



# fact sheet



NEW SOUTH WALES  
ABORIGINAL LAND COUNCIL

## Mining exploration activities in NSW

The NSW Aboriginal Land Council (NSWALC) is aware of concerns that have been raised by Local Aboriginal Land Councils (LALCs) across the State in relation to mining exploration activities. The below information provides general information for LALCs in relation to mining exploration and some issues LALCs may wish to consider.

**IMPORTANT NOTE:** This document primarily relates to mining *exploration* activities. If someone wishes to undertake other mining activities there are separate approval, notification and consultation processes that need to take place.

Please also note: while all care has been taken in the preparation of this document, it should not be seen as a substitute for independent consideration of the issues and/or legal advice on this subject. This document is current as of June 2011.

**Recent Government announcements:** The NSW Government has recently announced transitional arrangements in relation to coal, coal seam gas and petroleum exploration licenses in response to concerns over land use conflicts.<sup>i</sup> These arrangements include:

- A 60 day moratorium on issuing coal, coal seam gas and petroleum exploration licenses which commenced on 3 May 2011; and
- Thereafter, a requirement that all applications for coal, coal seam gas, and petroleum exploration licences be exhibited for public comment. Further details of this proposal and when it is due to commence are yet to be announced by the Government.

### Mining exploration and Aboriginal culture and heritage

Under the NSW Aboriginal culture and heritage laws, those wishing to undertake mining activities can be issued with an Aboriginal Heritage Impact Permit (AHIP) which authorises harm or damage to culture and heritage items. In addition ***some mining exploration activities are designated as 'low impact' activities<sup>ii</sup> which may offer a defence if Aboriginal heritage is harmed*** without such authorisations. These activities include costeaning, bulk sampling and drilling in certain circumstances.

Additionally, compliance with an approved due diligence 'Code of Practice' can also offer a defence for other activities where Aboriginal heritage is harmed<sup>iii</sup>. The Minerals Industry has such a Code of Practice of their own<sup>iv</sup>.

There are however **actions that can be taken to increase protections for Aboriginal culture and heritage** including applying for protection of sites under the State and Federal Heritage laws, and writing to the Minister/s responsible for approving the mining activities to raise your concerns. Please refer to NSWALC Site Protection Fact Sheets available on the 'Culture and Heritage' pages of the NSWALC website: [www.alc.org.au](http://www.alc.org.au).

### What are mining exploration activities?

In NSW, mining activities for minerals are mainly covered by the *Mining Act 1992* and the *Environmental Planning and Assessment Act 1979*.<sup>v</sup>

Mining exploration activities can include excavations, drilling holes, sampling of substances such as rocks, soil, water and stream

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sediment, building access tracks, and rehabilitation works.

Under the *Mining Act*, mining exploration licences may be granted over land of any title or tenure,<sup>vi</sup> and allow the licence holder to explore for minerals over a particular area of land.<sup>vii</sup> Exploration licences do not permit mining and do not guarantee that a mining lease will be granted. Exploration licences are typically granted and renewed for periods not exceeding five years,<sup>viii</sup> and can cover areas of up to hundreds of square kilometres.

All exploration and mining activity in NSW must be conducted under an authority from Department of Trade and Investment, Regional Infrastructure and Services (DTIRIS), the State Government department responsible for mineral resources.<sup>ix</sup>

#### **Do LALCs have to be notified about mining exploration activities?**

Unless you own the land on which mining exploration activities are proposed, or are a registered native title claimant, there are currently no rights for LALCs to be specifically notified.

There is a **general public notice requirement** for the applicant of a mining exploration license to place a notice in a newspaper circulating generally in the State and in at least one newspaper circulating in the locality of the proposed exploration area after lodging an application for an exploration license.<sup>x</sup>

**Registered Native Title claimants** may have rights to negotiate in regards to mining and exploration-related activities, including “low impact” exploration as provided for under the *NSW Mining Act 1992*.

