Examination of the Land Access Arbitration Framework

Mining Act 1992 and *Petroleum (Onshore) Act 1991*

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1. Introduction

On 15 April 2014, the Hon. Anthony Roberts, Minister for Resources and Energy, announced an examination of land access arbitration processes under the *Mining Act 1992* ("the *Mining Act*") and the *Petroleum (Onshore) Act 1991* ("the *Petroleum (Onshore) Act*"). The Terms of Reference required the examination to consider and make recommendations on the following: on the other hand

a) Is the current arbitration panel appointment process appropriate?

b) What should be the qualifications and experience for appointment?

c) Are the current corporate governance arrangements sufficiently robust? For example, what should the arrangements be to address concerns about conflict and bias?

d) Is the current requirement that parties attempt to agree on an arbitrator, before the Secretary appoints an arbitrator from the panel, appropriate?

e) What is best practice for the arbitration process, and should this be supported by procedural guidelines? For example, should conciliation be part of the process or should it be part of a suite of tools?

f) What processes should be in place to ensure that the arbitration process is efficient and cost effective?

g) What should be the scope of the arbitrators' role?

h) Should arbitrators have the power to determine what is an "improvement" or "significant improvement" under the *Petroleum (Onshore) Act* and *Mining Act*, respectively?

i) What should be the process when assessing and determining compensation?

j) What procedures should be made for reviewing decisions, including appeals?

k) Should the Department have an oversight role?

l) Are policy and/or legislative amendments required to implement any of the recommendations?

m) Are there any further improvements required to support the objectives of this review?

To support this examination the Minister required targeted consultation to be undertaken. These consultations were facilitated by Mr Jock Laurie, the NSW Land and Water Commissioner, and were undertaken over 20, 26 and 30 May and on 2 June 2014 with the following groups or individuals:

- Exploration companies and representatives presently involved in arbitration processes;
- The members of the Arbitration Panel, Ms Patricia Lane, Mr Michael J Lawrence, Mr Phillip Watson and Ms Brydget Barker-Hudson;
- Division of Resources and Energy;
- NSW Law Society;
- The Institute for Arbitrators and Mediators;
- NSW Farmers Association;

- NSW Irrigators Association;
- Rice Growers Australia;
- Cotton Australia;
- NSW Wine Industry Association;
- NSW Minerals Council;
- Australian Petroleum Production and Exploration Association;
- Association of Mining Exploration Companies;
- Southern Highlands Coal Action Group;
- Lock the Gate; and
- A Senior Counsel.

The Minister also invited public submissions to be provided by 23 May 2014. This period was extended to 30 May 2014, with late submissions accepted after this date. A total of 31 submissions were received. In preparing this report and its recommendations I have taken into account all of the submissions and the issues raised in the targeted consultation meetings.

Selected representatives of the Division of Resources and Energy from NSW Trade & Investment provided assistance in this examination. The representatives:

- Arranged consultation with stakeholders;
- Attended consultations;
- Provided secretarial support for each consultation by taking minutes; and
- Supported the preparation of aspects of this Report that was subsequently settled by me.

Key Issues Confronting Arbitration Process for Land Access

The Division of Resources and Energy advises that generally for every active exploration licence there is at least one land access arrangement. Presently, there are some 1,058 mineral, coal and petroleum explorations licences. It is likely that the number of land access arrangements number in the thousands given the area covered by each licence (which can range from 3 km^2 to 300 km^2 and in the case of some petroleum exploration licenses can range up to 10,500 km^2) and the fact this will generally include multiple landholders. One submission suggested that there is likely to be more than 3000 land access arrangements.[1] In contrast, it is understood that there are only six current arbitrations by a Panel Arbitrator under the *Mining Act*. I am advised that there has not been an arbitration under the *Petroleum (Onshore) Act* since 2011[2]. Based on the feedback I received during targeted consultations, historically arbitrations usually ran for two to four months, with 2-3 days for the actual hearings.

However, it appears from the feedback I have received that in the last two years some arbitrations are running for over 12 months, sometimes 18 months. For these lengthy arbitrations it means that all participants to an arbitration process will face increased time, trouble and expense in what is perceived to be an uncertain, unpredictable and complex process.

[1] The reason why the precise number is not known is because these are private arrangements between the explorer and landholder and are not registered with the Division of Resources and Energy.

[2] Note the Agreed Principles for Land Access (March 2014) signed between the gas companies Santos and AGL and landholder representatives NSW Farmers, Cotton Australia and the NSW Irrigators Council.

In addition, the arbitration process has been used to raise issues of whether exploration development should proceed within certain communities. These are fundamental questions that go to whether an exploration licence should be granted and the role and function of land use and development assessment processes under the *Environmental Planning and Assessment Act 1979*. These questions are not within the remit of this examination, but they are key issues for government to consider in the broader context of mineral and resources exploration for NSW.

Nevertheless, this examination has revealed that while the fundamentals for arbitration are sound, there is a range of improvements to the land access arbitration framework needed to address weaknesses that relate to transparency, accountability and consistency. The key improvements are outlined in the recommendations below.

2. Recommendations

Recommendation 1

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide for appointment of Panel Arbitrators for a maximum of three years.

Recommendation 2

It is recommended that the process of appointment continue to be made by the Minister as set out in section 139 of the *Mining Act*, but that the process is strengthened with a new regulation for both the *Mining Act* and the *Petroleum (Onshore) Act* that sets out:

- Eligibility criteria that includes minimum qualifications for all land access arbitrators including members of the Arbitration Panel;
- Notice provisions such as in both State-wide and national circulating newspapers and arbitration accreditation bodies seeking suitably qualified arbitrators for the Arbitration Panel;
- Establishing an assessment panel to evaluate Arbitration Panel candidates based on eligibility criteria. The assessment panel is include people independent of the Division of Resources and Energy such as the NSW Land and Water Commissioner and an eminent legal practitioner experienced in arbitration; and
- Expanding the conditions of appointment to include performance requirements set in procedural guidelines.

As part of the appointment process candidates will be required to notify facts and circumstances such as personal or professional connections that may be relevant to possible perceptions of conflict or bias.

Recommendation 3

It is recommended that the process for appointing Panel Arbitrators follow the principles outlined in the Appointment Standards for Boards and Committees in the NSW Public Sector.

Recommendation 4

It is recommended that factual information is provided on the Division of Resources and Energy website on the process for appointing the Arbitration Panel. It is also recommended that once appointed, the contact details and qualifications of the Panel Arbitrators are also made publicly available on the Division of Resources and Energy website. These details are to be updated regularly. Consistent with Recommendation 10, a public register with any notifications of any possible conflict or bias should also be made available.

Recommendation 5

It is recommended that a new Arbitration Panel be established consistent with the eligibility criteria in Recommendation 7, and that the number of appointments be increased to 10. Existing Panel appointments should be terminated with immediate effect, except where they have commenced but not yet completed an arbitration. Members of the current Panel should be welcome to apply to the new Arbitration Panel.

Recommendation 6

It is recommended that the regulations be amended to provide for the eligibility criteria for Panel Arbitrators.

Recommendation 7

It is recommended that a person be eligible to be appointed to the Panel if they:

- Are an accredited arbitrator through a recognised body such as the NSW Law Society, the Institute for Arbitrators and Mediators or the National Mediator Accreditation System; and
- Have extensive arbitration experience.

In addition, a person must either:

- Have extensive resources or agricultural industry experience; or
- Be a legal practitioner who is eligible for appointment to the Supreme Court, with considerable litigation experience.

Recommendation 8

It is recommended that the Division of Resources and Energy induct Panel Arbitrators and provide annual seminars to provide updates on the *Mining Act* and the *Petroleum (Onshore) Act* and any related policy initiatives.

Recommendation 9

It is recommended that Panel Arbitrators maintain consistent minimum qualifications and be required to undertake continuous education and training consistent with accreditation requirements.

Recommendation 10

It is recommended that the Division of Resources and Energy develop appropriate policy guidance on the governance arrangements pertaining to land access arbitrations that includes:

- Practices and procedures for dealing with conflicts of interest and bias. This should include the procedures for mediators and arbitrators to declare conflicts of interest and bias and recuse themselves if appropriate, and for parties to request an arbitrator or mediator to recuse themselves due to a perception of conflict of interest or bias.
- Public disclosure requirements for Panel Arbitrators. A public register should record relevant employment and financial dealings. Refer to Recommendation 2.

