



Southern Highlands Coal Action Group

Presentation on

Hume Coal seeking access

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Summary of presentation

- Access arrangements - purpose, content, process in the Mining Act, representation and costs. When access arrangements should be refused
- Landholder improvements: Dwelling houses, gardens and significant improvements (s31 Mining Act), how to protect these
- Miner obligations: REFs, approvals, agricultural impact statements, insurances (PLI and EPI), aquifer access licence and aquifer interference approval
- Types of access arrangement: Template and SCHAG's access arrangement
- Questions

Part 8 Division 2 of the Mining Act (NSW) 1992

Access Arrangements

- Process: notice, negotiation, conciliation and arbitration (by an agreed arbitrator or by a panel arbitrator), arbitration by the Land and Environment Court (ss 142, 143, 144, 145, 147, 148, 149, 150, 151, 155 Mining Act)
- The miner can deny the landholder the right of legal representation in the conciliation and arbitration process, but the landholder may have an agent (s146)
- Costs: each party pay their own and miner must pay the arbitrator's costs (s152)

Access Arrangements

Access arrangement - content and effect (ss 140 & 141)

- The miner must not carry out prospecting operations except in accordance with an access arrangement (s140)
- Access arrangement is either agreed or determined by an arbitrator
- The DG has released, with the concurrence of the NSW Farmers Association and the NSW Minerals Council a template (**Template**). The use of the template is not mandatory. The Template is available at <http://www.resources.nsw.gov.au/landholder-information/template-for-land-access>
- SHCAG has had drafted an access arrangement for use by all landholders in AUTH349, which aims at protecting landholders rights (**SHCAG Access Arrangement**)
- The hierarchy of documents is the Act, the regs, the conditions of the prospecting title, then the terms of the access arrangement in the event of an inconsistency. Can negotiate a higher standard but not a lower standard.

Access Arrangements

Access arrangement - content and effect (ss 140 & 141)

- Access arrangement is a contract between the landholder and the miner
- It is the vehicle for the landholder to protect their land. The primary remedies are in contract and under the Mining Act eg s141(4) allows a landholder to deny access where the miner is in breach of the access arrangement
- Access can be refused where it is established there is no reason to drill on the land (*Brown v CMA* (2010) 76 NSWLR 473 @ [109])
- Access should be refused on flood prone sites (Brown [111])
- Access should be refused if there is inadequate protection for the property (Brown [118])
- Both the Template and the SHCAG Access arrangement are structured in the form of an **umbrella agreement** - similar to a legal retainer. There are a set of overriding provisions which apply to each “Deed of Entry” or “Access and Activity Deed (AAD)” relating to the specific activities the miner wishes to undertake
- This structure allows a landholder to specify and limit the activity and disturbance to their land, eg if a miner only wishes to drill a core hole (4 weeks) the AAD ensures the miner is in and out in 4 weeks and that is the end of the miner’s activity until the miner seeks to undertake a new activity, in which event, a new AAD needs to be negotiated

Landholder protections in Mining Act

Dwelling houses, gardens and significant improvements

s31 Mining Act

- No prospecting or mining on areas delineated by s31 and s62 respectively without landholder consent, if consent given it is irrevocable under the Act
- s31 Prospecting: The holder of an exploration licence may not exercise any of the rights conferred by the Licence over the surface of any land:
 - on which or within a prescribed distance (200m) of which is situate a dwelling house
 - on which or within a prescribed distance (50m) of which is situate a garden
 - on which is situate any significant improvement
- except with the written consent of the owner of the dwelling house, garden or improvement

Landholder protections in Mining Act

Dwelling houses, gardens and significant improvements

s31 Mining Act

- written consent given is irrevocable. **Beware** language in access arrangements which says “minimise any damage to buildings, improvements crops, trees, paths of entry”. This would be irrevocable waiver of s31 protections.
- Ulan case (NSWSC) gives further clarity on improvements to include airstrips, public roads, roads that are maintained and surfaced, fences, small catchment areas for dams, and there is argument to include crops under valuation legislation.
- If a dispute arises any party may apply to the LEC for a determination

Obligations of the miner

REFs, agricultural impact statements, approvals, insurances (PLI and EPI)

- A miner does not have a presumptuous or unfettered right of access [*Hume v Alexander [2012] LEC*]
- A miner must have title which covers your property
- Must have the necessary approvals to undertake the work it intends to undertake
- Must comply with those approvals in undertaking the work
- eg Hume may only undertake the approved REF work and only in compliance with that REF and approval.
- Water Management Act requires an aquifer access licence to be in place when >3ml/annum/title is taken - query whether they have already exceeded this limit?
- Water Management Act also arguably requires an aquifer interference approval to be in place before drilling into an aquifer
- numerous other regulatory requirements depending upon the land in question