Again, please note that the Government has announced that they will be requiring coal, coal seam gas, and petroleum exploration licences to be exhibited for public comment. However, further details about this proposal are still to be released.

#### **How can LALCs keep informed about mining activities?**

LALCs should **check local newspapers** for public notifications.

DTIRIS produces monthly title status reports that provide updated lists of current, granted, and expired coal, mineral and petroleum titles and applications in NSW. **LALCs are encouraged to check title status reports to monitor exploration and mining title/tenement activity in their region.** These reports are available online at: <http://www.dpi.nsw.gov.au/minerals/titles/status-reports>.

**LALCs can also check the online minerals mapping and search facilities available on the DTIRIS website** that allow members of the public to search an interactive database of exploration reports, geological maps and plans, as well as accessing and viewing titles and mapping information across NSW. These facilities are available online at: <http://www.dpi.nsw.gov.au/minerals/titles/online-services>

Such information can also be accessed by contacting the Department of Trade and Investment, Regional Infrastructure and Services on 1300 736 122; ask to speak with someone about mining exploration or mineral resources.

#### **Mining and the Aboriginal Land Rights Act**

Under Part 3 of the *Aboriginal Land Rights Act 1983 (ALRA)*, mining operations, including exploration activities, that take place on land vested in an Aboriginal Land Council (other than mining activities in respect of gold, silver, coal or petroleum) require the consent of that Council’s members and the approval of NSWALC or the Land and Environment Court.

This mechanism may provide some protection against unwanted exploration or mining activities on land vested in a LALC (provided the activities do not relate to gold, silver, coal or petroleum).<sup>xi</sup>

## What should LALCs do if mining exploration activities are proposed on LALC land?

First, determine what type of mineral the proposed exploration activity is in search of.

If the proposed mining exploration activities are in respect of any mineral other than gold, silver, coal or petroleum, Part 3 of the ALRA may apply, which requires the consent of a LALC's members and approval of the NSWALC or the Land and Environment Court for the undertaking of such activities.<sup>xii</sup>

In situations where part 3 of the ALRA does not apply, access to a landholder's land, including land vested in a LALC, will be in accordance with the *Mining Act 1992*. In these situations, before carrying out any activities for the exploration of minerals under an exploration licence or assessment lease on privately-owned land, the holder of the exploration title must enter into an access arrangement with the **landholder**, including a LALC.<sup>xiii</sup>

Where no agreement can be reached, an arbitrator can resolve the matter.<sup>xiv</sup> A party who is dissatisfied with an arbitrator's final determination can appeal to the Land and Environment Court.<sup>xv</sup>

An access arrangement can make provision for a range of matters, including:<sup>xvi</sup>

- the periods during which access is permitted;
- the parts of land to which access is permitted;
- the kinds of prospecting operations that are permitted;
- the conditions to be observed by the holder of the prospecting title;
- any compensation to be paid to the landholder as a consequence of the exploration;
- the manner of resolving any disputes arising,
- the manner of varying the arrangement,

**PLEASE NOTE:** Landowners including LALCs should not sign an access arrangement unless they are happy with its terms. Landowners should carefully review a proposed access arrangement to ensure the terms are clearly defined, especially in regards to access periods, access days, exclusivity and notice, legal advice should be sought where any uncertainty remains about the terms.

Where agreed to access arrangements are breached, a landholder may deny access to their land until the breach ceases or is remedied.<sup>xvii</sup>

## What should LALCs do if they have concerns about mining activities?

There are a range of options LALCs may wish to consider where concerns are held about mining activities; these include:

- Finding out the details of what has been proposed, and whether there are formal opportunities to raise your concerns,
- Seeking independent legal advice,
- Contacting your local member and the Minister with responsibility for making decisions about mining (Currently the Minister for Resources and Energy, the Hon. Chris Hartcher, MP).