Procedures for arbitration process costs to be remitted to the Division of Resources and Energy, except by prior agreement of all the parties.

Recommendation 11

It is recommended that the procedure where the Secretary appoints Panel Arbitrators on a strict rotational basis is published in procedural guidance referred to in Recommendation 12.

Recommendation 12

It is recommended that procedural guidance is prepared under the regulations of the *Mining Act* and *Petroleum (Onshore) Act* (section 148 and section 69K respectively) dealing with the following matters:

- Objectives and principles for arbitration;
- Role and scope of the arbitrator;
- Providing for teleconferencing or video conferencing as an alternative to face to face arbitrations;
- Stages and timeframes for the arbitration framework;
- Form and content requirements for submissions;
- Check list of documents to be provided to the landholder by the explorer, including relevant insurance details;
- Explorer providing draft access arrangement upfront ready to sign,;
- Baseline report, which is generally to be conclusive;
- Process for site visits;
- Landholder providing list of significant improvements;
- Non-binding view of what is a significant improvement (if this is in dispute)[3];
- Process for site visits;

[3] See Term of Reference h).

- Recording of proceedings;
- Interim determinations;
- Final determinations; and
- Summary reasons for decisions.

If the current regulation making powers under the legislation are not sufficient to enable what is envisaged then they should be amended accordingly.

Recommendation 13

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide a separate mediation process. This amendment should also provide that a person who acts as a mediator may not be an Arbitrator, except with the agreement of both parties.

Recommendation 14

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide a site inspection of view by a mediator or an arbitrator.

Recommendation 15

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that parties negotiating and arbitrating a land access arrangement must do so in good faith.

Recommendation 16

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide parties with the right to legal representation.

Recommendation 17

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that every determination by an arbitrator, whether they have been appointed or agreed to by the parties, be published on the Division of Resources and Energy website.

Recommendation 18

It is recommended that the Secretary of the Department approve a list of experts to undertake the proposed baseline reporting.

Recommendation 19

It is recommended to continue the current arrangements whereby the Land and Environment Court determine what a significant improvement is.

Recommendation 20

It is recommended that the Land and Environment Court be requested to consider procedures, perhaps by Practice Direction, to ensure special expedition of any necessary determinations of what constitutes a significant improvement.

Recommendation 21

It is recommended that new processes are implemented in relation to significant improvements to:

- Ensure that any dispute over significant improvement is identified early in the process (consistent with the new procedural guidelines in Recommendation 12);
- Provide that the arbitrator can make a non-binding view on which part of the land constitutes a significant improvement, and then can progress the arbitration; and
- Provide that the arbitration process be put on hold if a significant improvement dispute goes to the Land and Environment Court, and recommences once the Court has made an order.

Recommendation 22

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to introduce a regulation making power to declare what does and does not constitute a significant improvement. This should be complemented by guidance material.

Recommendation 23

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that a landholder cannot unreasonably withhold consent in relation to significant improvements or improvements.

Recommendation 24

It is recommended that the *Petroleum (Onshore) Act* be amended to align with the concept of significant improvement contained in the *Mining Act*.

Recommendation 25

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that a landholder is entitled as part of the negotiation and arbitration of an access arrangement to have the following costs paid by an explorer:

- Their time spent negotiating and arbitrating the access arrangement up to a capped amount;
- Their legal costs up to a capped amount; and
- Costs of any experts the landholders engage as part of this negotiation and arbitration process up to a capped amount.

Consideration should be given to enabling variable caps depending on the nature of the proposed exploration.

Recommendation 26

It is recommended that the *Petroleum (Onshore) Act* be amended to clarify that the provisions in that Act relating to the measure of compensation by the Land and Environment Court apply to compensation determined by an arbitrator in an access arrangement.

Recommendation 27

It is recommended that the *Petroleum (Onshore) Act* be amended to mirror the requirements of clause 74 of the *Mining Regulation 2010* in relation to the matters an Arbitrator needs to be taken into account in making an assessment of compensation.

Recommendation 28

It is recommended that the Division of Resources and Energy prepare guidance in relation to assessing and determining compensation.

Recommendation 29

It is recommended that the review and appeal processes under the *Mining Act* and the *Petroleum (Onshore) Act* remain the same.

Recommendation 30

It is recommended that explorers be required always to pay the costs of the landholder (whatever the outcome of the review) if a matter is heard in the Land and Environment Court, unless the Land and Environment Court determines that the landholders were unreasonable, and then only to the extent that such conduct increased the costs.

Recommendation 31

It is recommended that the Division of Resources and Energy undertake performance reviews every two years of the arbitration framework (not individual arbitrations) and consider, for example:

- The number of inductions and seminars offered to arbitrators;
- The number of land access arrangements determined through arbitration or the Land and Environment Court;
- Timeliness of arbitrations consistent with specified timeframes;
- Whether recordings made of arbitrations;
- The number and type of complaints received;
- The number and type of concerns relating to conflict or bias and how they have been addressed; and
- The number of land access arrangements determined through arbitration that are placed on the Division of Resources and Energy website.
- Whether Panel Arbitrators are maintaining continuous education consistent with their accreditation requirements.

These performance reviews are to be made publicly available.

Recommendation 32

I recommend that the Government consider these issues and respond to them separately.

3. Legal Framework and Governing Principles

This examination and my report following it concern access arrangements and, in particular, the statutory provision for their determination by arbitration when attempts to agree them have failed. The discussion below refers to the *Mining Act*, and should be understood to apply to the corresponding provisions of the *Petroleum (Onshore) Act*.

I should emphasize at the outset that, as the phrase "access arrangements" itself assumes, the object of my considerations is what follows after an earlier grant by the State of permissions or rights for which it has become necessary to arrange access. Some of the submissions made to me failed to distinguish between the earlier governmental decision to grant, say, an exploration licence under Part 3 of the *Mining Act* and the separate and consequential need for the explorer to obtain access in order to take advantage of the licence (and, indeed, to comply with its requirements). Some of the submissions made to me failed to distinguish between access arrangements and possible later governmental decisions to grant, say, a mining lease under Part 5 of the *Mining Act*.

In particular, it became clear during the course of this examination that some people regard the arbitration of access arrangements for explorers as a proper occasion and opportunity for them to oppose the ultimate exploitation of whatever mineral resource is in question. I must spell out as clearly as I can that this very important issue is simply not within my remit. Nothing in this report should be read as involving any statement about or implications for the exploitation of any kind of mineral resources in any particular place or under any particular conditions etc.

The legislation regulating exploration licences explicitly and exhaustively assigns the authority to make decisions upon applications for exploration licences. That authority and the associated powers and discretions are closely regulated by Part 3 of the *Mining Act.* They involve, undoubtedly, large matters of public policy as well as highly individual merits. Administrative conduct relating to and comprising the grant of exploration licences is subject to judicial review, as an integral aspect of the rule of law.

There is just no place at all in this explicit scheme for the grant of exploration licences to be reversed or second guessed in any way at all by arbitrators in determining access arrangements. In short, whether exploration should be permitted has been decided before and separately from arrangements for the requisite access on the part of the explorer.

The same functional separation is true for any subsequent mining leases. Their grant by government authority is closely regulated by Part 5 of the *Mining Act*. Further, the use of land for any ultimate mining and associated purposes requires development consent which involves a deal of closely regulated environmental assessment. Again, there is just no place at all in this scheme of regulation for any decision by an arbitrator determining an access arrangement.

It follows that notions that access arrangement determinations may involve consideration whether exploration should occur and whether eventually mining should occur are utterly misplaced. It is not relevant to the access arrangements that should be determined to consider the existence or otherwise of other requisite consents or permissions for carrying out the approved activities. The proposals advanced below concerning the detailed regulation of how access arrangement determinations should proceed are intended to keep the issues within these lawful limits.

It follows that I think there may have been some misunderstanding in some people concerning the relevance of environmental assessments and development approvals. I repeat, determinations of access arrangements are emphatically not a proper forum to contest an earlier grant of an exploration licence or a possible later grant of a mining lease.

On the other hand, in my opinion, it is plain to demonstration that the provisions of Div 2 of Part 8 of the *Mining Act*, being those which are the object of my examination and this report, should be read accordingly. In particular, the provisions of para 149(1)(a) of the *Mining Act* do not empower the arbitrator to revisit or even reverse the grant of the exploration licence in question. After all, that grant is the whole foundation of the arbitration system, by reason of subsec 138(1).