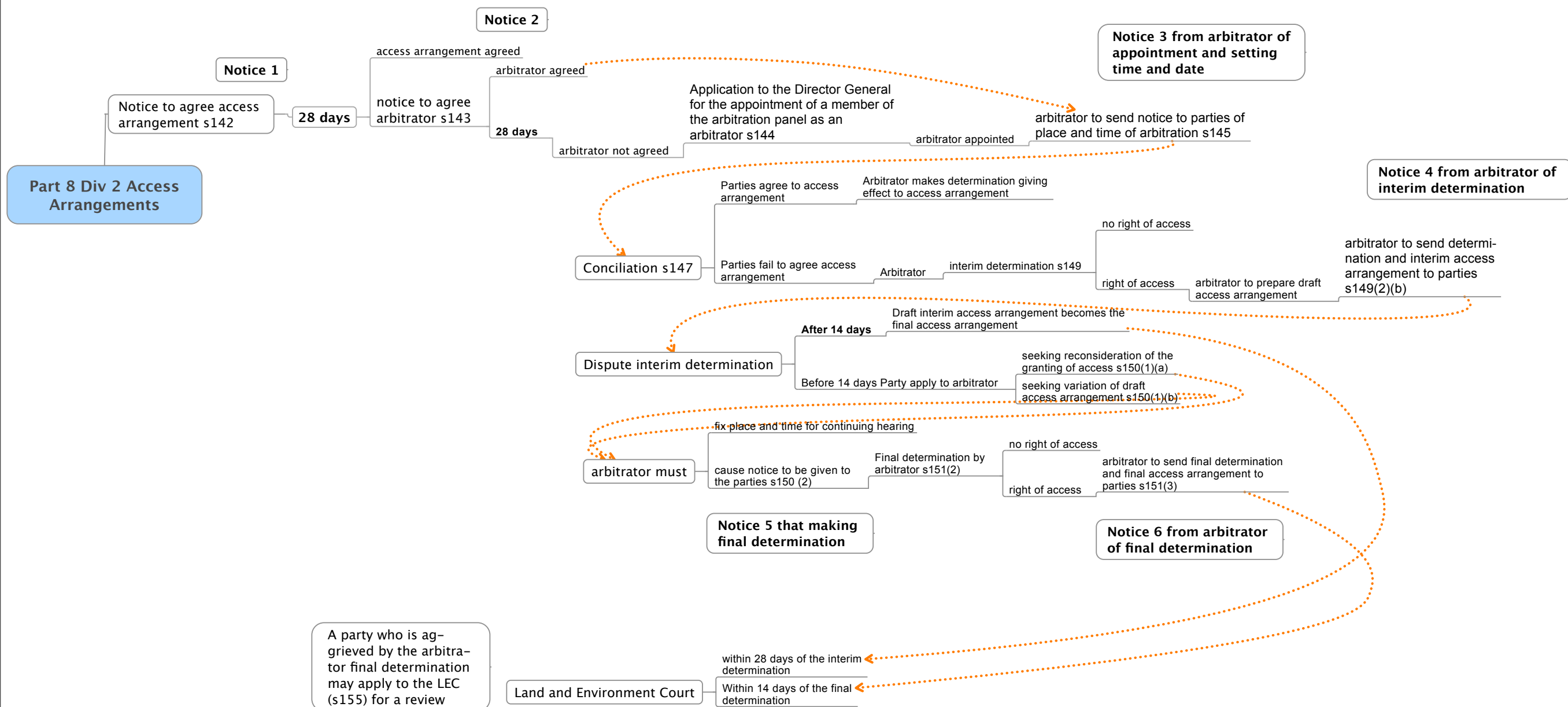
Landholder protection

s383C General immunity of landholders

- The landholder of any land, within which any person is authorised to exercise any power or right (the miner): under the Act; or, by an authority, is not subject to any action, liability, claim or demand arising as a consequence of the miner's acts or omissions in the exercise or purported exercise of any such power or right
- **Beware** this is not an indemnity, it is a defense. To be compensated for any such action an indemnity would also be required in the access arrangement and from the Miner

Access Arrangements

Process



Arbitration process

Right of legal representation (s146)

- No automatic right of legal representation
- Reciprocal right to deny legal representation in the arbitration process
- Yet the miner cannot deny Landholder right of an **agent** to represent them

Arbitration costs (s152)

- The Miner pays the costs of the arbitrator (s152)
- Each party pays its own costs in relation to the hearing (s152). We would argue this section also applies in relation to applications made to the LEC for a review of the arbitrator's determination under s155

Access Arrangements

Template

Comments and issues

- Great care needs to be taken with the Template, it is ripe for misapplication
- As an umbrella agreement, “Prospecting area” and “Paths of Entry” should be defined in and confined to the Deed of Entry, otherwise defeats purpose of Deed of Entry for particular activities
- “Improvements” and protection of improvements need to be clearly articulated, if not and under the current draft Template arguably lose legislative protection irrevocably (s31(3)). Rephrase clause 6.1 and 6.2 to state no activity on s31 protected areas, rather than minimal damage.
- Delete clause 7 do not need to agree on this
- Clause 9 Amend to require Environmental Protection Insurance (EPI). Public Liability Insurance (PLI) does not often cover pollution or contamination events
- Rephrase clause 10 to ensure “compensable loss” in accordance with the terms of the Act

