it is payable. And finally, the factors to be taken into account by the Surface Rights Board in determining compensation include the loss of use by an occupant of the area granted to the titleholder, the adverse effect of the area granted to the titleholder on the remaining land of the occupant, and the nuisance, inconvenience or noise that might be caused by or arise from or in connection with the operations of the titleholder and any other factors the Surface Rights Board considers proper under the circumstances.<sup>92</sup>

The process whereby the compensation to be paid for surface leases that provide for payment of compensation on an annual or other periodic basis or compensation orders is set forth in the *Surface Rights Act*. The *Surface Rights Act* breaks all surface leases into five year time periods and sets out a requirement that the titleholder notify the owner of the review process approximately one year prior to the end of each five-year time period.<sup>93</sup> If the titleholder and the owner are unable to reach an agreement on the rental to be paid for the next five-year time period, there is a process by which either the titleholder or the owner can submit the matter to the Surface Rights Board for a hearing. If the titleholder forgets or fails to provide notice to the owner, the owner may within a reasonable time period after such failure notify the titleholder that they wish to have the rate of compensation reviewed, and again, if the titleholder and the owner are unable to agree upon the rental amount, the matter can be submitted to the Surface Rights Board.<sup>94</sup> If the parties follow the review process set forth in the *Surface Rights Act* and reach agreement concerning the rental to be paid for the surface lease for the relevant five-year term, they are precluded from making an application to the Surface Rights Board for a hearing to determine the rate of compensation.

If the parties to a surface rights agreement enter into an amending agreement that does not comply with the review requirements of the *Surface Rights Act*, the amendment is effective.<sup>95</sup> However, the parties are not entitled to amend the “review date”, “effective date” or “date the leased commenced” for the purposes of the review requirements under the *Surface Rights Act*. So although the parties may reach agreement concerning rental compensation outside the terms of s. 27 of the *Surface Rights Act*, the parties are not then precluded from applying to the Surface Rights Board to review the surface rental.

Although the Surface Rights Board is not bound by the formality of judicial procedure and not bound by formal rules of evidence,<sup>96</sup> a hearing before it is nonetheless the functional equivalent of a judicial or

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<sup>90</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 15(1) (AB).

<sup>91</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 16(1) (AB).

<sup>92</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 25(1) (AB).

<sup>93</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 27(4)(a) (AB).

<sup>94</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 27(15) (AB).

<sup>95</sup> *Shepstone v. Alberta (Surface Rights Board)*, [2000] A.J. No. 1449.

<sup>96</sup> *Surface Rights Act*, R.S.A. 2000, c. S-24, s. 8(3)(a) and (b) (AB).

quasi-judicial proceeding. In determining the compensation to be paid for surface rights, the legislation sets forth various heads of compensation (which may or shall be considered). Compensation orders can be appealed in Alberta as to the amount of compensation payable or the person to whom the compensation is payable.

The *Surface Rights Act* includes a mechanism whereby the Surface Rights Board can direct the Crown to pay to the person entitled to receive the money, any amounts payable but not paid under a compensation order or surface lease.

### **British Columbia**

The *Oil and Gas Activities Act* (OGAA) and the *Petroleum and Natural Gas Act* (PNGA)<sup>97</sup> applies to petroleum and natural gas rights that are the property of the British Columbia Crown.

Prior to submitting an application to the British Columbia Oil and Gas Commission for an oil and gas activity permit, an applicant must conduct public consultations and/or notifications – formalised engagement processes allowing potentially affected parties to express concerns about how the applicant’s proposed oil and gas activity may affect them. Consultation is a vital, two-way exchange of information, allowing for the opportunity to voice concerns and work to resolve any issues prior to the screening of an application. If required, Landowner Liaisons within the Commission’s Community Relations department are available to gather information from affected parties and applicants to assist with dispute facilitation. This facilitation may be as simple as prompting the exchange of additional information to providing neutral mediation between parties.

A key component of a notification package is a statement advising the owner they have a 21-day window to object to or suggest modifications to the proposed activity. Additional descriptions of the nature and extent of foreseeable noise, dust, traffic, and odours that will be caused by the proposed activities are also provided, along with any measures that will be taken to mitigate these quality of life impacts. To calculate whether potentially affected parties fall within a consultation or notification radius, an applicant takes into account the nature and location of their proposed activity, as outlined in the Consultation and Notification Regulation (CNR) under OGAA. Where persons are located within a notification radius, an applicant is obligated to provide them with written notification regarding their application. Notices must include the applicant’s contact information, a description of their proposed activities, and the approximate order in which they plan to carry the activities out.

If an application is approved, the Commission will notify the landowner that an oil and gas permit has been issued. The titleholder must wait 15 days from the permit approval date before commencing activity unless the landowner has consented in writing that they may begin prior to the end of the 15 day wait period. Pursuant to section 25 of OGAA, when a permit is issued and the Commission provides the landowner notice of the permit, the Commission must also let the landowner know they can appeal the permit decision. As per section 72 of OGAA, the landowner has 15 days from the date of permit approval to file an appeal on the Commission’s permit decision with the Oil and Gas Appeal Tribunal or the Surface Rights Commission, whichever has jurisdictions over the matter

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<sup>97</sup> R.S.B.C. 1996, c. 361 (BC).