The provisions of para 149(1)(a) require an interim determination "as to whether or not the holder of the prospecting title [including an exploration licence, being the example I refer to above] should have a right of access to the land concerned". Read as I believe it must be, that is not a normative question at large. It is certainly not a contradiction of the explicit and detailed system of discretionary decision making already carried out under Part 3 of the *Mining Act*.

The most obvious, and probably only, contested issue properly before an arbitrator whose role is to determine access arrangements, on the question raised by para 149(1)(a), is what may colloquially be called the no-go areas contemplated by secs 30 and 31 of the *Mining Act*. As discussed below, in particular under current conditions and in recent times this will involve consideration of the existence and situation of so-called significant improvements. As subsec 31(5) makes clear, and as should remain the case in my opinion, arbitrators determining access arrangements do not have jurisdiction finally to decide that critical question. On the other hand, where conceded significant improvements and topographical and physical constraints combine to impede any practicable access, an arbitrator could and should determine under para 149(1)(a) that the explorer should not have access to the land in question (given an assumed lack of consent).

In making the suggestions that follow for what I regard as improvements to the present system and its operation, I have been guided in part by the restricted ambit of these determinations, as discussed above. I have also been guided by the following general considerations, as a matter of policy and respect for private property.

For nearly the whole history of New South Wales following British settlement, some kind of control by the Crown of mineral resources has been to the forefront of public administration. For nearly all that time, and certainly since self-government in 1855, the near universal experience has been that the mineral resources of the State be explored and exploited in accordance with governmental permission and control and the appetite for risk of mining entrepreneurs.

This approach to mining is not peculiar to New South Wales or Australia, in general terms. There is a widespread expectation that, whether by way of royalties, resource rent taxes or other means, the public treasury (and by extension the common weal) should benefit from minerals found underneath the surface of otherwise privately owned land.

This approach involves, in very broad terms, everyone obtaining what is conventionally regarded as an advantage by reason of the disturbance – and in some cases of open cut coal mining the virtual destruction or adverse transformation – of particular landowners' private property.

It is in accordance with deeply held and widespread political sentiment that such public advantage not be yielded at the cost of arbitrarily allocated private loss and damage. That is why in New South Wales the terms of the *Land Acquisition (Just Terms Compensation) Act 1991* are as comprehensive and ample as they are. (It also explains the constitutional protection at the Commonwealth level given by sec 51(xxxi.) of the *Constitution*, requiring just terms for the acquisition of property.)

It follows in my opinion that every reasonable effort should be made to avoid casting on anyone who has to have access sought by an explorer under the *Mining Act*, to their land, any more private cost or detriment. We, by which I mean the public, should ensure to the maximum extent reasonably possible, that the cost of obtaining the supposed benefit of mineral exploitation by borne by us.

Because in our society mining is rarely, nowadays following the privatisation of former State coal mines, conducted entirely at public risk and expense, it is also therefore appropriate that the private enterprise entities that seek the rewards of mining should be required by public regulation to pay the costs of landowners from whom access is sought for the purposes of their business.

For these reasons, it seems to me that, as a matter of principle, procedures for determining by arbitration access arrangements for mineral explorers should involve as much compensation for the reasonable costs of negotiating or arguing those arrangements, that may be incurred by landowners.

The disruption, personal, commercial and proprietary, represented by access by an explorer to private land is very considerable. One purpose of the suggestions for improvement made below is to soften to some extent that disruption currently suffered by some for the purpose of producing what is perceived to be a public good.

4. Addressing the Terms of Reference

This section summarises the relevant points made in the submissions and targeted consultation and provides a high level analysis with the corresponding Terms of Reference.

a) Is the current arbitration panel appointment process appropriate?

The submissions revealed mixed views on the appropriateness of the appointment of the land access Arbitration Panel. Some submissions indicated that the current process is appropriate, where the Arbitration Panel is sourced by the Division of Resources and Energy with appointment by the Minister for Resources and Energy. One submission recommended that the process of appointment is given to an independent body. Another submission indicated that there should be full consultation with key interest holders, beyond the Ministers stipulated in the Act, with another suggesting that a member of the Land and Environment Court along with the NSW Land and Water Commissioner select the Arbitration Panel. An alternative approach suggested that the Land and Environment Court administer the appointment of arbitrators and the arbitration process. Another point made was that there should be a process for revoking appointments where there is evidence of poor performance.

Arbitration appointments in comparable legislation can be made by a court, agency or an office holder without guidance[4] or with further guidance, such as in consultation with other people, or in accordance with criteria developed by a Minister.[5] Under the *Mining Act,* sec 139 provides that there is to be an Arbitration Panel and that the Minister is to appoint the Panel following consultation with the Minister for Agriculture and the Minister for Aboriginal Affairs.[6] The Minister is also to determine the conditions upon which a member of the Arbitration Panel holds office. Currently the Minister imposes conditions relating to the termination of their appointment, remuneration and travelling and subsistence allowances. The Minister generally appoints five arbitrators to the Arbitration Panel. While there are only a small number of arbitrations at any one time, there is benefit in expanding the number of Panel Arbitrators to provide a greater pool to select from, particularly in circumstances where a potential conflict has been declared. It will also support the proposal listed under recommendation 13.

Some submissions indicated that there should be standard costs for arbitrators. This is already the case, as established by the Public Service Commission.[7] This standard cost, which is a $700 daily rate, is included in the Panel Arbitrator conditions of appointment.

The NSW Government has developed appointment standards for boards and committees. This should provide some assistance on the principles for appointing Panel Arbitrators.[8]

Where most of the submissions are unanimous, is the need for specific details on the process for appointment because of a lack of transparency. This is an important point because if participants do not

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[4] For example, *Dust Diseases Tribunal Regulation 2013* (NSW) cl 37(3); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318A(5); *Architects Act 2003* (NSW) s 40(3); *Veterinary Practice Act 2003* (NSW) s 43(3); *Residential (Land Lease) Communities Act 2013* (NSW) s 148(1); *Community Justice Centres Act 1983* (NSW) s 20(2), 20A(3)(a); *Water Act 1912* (NSW) s 170B(2).

[5] *Legal Profession Act 2004* (NSW) s 520(2); *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 318F(1).

[6] The *Petroleum (Onshore) Act* adopts the Panel constituted under the *Mining Act.*

[7] New South Wales Public Service Commission, NSW Government Boards and Committees webpage. Accessed on 12 June 2014 at http://www.psc.nsw.gov.au/About-the-Public-Sector/NSW-Government-Boards-and-Committees-

[8] New South Wales Public Service Commission, Appointment Standards - Boards and Committees in the NSW Public Sector, July 2013. Accessed on 10 June 2013 at http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0020/154154/P2013_001_Appointment_Standards_July_2013_V1_1.pdf

know who or how arbitrators are appointed, then this will diminish confidence at the commencement of an arbitration process. With few legislative details and with an absence of publicly available policy guidance on the Division of Resources and Energy website, it means that the public has little information on how the Panel Arbitrators are sourced, selected and what qualifications, experience and training are determined to be satisfactory. Nor does the Division of Resources and Energy website provide details on the members of the Arbitration Panel. The absence of this basic information is at odds with common practices. For example, the Australian Centre for International Commercial Arbitration provides that:

> *"Where the names of one or more persons are proposed for appointment as arbitrators, their names, postal addresses, telephone and facsimile numbers and email addresses (if any) shall be provided and their nationalities shall be indicated, together with a description of their qualifications."*[9]

Consequently, there are improvements to be made to increase public information on the process of appointment for Panel Arbitrators.

Recommendation 1

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide for appointment of Panel Arbitrators for a maximum of three years.

Recommendation 2

It is recommended that the process of appointment continue to be made by the Minister as set out in section 139 of the *Mining Act,* but that the process is strengthened with a new regulation for both the *Mining Act* and the *Petroleum (Onshore) Act* that sets out:

- Eligibility criteria that includes minimum qualifications for all land access arbitrators including members of the Arbitration Panel;
- Notice provisions such as in both State-wide and national circulating newspapers and arbitration accreditation bodies seeking suitably qualified arbitrators for the Arbitration Panel;
- Establishing an assessment panel to evaluate Arbitration Panel candidates based on eligibility criteria. The assessment panel is include people independent of the Division of Resources and Energy such as the NSW Land and Water Commissioner and an eminent legal practitioner experienced in arbitration; and
- Expanding the conditions of appointment to include performance requirements set in procedural guidelines.