Access Arrangements

Template

- Rephrase clause 11 to require compliance with the Mining Act, the Regulations, the title, any approval, and the law, allowing for denial of access if breach.
- Clause 12 Amend to ensure rehabilitation is mandatory. Define “rehabilitation” as restoration to pre exploration conditions
- Clause 13 Amend to require an expert to inspect the rehabilitated site
- Clause 16.3 The 14 days is an unreasonably short period of time to attempt to negotiate the Deed of Entry
- Clause 18 Delete force majeure clause as provides an excuse for the miner to say damage caused by act of god

Access Arrangements

Template

- Annexure B This should be a map of the property (rather than the “prospecting area”) and needs to set out the baseline position of the property
- EG Annexure B should set out: dwelling houses + 200 m perimeter, gardens + 50m perimeter, the agricultural land, the sensitive areas, existing bores, creeks, rivers, improvements: contour banks, dams, irrigation channels, graded banks, levees, water disposal areas, soil conservation work, fence lines, gates, styles, all structures, all utility lines and easements, tracks, roads, hedges and state no access to or on this land
- Baseline data essential to establish compensable loss and breach (both of the Access Arrangement and the exploration licence). It is essential to then have that baseline continuously monitored to ensure no breach, and preferably by an independent agronomist, hydrogeologist, valuer, doctor, veterinarian, noise consultant, air quality consultant, environmental scientist (this is in the SHCAG access arrangement but not in the Template)

Access Arrangements

Template

- Annexure C Farm protocols: Refer to the Code of Practice previously determined by the NSW Farmers Association and the NSW Minerals Council (in the SHCAG access arrangement but not in the Template)
- Annexure E Compensation: the object of compensation should begin with the principle that the landholder and the property should be no worse off as a consequence of the miner seeking and undertaking prospecting operations
- Annexure D Special conditions: Requiring a personal guarantee from the directors of the Miner if the Miner is insubstantial (Rosane Pty Ltd); Requiring ultimate holding company guarantee (CMA and BHP), Requiring the provision of a security (as is done in construction contracts to ensure ready availability of funds to fix breaches)
- Annexure F Deed of Entry - should be specific to particular activity

SHCAG access arrangement

summary

- Umbrella Agreement - term continues into the Mining Lease phase as no statutory right requiring the miner to enter into an access arrangement in the Mining Lease phase
- Purpose to protect the landholder by utilising the landholder protections under the Mining Act and other applicable legislation
- Principle is to minimise impact on landholder and maximise control, whilst ensuring landholder no worse off financially and the property is properly protected and rehabilitated
- None of the provisions are outlandish and all have practical, case law or legislative basis

SHCAG access arrangement

Terms

- Baseline data collection before prospecting occurs, essential to establish compensable loss and proper rehabilitation and breach
- Access only with appropriate insurance in place: PLI and EPI
- Access only if all approvals are in place and all complied with
- Access only after receipt of Security and Guarantee (Rosane)
- Protection of restricted areas, sensitive areas and agricultural land
- Process for agreement of access and activity deeds to ensure landholder has all the information from the miner, and AAD is in accordance with approvals
- Environmental protection in accordance with specialist advice

SHCAG access arrangement

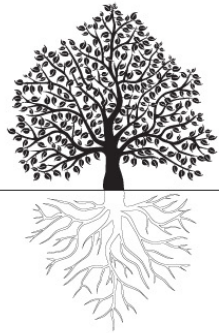
Terms

- Miner indemnifies the landholder for any loss
- Mitigation measures in accordance with specialist advice
- Rehabilitation in accordance with specialist advice
- Specialist advice paid for by miner as part of compensable loss, it is necessarily consequential to establishing the loss (s262)
- Events of default clearly specified to easily enable denial of access
- If dispute have expert determination of compensable loss and default price
- Reporting to ensure landholder aware of what miner contemplating on landholders land

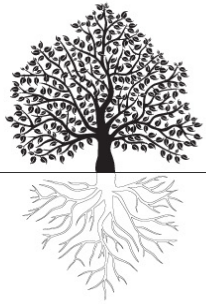
SHCAG access arrangement

Terms

- Schedule 1 Contacts and specialists
- Schedule 2: Map setting out baseline position
- Schedule 3: Access and Activity Deed
- Schedule 4: Aerial photo
- Schedule 5: Compensable loss: according to Act and the activities in the title
- Schedule 6: Warranties
- Schedule 7: Security
- Schedule 8: Guarantee
- Schedule 9: Code of Conduct



Questions?



Thank you

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- This presentation represents a brief summary of the law as at January 2013 relating to Mining Act. It should not be relied upon as definitive, complete or conclusive. It is not legal advice.