

# THE LAND

## Land access law ‘terrifying’

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TERRIFYING. Biased. Unjust. Not the words a landholder wants to hear describing the laws standing between him and unfettered access to his property for coal and gas exploration.

Unfortunately, that's the assessment from lawyers who have dedicated themselves to the difficult task of representing NSW's rural landholders when the resources sector knocks on the door.

A review of the laws was commissioned in April and public submissions have been received.

The Land understands recommendations will be handed down and made public in the coming weeks.

Regional stakeholders hope sweeping changes will be recommended to balance the system, which they say is skewed toward the resources sector.

In April, NSW Resources Minister Anthony Roberts announced senior counsel Bret Walker would conduct a review into the controversial laws.

Mr Roberts said perceptions of lack of transparency, consistency and "perceived conflicts of interest" within the process had prompted the review.

Retired Family Court judge Ian Coleman SC, has returned to the Bar to work as a barrister representing landholders in negotiations with mining and gas exploration companies.

"In large measure I was motivated by what I saw happening," Mr Coleman said.

"The arbitration process is slanted in favour of the mining companies."

First on his list of "realistically achievable" reforms would be to make legal qualifications compulsory for government-appointed arbitrators who preside over a formal process to determine an explorer's access conditions.

Arbitrators are selected from a panel appointed by the resources minister.

Not all have formal legal qualifications and Mr Coleman said it showed.

Some arbitrators were retired senior counsels “who are superb”, Mr Coleman said. But others “don’t understand the complexity of the matters”.

The decision-making process in arbitration can involve complicated legal arguments with significant consequences.

“There are some judges who hear cases that are no more complex,” Mr Coleman said.

Arbitrators’ rulings are “like a contract”, he said.

The only recourse for an unhappy landowner is to appeal to the Land and Environment Court, with the prospect of exorbitant legal costs.

Mr Coleman also wants to see a guaranteed right to legal representation during arbitration hearings.

Currently, a landowner can have their lawyer present if the explorer consents.

This can create an imbalance, as companies often have representation with legal expertise, sometimes a lawyer on a sabbatical, to represent them in hearings.

Lastly, Mr Coleman said landowners’ costs should be covered by the explorer.

Currently, the explorer only covers the cost of the arbitration process.

The cost of legal counsel, expert advice from agronomists, and so on, is borne by the landowner.

Mary Lou Potts runs a private practice and has advised about 50 clients in land access negotiations.

Her experience has formed her bleak view of land access laws.

“The current system, in my view, is truly a travesty of justice,” Ms Potts said.

An explorer could seek access before it had all the appropriate approvals, leaving the landowner with the choice of paying for legal advice or relying on their wits to negotiate access for exploration that might never occur, she said.

“A landholder potentially could spend \$100,000 during arbitration, which could run for several years and in the end it might turn out that the miner doesn’t get approval or it doesn’t even undertake the exploration,” she said.

Risks and costs were pushed onto the landholder, Ms Potts said.

One clear point of law is explorers must not have an impact on significant improvements on a property, such as dams, valuable work or infrastructure, such as buildings, banks and so on.

However, Ms Potts said it was common for an explorer to contest what constitutes a significant improvement, citing a current battle over a six-strand electrified boundary fence as an example.

Even those who know the system are intimidated by it.

Mr Coleman owns a small farm near Rylstone, which is covered by a coal seam gas exploration licence.

“I dread the day the licence holder comes here to explore,” he said.

“I have been a barrister for 40 years, and it terrifies me.”