As part of the appointment process candidates will be required to notify facts and circumstances such as personal or professional connections that may be relevant to possible perceptions of conflict or bias.

[9] Australian Centre for International Commercial Arbitration, *ACICA Arbitration Rules Incorporating the Emergency Arbitrator Provisions 2011*. Accessed on 5 June at http://acica.org.au/acica-services/acica-arbitration-rules

Recommendation 3

It is recommended that the process for appointing Panel Arbitrators follow the principles outlined in the Appointment Standards for Boards and Committees in the NSW Public Sector.

Recommendation 4

It is recommended that factual information is provided on the Division of Resources and Energy website on the process for appointing the Arbitration Panel. It is also recommended that once appointed, the contact details and qualifications of the Panel Arbitrators are also made publicly available on the Division of Resources and Energy website. These details are to be updated regularly. Consistent with Recommendation 10, a public register with any notifications of any possible conflict or bias should also be made available.

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It is recommended that a new Arbitration Panel be established consistent with the eligibility criteria in Recommendation 7, and that the number of appointments be increased to 10. Existing Panel appointments should be terminated with immediate effect, except where they have commenced but not yet completed an arbitration. Members of the current Panel should be welcome to apply to the new Arbitration Panel.

b) What should be the qualifications and experience for appointment?

Most of the submissions indicated that the arbitration process would be enhanced with upfront criteria on the expected qualifications for Panel Arbitrators. However, the submissions reveal mixed views on what qualifications Panel Arbitrators should hold. They range from only legal practitioners (or a subset of legal practitioners such as senior barristers or retired judges), or resources and agricultural industry experts. Most submissions indicated that all arbitrators are trained and experienced in arbitration and hold specialist arbitration accreditation. Some submissions recommended that arbitrators have experience in the application of legislation, possess good knowledge of an application of rules of evidence, as well as the *Mining Act* and the *Environmental Planning and Assessment Act 1979*. One submission suggested that the Land and Water Commissioner take on the role as a mediator.

Other submissions suggested that arbitrators should have no connection with industry for fear of perceived bias or risking conflicts of interest. Nevertheless, most submissions indicate that there should be a consistent depth of skill and experience among arbitrators and that this is known publicly upfront.

Presently, all Panel Arbitrators are experienced in mediation and arbitration; some have legal qualifications or have industry experience. Some are accredited arbitrators or mediators. However, as identified above, this information is not publicly available. Importantly, the Act has no requirement on the experience and qualifications for arbitrators, nor is there publicly available policy guidance on this matter. Comparable legislation requires "suitably qualified and experienced"[10] people or people "with appropriate expertise or experience".[11] However, for alternative dispute resolution processes under quasi-judicial bodies, such as the Dust Diseases Tribunal, a list of people are nominated jointly by the

[10] *Civil Procedure Act 2005* (NSW) s 36(1).

[11] *Farm Debt Mediation Act 1994* (NSW) s 12(1).

NSW Law Society and Bar Association, or failing such a nomination, people chosen by the Tribunal President.[12]

The process for determining land access arrangements will benefit from experience and knowledge of landholder and explorer issues. This is because arbitrators with relevant experience and training are more likely to rapidly arrive at the substantive issues involved in land access arrangements. Consequently, it is highly likely that without this necessary experience it will increase the risk of delay due to the time needed to identify relevant issues, and this may contribute to sub optimal determinations for both landholder and explorer alike.

Further, there is a need for a regulation to clearly stipulate eligibility criteria necessary for Panel Arbitrators, and that should be matched with continuous education to ensure that contemporary and consistent knowledge of relevant legislative requirements and policy initiatives. These eligibility criteria should also address declaring any possible conflicts of interest or bias.

In cases where the arbitrator is appointed by agreement, the parties should continue to have complete freedom to choose whomever they agree on. Accordingly, these proposed eligibility criteria should not apply to them.

Recommendation 6

It is recommended that the regulations be amended to provide for the eligibility criteria for Panel Arbitrators.

Recommendation 7

It is recommended that a person be eligible to be appointed to the Panel if they:

- Are an accredited arbitrator through a recognised body such as the NSW Law Society, the Institute for Arbitrators and Mediators or the National Mediator Accreditation System; and
- Have extensive arbitration experience.

In addition, a person must either:

- Have extensive resources or agricultural industry experience; or
- Be a legal practitioner who is eligible for appointment to the Supreme Court, with considerable litigation experience.

Recommendation 8

It is recommended that the Division of Resources and Energy induct Panel Arbitrators and provide annual seminars to provide updates on the *Mining Act* and the *Petroleum (Onshore) Act* and any related policy initiatives.

Recommendation 9

It is recommended that Panel Arbitrators maintain consistent minimum qualifications and be required to undertake continuous education and training consistent with accreditation requirements.

[12] *Dust Diseases Tribunal Regulation 2013* (NSW) s 37(3).

c) Are the current corporate governance arrangements sufficiently robust? For example, what should the arrangements be to address concerns about conflict and bias?

Nearly all submissions stated that the governance arrangements for the land access arbitration framework are inadequate and that improvements are needed. In fact, the submissions observed that there is no public information on the corporate governance arrangements for arbitrators apart from minimal guidance in the *Mining Act*.

A particular concern raised in many submissions related to possible arbitrator conflict of interest or bias. Feedback in the targeted consultation indicated that some arbitrators may have discussed travel arrangements and costs directly with explorers. While mediators, arbitrators and legal practitioners are trained to deal with these issues, the absence of any guidance that details how one should declare, address or record issues of conflict or bias, means that the parties to a conciliation or arbitration are unclear how these matters should be routinely dealt with. Moreover, where there is an unchecked suggestion of conflict or bias, this may undermine confidence in the arbitration framework.

During the targeted consultation process it became apparent that there is a misunderstanding on what these terms mean. For example, there were suggestions that an environmental consultant that routinely provides expert advice to an explorer may have a conflict of interest or is biased. It does not follow that if a consultant routinely works for a party that it constitutes a conflict of interest or bias. For example, the *Butterworths Concise Australian Legal Dictionary* provides that:

- A conflict of interest is "a situation where a person has a personal interest in a matter the subject of a decision or duty of the person".
- Bias is "a pre-existing favourable or unfavourable attitude to an issue when impartial consideration of the merits of the case is required. Actual bias or a reasonable apprehension of bias on the part of a decision maker are a breach of the rules of procedural fairness".

The NSW Government offers some guidance in these matters. For example, the Division of Resources and Energy[13] and the Department of Premier and Cabinet provide guidelines on how conflicts are to be addressed for staff, and boards and committees (respectively). The Department of Premier and Cabinet's Boards and Committee guidelines provides details for appointments and general governance arrangements. It states that a conflict of interest is where:

> "*A conflict of interest exists when it is likely that a member could be influenced by a personal or business interest. If a conflict of interest leads to partial decision making, it may constitute corrupt conduct……*
>
> *A member has a duty to declare any private interest that may impinge on a board or committee decision……. A register of such interests should be maintained by the board or committee and must also be reported to the Minister. "*[14]

Separately, accreditation bodies such as the National Mediator Standards provide that:

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13 NSW Trade & Investment, *Conflict of Interests*, TI-P-142, 9 November 2012. Accessed on 12 June 2014 at http://www.trade.nsw.gov.au/__data/assets/pdf_file/0010/449587/Conflicts-of-interests-policy.pdf

14 NSW Government, *Boards and Committees Guidelines,* July2013. Accessed on 8 June 2014 at http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0020/154127/2013-170983_NSW_Government_Boards_and_Commitees_Guidelines.pdf

"A mediator must conduct the dispute resolution process in an impartial manner and adhere to ethical standards of practice.

Impartiality means freedom from favouritism or bias either in word or action, or the omission of word or action, that might give the appearance of such favouritism or bias. A mediator will disclose actual and potential grounds of bias and conflicts of interest."[i]

Professionals in this field understand how to address these issues. This is done, first by automatically recusing themselves if they believe there is a real issue of conflict or bias. Second by notifying parties of circumstances that are appropriate to be known by the parties so as to permit representations to be made by them that the arbitrator should recuse themselves. For the parties to an arbitration there is no relevant guidance on this issue. This was identified as an issue in some of the submissions. This is an area in need of improvement.