The EDO has prepared a useful range of Fact Sheets which are available on their website [http://www.edo.org.au/edonsw/site/factsh/fs10\\_1.php](http://www.edo.org.au/edonsw/site/factsh/fs10_1.php) which outline a range of **advocacy methods** and strategies including writing letters, using the media, speaking out in public and seeking legal advice and litigation.

## Possible legal actions

Any LALC considering possible legal challenges to mining activities should obtain legal advice before taking any action. In this regard the free legal advice service of the Environmental Defender's Office (details below) may be of assistance.

## Contact information

**NSWALC Policy and Research Unit:** Phone 02 9689 4444, Email [policy@alc.org.au](mailto:policy@alc.org.au). The Policy and Research Unit has developed a range of Fact Sheets, including a series on *Site Protection*, and other resources, available on the 'Culture and Heritage' pages of the NSWALC website: [www.alc.org.au](http://www.alc.org.au).

**Environmental Defender's Office** is a community legal centre which has a **free legal advice line**: Phone 02 9262 6989 or 1800 626 239. They also publish a range of materials and fact sheets on environmental, Indigenous and planning laws, including Fact Sheets on **Mining**, and **Advocacy**, available at: <http://www.edo.org.au/edonsw/site/factsheets.php>

**Office of Environment and Heritage (OEH):** 02 9995 5000. OEH employ Aboriginal Heritage Officers who may be able to provide advice about protecting Aboriginal culture and heritage. **Any concerns about harm to Aboriginal cultural heritage should be urgently reported to the OEH.**

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<sup>i</sup> See the 'Strategic Regional Land Use' pages on the Department of Planning and Infrastructure website: <http://www.planning.nsw.gov.au/StrategicPlanning/StrategicRegionalLandUse/tabid/495/language/en-AU/Default.aspx>

<sup>ii</sup> Clause 80B, *National Parks and Wildlife Regulation 2009*; A copy of the *National Parks and Wildlife Act* and *National Parks and Wildlife Regulations* are available at: <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+80+1974+cd+0+N>

<sup>iii</sup> Clause 80A, *National Parks and Wildlife Regulation 2009*

<sup>iv</sup> NSW Minerals Council, *NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal objects*, September 2010, available on the OEH website at: <http://www.environment.nsw.gov.au/resources/cultureheritage/ddcop/ddcop-minco.pdf>

<sup>v</sup> There are also two State Environmental Planning Policies (SEPPs) which apply: *SEPP (Major Developments) 2005* and *SEPP (Mining, Petroleum Production and Extractive Industries) 2007*. There separate laws for Petroleum.

<sup>vi</sup> Section 24, *Mining Act 1992*

<sup>vii</sup> Section 29, *Mining Act 1992*

<sup>viii</sup> Section 27, *Mining Act 1992*

<sup>ix</sup> Section 5, *Mining Act 1992*

<sup>x</sup> Section 13A, *Mining Act 1992*

<sup>xi</sup> Mining and exploration activities undertaken in respect of gold, silver, coal or petroleum remain governed by the *Mining Act 1992* and other relevant legislation.

<sup>xii</sup> LALCs should note, however, that even when the exploration activities are in respect of these "other"

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minerals, it may be that they are still excluded from the operation of Part 3 of the ALRA if the "right" conferred by or under the *Mining Act 1992* (or any other relevant legislation) was a right that was in force **at the time the land was vested in the LALC**. Therefore, LALCs should determine when the person seeking access to the LALC's land for exploration purposes obtained their "right" to undertake the exploration, and compare this with the date the land was vested in the LALC to ascertain if the "right" existed at the time of such vesting.

<sup>xiii</sup> Section 140, *Mining Act 1992*. Access arrangements are provided for under Division 2, ss 138 - 158 of the *Mining Act 1992*.

<sup>xiv</sup> s 139, 140(b), 143 - 153, *Mining Act 1992*

<sup>xv</sup> s 155, *Mining Act 1992*

<sup>xvi</sup> s 141, *Mining Act 1992*

<sup>xvii</sup> s 141(4), *Mining Act 1992*