## Manitoba

The Surface Rights Board is a quasi-judicial body made up of a minimum of three members appointed by the province. The Board is charged with administering and enforcing *The Surface Rights Act* and one of its main functions is to determine compensation where the parties are unable to agree. The Board has the authority to gather, or have gathered for its use, any information deemed necessary to fulfil this role. The Board is an impartial body, responsible for hearing all sides, and from the evidence, making decisions within the framework of *The Surface Rights Act (The Act)*.

In Manitoba, a large majority of the leases between titleholder and owners/occupants result from free and open negotiations. The lease agreed upon legally secures for the titleholder the surface of the land for extracting minerals. In return, the titleholder will compensate the owner or occupant for loss of the land used in connection with mineral extraction. Compensation will be in the form of a “first year payment” and subsequent “annual payments” for the balance of the lease. An employee or agent of the company holding the mineral rights will approach the landowner with a surface lease. This will have a sketch or map attached to it which shows the area the company wishes to lease, and also shows the compensation that the company is prepared to pay for the surface rights. *The Surface Rights Act* specifically requires a minimum of three (3) days before a Surface lease can be signed by the owner/occupant and is meant to ensure the landowner has time to consider the offer made and to obtain advice, if necessary. This time period may be waived by owner.

An owner may apply to the Board for a determination of any dispute that may arise in regards to the surface rights that are required, compensation for surface rights, interpretation of a lease or agreement, the exercise of any right or the performance of any obligation under a lease or agreement, or any other matters where *The Act* authorizes an application

If an owner refuses to allow access the titleholder has the right to apply to the Board for a Right of Entry Order. The Board will verify that the titleholder has the rights and, as such, is entitled to explore for and develop those rights. There is usually little to dispute in this area. The time and costs of a hearing can be avoided if the parties agree that the titleholder is the party entitled to exercise the mineral rights. The owner/occupant may then wish to consent to the titleholder entering the lands, subject to payment of satisfactory interim compensation before consent is granted. If such an arrangement cannot be made, the Board will arrange an early hearing date or arrange for mediation.

*The Act* states that where parties are unable to agree upon compensation, the Board shall determine the amount payable. The court has recognized the use in the industry of two methods of calculation of compensation. The “empirical” method applies a value to each factor set out in Section 26(1) of *The Act*. The “global” method is more widely used because it is recognized that it is difficult to assess and quantify accurately each factor set forth in Section 26(1). Using this method, the Board looks at whether a proposed site is a typical well site. A typical well site is one that does not present any special conditions that would make it unduly costly for a farmer to farm the land on which the site is located, and is within the Manitoba average of between two and four acres. The Board relies heavily on freely negotiated comparable leases as a proxy to determine the market value of a surface lease.

### SUMMARY

- Crown reservation over minerals and petroleum are extended through the Canadian constitution
- Water regulation is a matter for the provinces
- Access to surface land is negotiated between the landholder and the licensee in all provinces, with some variations.
- There is no ‘template’ land access agreement, although the Canadian Landsman’s lease is uniformly utilized
- All provinces require an agreement for entry and compensation for loss, and is regulated under the relevant Act.
- The calculation of compensation is complex and is generally determined by the Surface Rights Board.
- There is no use of arbitrators due to the presence of the Surface rights Board.

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## TEMPLATE COMPENSATION AGREEMENTS FOR LAND ACCESS

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### WESTERN AUSTRALIA

APPEA/WAFF/PGA/vegetablesWA – [Farming Land Access Agreement Template](#), 2015

A code of conduct for the owners of farming properties and persons exploring or mining on private (agricultural) land in the central great southern, September 1999

### QUEENSLAND

#### [Land Access Code 2016](#)

A template agreement for CCAs was developed by the Newman Government in 2010 to fulfill requirements under the LAC 2010. However, there is no template agreement for CCAs under the LAC 2016.

### NSW

#### [Petroleum land access Code of Practice](#)

#### [Land Access Arrangement for Mineral Exploration](#) .

### UK

#### UKOOG - [Community Engagement Charter](#)

### CANADA

Canadian Association of Petroleum Landmen (CAPL) - [Leases \(various\)](#)





## APPENDIX 1

Summary of rights, compensation, access and dispute resolution in jurisdictions of study

	QLD	NSW	Tas	Vic	SA	WA	NT	NZ	UK	CAN (AB)	CAN (BC)	CAN (MB)
Crown reservation of minerals	X	some	X	X	X	X		X		X	X	X
Crown reservation of petroleum	X	X	X	X	X	X	X	X	X	X	X	X
Water authority required/ regulated under water act		X	X	X	X	X	X	X	X			
Legal requirements for land access agreement on surface	X	X	X	X	X	X	X	X	X	X	X	
Mandatory land access requirements (set out in code/legislation)/ or standardized interaction protocol	X	X										
Legal requirements for land access agreement subsoil									X			
Compensation paid - Surface	X	X	X	X	X	X	X	X	X	X	X	X
Compensation paid - Subsoil									X			
Dispute resolution - Court	X	X	X	X	X	X	X	X	X		X	X
Alternative Dispute Resolution	X	X								X		