Under the current arbitration process the costs of the arbitration are paid by the explorer. These are not paid direct to the arbitrator. Rather, the Division of Resources and Energy acts as an intermediary to keep these matters at arm's length. This is a highly desirable approach and should continue. While circumstances may arise where a direct payment is necessary this should only occur with the explicit prior agreement of all the parties.

Recommendation 10

It is recommended that the Division of Resources and Energy develop appropriate policy guidance on the governance arrangements pertaining to land access arbitrations that includes:

- Practices and procedures for dealing with conflicts of interest and bias. This should include the procedures for mediators and arbitrators to declare conflicts of interest and bias and recuse themselves if appropriate, and for parties to request an arbitrator or mediator to recuse themselves due to a perception of conflict of interest or bias.
- Public disclosure requirements for Panel Arbitrators and other arbitrators. A public register should record relevant employment and financial dealings. Refer to Recommendation 2.
- Procedures for arbitration process costs to be remitted to the Division of Resources and Energy, except by prior agreement of all the parties.

d) Is the current requirement that parties attempt to agree on an arbitrator, before the Secretary appoints an arbitrator from the panel, appropriate?

A review of the submissions indicated general support to retain the right of the parties to agree on an arbitrator upfront. One submission put forward the position that whether an arbitrator is appointed or agreed to should be based on meeting the minimum qualifications, skills or experience requirements in the legislation or any associated guidance. This issue is addressed above under Term of Reference b).

While some of the submissions raised whether the appointment of a Panel Arbitrator should be given to an independent third party, none of the submissions considered in detail whether the current appointment process by the Secretary is appropriate. Perhaps the reason for this is because of an absence of publicly available information about this process.

I am advised that the Secretary of NSW Trade & Investment appoints arbitrators from the Arbitration Panel on a strict rotational basis, continually moving through the list and then starting again. There are strong benefits for this approach. This is because it is random and it provides no means to influence the appointment of the arbitrator. The only departures from this strict application would be where an arbitrator recused themselves or they are un available to undertake the arbitration. The benefits of this approach will be enhanced should the size of the Panel increase consistent with the Recommendation 5 above.

Despite this practice being in place, this important safeguard has not been communicated publicly.

Recommendation 11

It is recommended that the procedure where the Secretary appoints Panel Arbitrators on a strict rotational basis is published in procedural guidance referred to in Recommendation 12.

e) What is best practice for the arbitration process, and should this be supported by procedural guidelines? For example, should conciliation be part of the process or should it be part of a suite of tools?

A number of submissions from landholders raised serious misgivings on their part on the fundamental fairness of the process for determining land access arrangements. While I cannot rule on the veracity, I note a frequent complaint was that the process has led to arrogant behaviour by some explorers.

It is certainly understandable how such perceptions have come about. They reflect strongly opposed views about Government policy about the exploiting of the State's mineral resources. Both the *Mining Act* and the *Petroleum (Onshore) Act* provide that once an exploration licence is issued to explore the State's resources (subject to conditions), an explorer can seek a land access arrangement on private land to conduct exploration activities. I am of the view that some of the concerns being expressed may be due to a limited understanding of the operation of the legislation, and that landholders oppose an exploration licence being issued in the first place. As indicated earlier, this is a matter outside the remit of my examination.

The introduction of conciliation and arbitration under the *Mining Act* in 1989 and then into the *Petroleum (Onshore) Act* in 1994 was intended to provide maximum flexibility and to be low cost and non-legalistic mechanism to resolve disputes. These goals are still important to ensure as few parties as possible resort to the Land and Environment Court to obtain a determination for land access arrangements. However, the submissions have highlighted that the arbitration process has broken down in the last few years where some arbitrations have run for inordinately long periods of time (around 18 months). These arbitrations have been marked by extensive documentation and have been by all accounts a stressful and costly process for all involved. As one submission observed, the current framework is deficient because it does not prescribe a timeline for the conduct and completion of the arbitration process.

The submissions generally called for more transparency in relation to the arbitration process, with clear guidance on the process for arbitration so that all parties are informed of the roles and responsibilities and procedures. This issue is particularly relevant for landholders and small explorers who are often one off participants to an arbitration process compared to major explorers. While I understand that guidance

has been prepared by an industry body for its members,[15] there was a general concern about the lack of clarity around the process. Suggestions to improve the process included utilising template agreements, setting out standard rates of compensation, establishing timeframes, setting out documentation requirements, providing insurance details and indemnities, using independent experts, recording and transcribing arbitration hearings, cross examining experts, and providing reasons for determinations. The submissions also raised concerns that the current process gave arbitrators too much power and that there needed to be explicit good faith obligations imposed on the parties to ensure the process was fair. In addition, many of the submissions reiterated the need for legal representation and for this to be as of right and not by consent.[16]

In light of these developments, it is clear that participants would benefit from procedural guidance that sets out the process to be followed for the parties and the arbitrator. This guidance should provide certainty and predictability and facilitate arriving at the substantive issues earlier in the process, while still accommodating exceptional circumstances. It is my view that the arbitration process should take no more than 3 months from start to finish. The key steps of this process would include the parties documenting their initial positions prior to the arbitration occurring, the arbitration itself, a site visit, the interim determination and the final determination. The desirable limit of 3 months should be seen as an aim rather than an inflexible requirement in order to permit the shaping of procedures to particular or exceptional circumstances.

Procedural guidance should therefore stipulate time limits for the taking of steps before, during and after any formal hearing. They should explicitly empower arbitrators to vary periods stipulated in the guidelines if, and only if, an arbitrator considers exceptional circumstances require variation so as to render the process fair. Where parties join in requesting a delay the arbitrator should ordinarily be prepared to permit extensions of the time table because usually this agreed position will be for the purposes of facilitating an overall agreement as to access. Generally landholders could justifiably be provided with longer timeframes in recognition that they may more time to be acquainted with the process and allow for a meaningful contribution. While it is acknowledged that may be small explorers who are sometimes one off participants to a land access arbitration process, on balance, landholders are more often than likely to be one off participants compared to exploration companies.

In order to arrive at the substantive issues earlier in the process, the explorer should be required to provide a draft agreement upfront that sets out a complete position as to what they are proposing to do on the relevant land and give the landholder sufficient detail so that if the landholder is satisfied they can sign and agree to the arrangement immediately. To this end, a land access template should be utilised where possible to drive consistency and transparency to all parties.[17]

As part of this draft agreement provided by the explorer, it may include what is in effect a baseline report similar to what is more commonly known as a dilapidation report. This will mean that it provides a snapshot of current conditions (for example a pressure and water quality test of any existing bores on the property) to be the basis of ensuring appropriate future rehabilitation. This would not include more comprehensive groundwater monitoring as contemplated by the Government's Aquifer Interference

[15] NSW Farmers, Mining and Coal Seam Gas in NSW – Information for landholders.

[16] Currently consent of all the parties and the leave of the arbitrator is required. *Mining Act 1992* s 146 and *Petroleum (Onshore) Act 1991* s 69I.

[17] Sec 141(1A) of the *Mining Act 1992* provides for the use of a standard template. It is understood that a template was published on 22 October 2012. NSW Farmers withdrew their support for the use of this template on 25 June 2013.

Policy. However, it is open for the issue of water testing information to be included in the access arrangements. This will protect both landholders and explorers by giving the parties certainty over the starting position, pre-exploration. If a baseline report is not able to be prepared because access has not been permitted for this purpose, then it should simply be a condition of the access arrangement. To fulfil this condition, the explorer should nominate the expert who will undertake the baseline report and provide the landholder with their curriculum vitae. If the landholder raises concerns with the proposed expert, an expert should then be chosen by the explorer from a list of experts approved by the Secretary for NSW Trade & Investment. In the absence of fraud, the baseline report will be deemed to be conclusive for the purpose of establishing the condition of the landholder's land pre-exploration under the access arrangement.

For landholders, they will be required to provide upfront a list of what they consider to be significant improvements. If there is any dispute about this list the arbitrator will have the ability to give the parties a non-binding view on whether they believe something is or is not a significant improvement. If the parties still do not agree they will be able to refer the issue to the Land and Environment Court for an expedited ruling. While this is occurring the arbitration would be placed on hold. This process is discussed further under Term of Reference j).

To facilitate the drafting of a land access arrangement, it is usually necessary for a site visit. A number of submissions raised the need for appropriate insurance arrangements to be in place before these site visits can proceed. It is clear that a site visit, which is a regular occurrence in many Court proceedings, is important and should be allowed. The concerns about insurance are adequately dealt with by virtue the statutory immunities given to landholders under the legislation.[18]

Separately, some landholders have expressed concern that they have found it difficult for them to obtain insurance details from explorers, or to simply have insurance brokers made available to determine the nature and adequacy of insurance arrangements. As a matter of good practice, insurance details should be provided upfront by an explorer.

Some submissions have indicated that there have been instances where recording or transcribing arbitration hearings have been denied by an arbitrator. It is my view that there is great benefit in having proceedings recorded. Recording is a cost effective exercise which ensures the parties will have access to a record of the proceedings in the event they wish to take the arbitration to the Land and Environment Court. However, transcription is expensive and I do not think the benefits of making this mandatory outweigh its cost when either party can simply arrange for the relevant part of the recording to be transcribed if it is needed.

Another matter raised in submissions was that the arbitration hearings be an open court. It is my view that this is only appropriate if both parties agree. Otherwise, only participants to the hearings should attend. Of course, their agents and authorised representatives or consultants are included in the confidential circle.

The current process provides for an arbitrator to conciliate or mediate before they commence formal arbitration. It is my view that mediation should remain part of the process but that it should be decoupled from arbitration consistent with the process provided by sec 27D of the *Commercial*

[18] *Mining Act* s 383C and *Petroleum (Onshore) Act* s 141

Arbitration Act 2010. This is an important point and one raised in submissions. The rationale for decoupling conciliation / mediation from arbitration is because mediation is a very different process to arbitration. Mediation, unlike arbitration, is confidential, the parties are able to make admissions and put positions on a without prejudice basis. If an arbitrator is conducting both processes then these admissions may affect judgments made in an arbitrated determination.

The mediation process should be short and concise and it should take no more than a week from start to finish. This timeframe would encompass providing to the mediator, the parties positions on the key issues, the mediation and possibly a site visit. As part of providing their initial position, an explorer would include a comprehensive proposed draft access arrangement and it may also include a baseline report. One submission said that the Land and Water Commissioner should mediate land access disputes. I am not of the view that this should occur as role of the Commissioner is separate to that of a mediator as part of determining individual land access arrangements.

As suggested in the submissions, it is important both parties undertake negotiations and arbitration in good faith and I see no reason why this should not be made an explicit legislative requirement.

In relation to legal representation, I am of the strong view that this is an essential requirement for a well-functioning arbitration process and to ensure that the timeframes and documentation requirements are met. This will also help to provide a discipline to the process to ensure that there is a focus on the substantive issues in dispute. Legal practitioners are themselves bound by professional rules and discipline in such a way as to render likely an enhancement of the arbitration process through their involvement. Parties should still have the choice as to whether they wish to be represented by an agent or a legal representative.

To also assist participants in the land access arrangement process I am of the view that all land access arrangements determined by an arbitrator should be published to promote transparency. This is more important than privacy interests, and is more akin to the publicity given to land prices by reason of public registers.

In accordance with good practice for administrative decision making, I also am of the view that arbitrators should be required to provide summary reasons for their decisions. This will also assist if the case is reviewed by the Land and Environment Court. Importantly, this measure will also increase transparency and assist parties to understand the reasoning behind the determination.

I note that while the process of negotiation of an access arrangement is outside my remit, a number of my recommendations will only be fully effective if applied equally to both stages of the process to ensure that the making of access arrangements occurs within a consistent framework.

Recommendation 12

It is recommended that procedural guidance is prepared under the regulations of the *Mining Act* and *Petroleum (Onshore) Act* (section 148 and section 69K respectively) dealing with the following matters:

- Objectives and principles for arbitration;
- Role and scope of the arbitrator;

- Providing for teleconferencing or video conferencing as an alternative to face to face arbitrations;
- Stages and timeframes for the arbitration framework;
- Form and content requirements for submissions;
- Check list of documents to be provided to the landholder by the explorer, including relevant insurance details;
- Explorer providing draft access arrangement upfront ready to sign;
- Baseline report, which is generally to be conclusive;
- Process for site visits;
- Landholder providing list of significant improvements;
- Non-binding view of what is a significant improvement (if this is in dispute)[19];
- Process for site visits;
- Recording of proceedings;
- Interim determinations;
- Final determinations; and
- Summary reasons for decisions

If the current regulation making powers under the legislation are not sufficient to enable what is envisaged then they should be amended accordingly.

Recommendation 13

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide a separate mediation process. This amendment should also provide that a person who acts as a mediator may not be an Arbitrator, except with the agreement of both parties.

Recommendation 14

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide a site inspection of view by a mediator or an arbitrator.

Recommendation 15

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that parties negotiating and arbitrating a land access arrangement must do so in good faith.

Recommendation 16

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide parties with the right to legal representation.

[19] See Term of Reference h).

Recommendation 17

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that every determination by an arbitrator, whether they have been appointed or agreed to by the parties, be published on the Division of Resources and Energy website.

Recommendation 18

It is recommended that the Secretary of the Department approve a list of experts to undertake the proposed baseline reporting.

f) What processes should be in place to ensure that the arbitration process is efficient and cost effective?

A range of improvements to the arbitration process is outlined above in the recommendations for Term of Reference e). In summary, by having a:

- Separate mediation and arbitration process;
- Procedural guidance for the arbitration process, with clear timeframes and concise documentation requirements;
- The right to legal representation together with a cap on costs;[20] and
- The Land and Environment Court expeditiously determine significant improvement issues

will all contribute to efficient and cost effective land access arbitration processes.

g) What should be the scope of the arbitrators' role?

The submissions were in agreement that arbitrators should not have the ability to finally determine questions of law. However, because of the flexible nature of the arbitrators' capacity to determine the procedure of arbitration hearings, the scope of their role may be perceived as overly broad. This has led to concerns being raised that the role of the arbitrator can be uncertain and varies between arbitrators.

One of the key matters of contention raised in the submissions and in the targeted consultations is whether an arbitrator can determine if an explorer should **not** be granted a right of access (emphasis added). It is considered that the arbitrator does have this power[21], but only in very limited circumstances. This is because Parliament has determined that in order for resources to be efficiently developed, exploration can take place on private land. Once an exploration licence is granted, and subject to conditions, land access arrangements are concerned with ensuring that the landholder receives compensation for providing access and that access is subject to the terms and conditions of an access arrangement between the explorer and the landholder. As such, arbitration is not about determining whether or not exploration can occur. Accordingly, the only circumstance in which an arbitrator may determine that an explorer cannot be granted a right of access is where:

- The parties have agreed;

[20] Refer to Term of Reference i).

[21] *Mining Act* s 149(1) and s 151(2) and *Petroleum (Onshore) Act* s 69L(1) and 69N(1).

- The landholder has expressed a non-binding view (which the parties have elected not to take to the Land and Environment Court for determination); or
- A Court has determined

that the land is within the provisions of sec 31 of the *Mining Act* or sec 72 of the *Petroleum (Onshore) Act* (that is, is a dwelling house, garden or significant improvement), and cannot be accessed without landholder consent. It will be unusual for the whole of the landholder's land to be a significant improvement.

Under the current arbitration framework, the role of the arbitrator is to determine an access arrangement and the terms and conditions for undertaking exploration. The broad parameters for what an access arrangement may include are set out in subsec 141(1) of the *Mining Act* (this is mirrored in subsec 69D(1) of the *Petroleum (Onshore) Act*). This includes such things as the periods in which access is permitted, the parts of the land on which exploration can occur, what exploration activities can occur on the land, any conditions that are to be observed by the explorer when they are on the land and how any disputes arising in connection with the access arrangement are to be resolved. An arbitrator must also determine other matters for inclusion in the access arrangement, such as assessing compensation[22].

To address the role, scope and consistency of the arbitrators' role, the above recommendations relating to the use of procedural guidance will clarify this issue and provide practical assistance.

Another issue raised in the submissions is whether there should be joint arbitrations and notice provisions to adjoining landholders. As arbitrations concern an individual property and are private agreements between land holder and explorer, this suggestion is inconsistent with the land access framework.

h) Should arbitrators have the power to determine what is an "improvement" or "significant improvement" under the *Petroleum (Onshore) Act* and *Mining Act*, respectively?

Where significant improvements (*Mining Act*) or improvements (*Petroleum (Onshore) Act*) exist on a landholder's property, an explorer is restricted from accessing those areas unless they obtain the written consent of the landholder. The difference in terminology in the legislation is a result of amendments made to the *Mining Act* in 2008 where the word 'significant' was added. The making of a parallel amendment to the *Petroleum (Onshore) Act* appears to have been an oversight as historically the land access arrangements under the two pieces of legislation have travelled together. It is important that the two Acts are harmonised to provide certainty and predictability for explorers and landholders. The submissions were generally in agreement that the power to determine significant improvements/ improvements ("significant improvement") should remain with the Land and Environment Court, and should not be a matter that an arbitrator can make a determination on.

Many of the submissions suggested that more guidance could be given on what constitutes a significant improvement. Some submissions suggested that the concepts of significant improvement be broadened to include specific structures and/or land with certain values or certification (biodynamic or organic). These terms are important because what constitutes and what is determined a significant improvement may provide the landholder with the ability to withhold consent for access for certain parts of their land. At the moment the definition of these terms is not clear and parties are relying on Court decisions or

[22] *Mining Act* s 141(2) and *Petroleum (Onshore) Act* s 69D(2)

anecdotal information to guide their position. This absence of transparent guidance is contributing to uncertainty and confusion. Consequently, there is a need for a principle based, non-prescriptive approach to guide participants as to what is or isn't a significant improvement. For consistency I suggest that this apply to the entire land access process. This may in fact reduce the number of arbitrations required. This ought to be a matter covered in the induction process for mediators and arbitrators and a regular feature of their annual seminars.

In order to assist the parties further, there is value in enabling an arbitrator to express a non-binding view on whether a part of the land is a significant improvement, in order to enable the arbitration to proceed. At this point either party may elect to take the matter to the Land and Environment Court for a binding determination. If this occurs, it is suggested that the arbitration be stayed, and re-commence once a determination on significant improvement by the Court has been made. If neither party elect to take the matter to court, the arbitrator simply continues to progress the hearing in order to make an access arrangement determination.

If the matter goes to the Land and Environment Court for determination, then the explorer should pay the landholder's legal costs, regardless of which party obtains a favourable judgment. The only exception is where the landholder has acted unreasonably or vexatiously, when the Court should have the ability to make a costs order that the landholder pay for their own costs, to the extent that they were unreasonable.

It is also suggested that the Court matter be expedited, consistent with the need to ensure that arbitrations are conducted in a timely and cost effective way.

For the process outlined above to be feasible, any relevant issue of significant improvement needs to be raised early in the land access arrangement process. As noted earlier in Term of reference e), the landholder should provide details of what they claim to be a significant improvement, and the rationale.

Further, some submissions suggested that the Division of Resources and Energy issue guidance to assist the parties in coming to agreement on what parts of the land are significant improvements. The vagueness of these terms creates difficulties in the negotiation and arbitration process, as there are no clear boundaries or guidance on what constitutes a significant improvement. Based on the feedback I received during the targeted consultations, this uncertainty has led to large differences in what is being claimed, and in at least one arbitration, I was advised that a landholder claimed the whole of their property as a significant improvement.

Accordingly, it is desirable for the Government to clarify this matter through legislative guidance.

Another issue that has become apparent in the consultation process is that the significant improvement restriction may perversely lead to an outcome that is worse for the landholder. For example, a landholder may claim that a road or driveway is a significant improvement, and withhold consent. However, the explorer will still need access for vehicles and accordingly will negotiate to disturb additional parts of the land to use as a road. A more common-sense approach would be to enable access on the significant improvement subject to the explorer remediating the road to its former condition and the landholder having a right to reasonable access on the road.

Another example is where the landholder claims that all fences are significant improvements, and therefore withholds consent for any part of the fence being used for access. This may lead to the

explorer disturbing a larger part of the property as they avoid the significant improvement. Again, a common-sense approach would be to enable access to a portion of the fence, subject to appropriate measures being taken to control livestock, and the fence being remediated to its former condition.

While it is likely that such common-sense arrangements are made in the majority of cases, the legislation should be amended so that consent for access on a significant improvement cannot be unreasonably withheld.

Recommendation 19

It is recommended to continue the current arrangements whereby the Land and Environment Court determine what a significant improvement is.

Recommendation 20

It is recommended that the Land and Environment Court be requested to consider procedures, perhaps by Practice Direction, to ensure special expedition of any necessary determinations of what constitutes a significant improvement.

Recommendation 21

It is recommended that new processes are implemented in relation to significant improvements to:

- Ensure that any dispute over significant improvement is identified early in the process (consistent with the new procedural guidelines in Recommendation 12);
- Provide that the arbitrator can make a non-binding view on which part of the land constitutes a significant improvement, and then can progress the arbitration; and
- Provide that the arbitration process be put on hold if a significant improvement dispute goes to the Land and Environment Court, and recommences once the Court has made an order.

Recommendation 22

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to introduce a regulation making power to declare what does and does not constitute a significant improvement. This should be complemented by guidance material.

Recommendation 23

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that a landholder cannot unreasonably withhold consent in relation to significant improvements or improvements.

Recommendation 24

It is recommended that the *Petroleum (Onshore) Act* be amended to align with the concept of significant improvement contained in the *Mining Act*.

i) What should be the process when assessing and determining compensation?

While the Terms of Reference make it clear that the consideration of costs is excluded from my examination, this issue was raised in the majority of submissions and in most of the targeted consultations. This is why I make the following observations.

The targeted consultations and the submissions revealed that there are two key issues that I intend to address. First, there is the cost of the land access arrangement process. Second, is the compensation payable under the legislation as a result of the activities undertaken by the explorer.

Process Costs

The current compensation provisions do not include the costs of negotiating or arbitrating an access arrangement. The costs of the arbitration process are paid for by the explorer (such as the costs of the arbitrator, the venue in which the arbitration is held, etc.), however, each party is liable for their own costs. The legislation does provide that landholders are entitled to initial legal advice for a proposed access arrangement. In my view this is inadequate.

The submissions have suggested that the landholders costs of negotiating and if necessary arbitrating an access arrangement should be paid for by the explorer. Other submissions have vigorously opposed such a change.

For an explorer, the negotiation and arbitration of a land access arrangement is a cost of the business of exploration. For a landholder, this is a forced arrangement. It is not a commercial arbitration where there are willing participants and mutual benefits to be achieved from arbitration. In this context, the argument that a landholder should be compensated for these costs is attractive as part of the trade-off for their private property rights being overridden and is similar to comparable legislative schemes where private rights are being overridden and those affected are compensated (e.g. the *Land Acquisition (Just Terms Compensation) Act 1991*). Further, it has been submitted that the compensation payable should include the cost of negotiating and arbitrating an access arrangement, including legal and expert fees and to compensate landholders for the time taken away from their business.

However, as some submissions have suggested, these costs ought to be capped to prevent uncontrolled and escalating costs. This will provide certainty to the parties and provide an incentive for the parties to be efficient. I believe that it is appropriate for there to be different caps depending on the nature of the proposed exploration.

Compensation Costs

Compensation is a key part of the offsets Parliament has provided in allowing exploration on private land. The other being that access arrangement are intended to minimise the impact on the landholder of the exploration activities by setting appropriate terms and conditions. It is therefore crucial that this provide adequate compensation for the impact of exploration on the landholder.

The submissions raised concerns with the adequacies of the existing compensation framework in terms of ensuring that landholder and the property were no worse off because of the exploration occurring. There were also suggestions for standard rates or schedules of compensation, including non-monetary compensation such as upgrading roads and fences, and the need for guidance to assess and determine

compensation. It may be useful for the Division of Resources and Energy to prepare guidance on this issue to assist the parties to reach an agreement.

Some submissions supported having compensation being made public, while others argued that this should be kept confidential. I am of the view that there is a need for transparency and so arbitrated access arrangements ought to be made public. Refer to Recommendation 17. I appreciate that non-agreed access agreements requiring determination by an arbitrator are very few compared to current experience of negotiated agreements – and so the published data would not be necessarily representative of the whole market, so to speak. On the other hand, there is an analogy with statutory valuation upon resumption or compulsory acquisition, where there are more details in public in the subset of contested cases then are available in relation to compensation agreed without the need for any litigation. There is virtue in public knowledge concerning the outcome of previous contests, not least to enable better informed decisions by those choosing between agreement or contest.

I note that non-monetary compensation is something that the parties can either agree to as part of the negotiation process, or can be taken into account in assessing and determining compensation during an arbitration. I am advised that such non-monetary compensation is something that is negotiated in practice, particularly in-kind works such as the upgrading of a road or a fence or a commitment to restore the road or fence post exploration to its original state or better post exploration.

There are some minor differences in how the arbitration and compensation provisions interact between the *Mining Act* and the *Petroleum (Onshore) Act.* In this regard the current compensations provisions in the *Petroleum (Onshore) Act* could be clearer that the provision for compensation which can be included in an access arrangement is on the basis of the statutory provisions. The *Petroleum (Onshore) Act* also does not the matters that an Arbitrator should take into account when assessing compensation (clause 74 of the *Mining Act Regulation 2010*).

Recommendation 25

It is recommended that the *Mining Act* and the *Petroleum (Onshore) Act* be amended to provide that a landholder is entitled as part of the negotiation and arbitration of an access arrangement to have the following costs paid by an explorer:

- Their time spent negotiating and arbitrating the access arrangement up to a capped amount;
- Their legal costs up to a capped amount; and
- Costs of any experts the landholders engage as part of this negotiation and arbitration process up to a capped amount.

Consideration should be given to enabling variable caps depending on the nature of the proposed exploration.

Recommendation 26

It is recommended that the *Petroleum (Onshore) Act* be amended to clarify that the provisions in that Act relating to the measure of compensation by the Land and Environment Court apply to compensation determined by an arbitrator in an access arrangement.

Recommendation 27

It is recommended that the *Petroleum (Onshore) Act* be amended to mirror the requirements of clause 74 of the *Mining Regulation 2010* in relation to the matters an Arbitrator needs to be taken into account in making an assessment of compensation.

Recommendation 28

It is recommended that the Division of Resources and Energy prepare guidance in relation to assessing and determining compensation.

j) What procedures should be made for reviewing decisions, including appeals?

Under the current arbitration framework, both the *Mining Act* and the *Petroleum (Onshore) Act* permits a review by the Land and Environment Court of a final access arrangement has been determined. This is a merits review. There is also the ability to seek judicial review on questions of law.[23]

Some submissions raised concerns that the Land and Environment Court was a financially prohibitive review body. However, there was general agreement that the Court was the appropriate body to hear reviews, with some submissions suggesting that:

- Costs should follow the event (as usually occurs in court proceedings),
- Costs should be borne by the explorer, unless the landholder was unreasonable,
- There should only be a right of appeal for questions of law (that is, to remove the merits review function), and
- The court proceedings should be structured to avoid lengthy delays.

It is considered that the Court is the most appropriate body to conduct merits review of access arrangements and to resolve questions of law. It is also important that the right to seek merits review is retained. Merits review is an essential safeguard within the arbitration framework, and it is critical that it be undertaken by an independent body such as the Court. Currently, a merits review appeal in the court is by way of rehearing. This arrangement should remain. It is noted that with the recommendations to undertake recordings of the arbitration hearings and for arbitrators for their determinations will assist the Court identifying the issues in dispute.

Given that significant improvement disputes go to matters of law, they will be referred to the Court for resolution prior to an access arrangement being determined by the arbitrator. This approach has the benefit of potentially reducing appeal applications following an access arrangement determination. This is why I have recommended that the Court expedite such decisions to enable the early resolution of the arbitration[24].

As discussed in other parts of this report, it is desirable for the explorer to bear the landholder's costs of the arbitration process, subject to a cap. Consistent with this approach, it is suggested that the explorer continue to pay the landholder's costs if a review is sought in the Court, whatever the outcome of the

[23] *Mining Act* s 155 and of the *Petroleum (Onshore) Act* s 69R.
[24] Refer to recommendation 20.

review. The only exception is if the Court determines that the landholder acted unreasonably, and in those cases the Court may determine that the landholder pays their own costs.

Recommendation 29

It is recommended that the review and appeal processes under the *Mining Act* and the *Petroleum (Onshore) Act* remain the same.

Recommendation 30

It is recommended that explorers be required always to pay the costs of the landholder (whatever the outcome of the review) if a matter is heard in the Land and Environment Court, unless the Land and Environment Court determines that the landholders were unreasonable, and then only to the extent that such conduct increased the costs.

k) Should the Department have an oversight role?

A number of submissions indicated that the Division of Resources and Energy should have a role to oversight the performance of the land access arbitration framework. This included:

- Training requirements;
- Continuous professional development;
- Accreditation of arbitrators;
- Ensuring guidelines are adhered to;
- Ensuring records are kept; and
- Processes are transparent.

Conversely, some submissions indicated that neither the Division of Resources and Energy nor any other entity should have an oversight role because; the arbitration process should be treated as judicial/ quasi-judicial process and thus the doctrine of separation of powers should apply.

The *Mining Act* and the *Petroleum (Onshore) Act*, provide that a land access arrangement and the arbitration framework is a private matter between explorer and landholder. Therefore, the Government is independent of these arrangements and has no power to step into arbitration processes. Recourse is available through merit appeals and judicial review in the Land and Environment Court.[25]

However, on behalf of the Government, the Division of Resources and Energy has a service delivery responsibility to ensure that the performance of the arbitration processes provides confidence and that it meets the objectives of the *Mining Act* and the *Petroleum (Onshore) Act*. Given the range of concerns expressed in submissions regarding the need for continuous training and education of arbitrators and ensuring there are adequate practices and procedures for making complaints and dealing with issues of conflict of interest and bias, they all indicate a clear need for a Departmental oversight role in relation to the performance of the arbitration process.

[25] Ibid.

Recommendation 31

It is recommended that the Division of Resources and Energy undertake performance reviews every two years of the arbitration framework (not individual arbitrations) and consider, for example:

- The number of inductions and seminars offered to arbitrators;
- The number of land access arrangements determined through arbitration or the Land and Environment Court;
- Timeliness of arbitrations consistent with specified timeframes;
- Whether recordings made of arbitrations;
- The number and type of complaints received;
- The number and type of concerns relating to conflict or bias and how they have been addressed; and
- The number of land access arrangements determined through arbitration that are placed on the Division of Resources and Energy website.
- Whether Panel Arbitrators are maintaining continuous education consistent with their accreditation requirements.

These performance reviews are to be made publicly available.

l) Are policy and/or legislative amendments required to implement any of the recommendations?

As per the discussion and recommendations set out above in relation to the other Terms of Reference there are a number of policy and legislative changes required. In summary the key policy and legislative changes to implement the recommendations include:

Policy

- Preparation of an induction and annual seminar program for arbitrators and mediators.
- Preparation of appropriate policies in relation to governance of arbitrators and mediators, including practice and procedures to deal with conflicts of interest and bias and public disclosure requirements for arbitrators and mediators of their employment and financial dealings.
- Preparation of guidance material in relation to compensation;
- Performance reviews of arbitrators every two years;

Regulations

- The establishment of procedural guidelines for arbitration, which will cover the role and scope of the arbitrator, timeframes, form and content requirements for submissions, baseline reporting, significant improvements and the making of the interim and final determination;

Acts

- Eligibility criteria for landholders;
- Creation of a separate mediation process prior to arbitration;
- Giving parties a right to legal representation or an agent;
- Provision for a site view;
- Publication of all arbitrated land access arrangements;

- Requiring that parties negotiate and conduct arbitrations in good faith;
- Expanding compensation payable to landholder to include their time negotiating and arbitrating the access arrangement, their legal costs and the costs of any experts they have engaged up to a capped amount; and
- Where there is an appeal to the Land and Environment Court, the explorer is to pay the landholder's costs unless the Court finds that the landholder has acted unreasonably.

m) Are there any further improvements required to support the objectives of this review?

No further improvements were identified other than those covered by the above recommendations. There were however a couple of issues raised that were clearly beyond my remit. These were as follows:

- Landholder's accessing security deposits or a separate newly created landholder rehabilitation fund in the event of an explorer causing damage to their land;
- Whether an exploration licence should terminate if there is a breach of an access arrangement;
- Issues of fatalities associated with the effects of living near mining, particularly coal seam gas and unconventional gas drilling;
- Crown ownership of the resources and whether the Crown should continue to own the resources after they have been extracted; and
- The scope of the definition of prospecting under the *Mining Act* and whether it should be amended to include environmental assessments to avoid companies having to enter into an access arrangement and obtain a sec 252 permit.

Recommendation 32

I recommend that the Government consider these issues and respond to them separately.

[i] Mediator Standards Board, *National Mediator Accreditation Standards*, March 2012, p 6. Accessed on 8 June 2014 at http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf