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**LAND ACCESS ARRANGEMENT REASONABLE COSTS ORDER 2016**

under the

MINING ACT 1992 and the PETROLEUM (ONSHORE) ACT 1991

I, Anthony Roberts MP, Minister for Industry, Resources and Energy, pursuant to section 142 (2B) of the *Mining Act 1992* and section 69E (2B) of the *Petroleum (Onshore) Act 1991*, make the following order.

Dated this 23rd day of November 2016.

ANTHONY ROBERTS, MP  
Minister for Industry, Resources and Energy

**Explanatory note**

This Order is made pursuant to section 142 (2B) of the *Mining Act 1992* and section 69E (2B) of the *Petroleum (Onshore) Act 1991*. The object of this Order is to declare the maximum amount of reasonable costs payable by the holder of a prospecting title to a landholder for participating in negotiating an access arrangement.

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**LAND ACCESS ARRANGEMENT REASONABLE COSTS ORDER 2016**

under the

MINING ACT 1992 and the PETROLEUM (ONSHORE) ACT 1991

**1 Name of Order**

This Order is the *Land Access Arrangement Reasonable Costs Order 2016*.

**2 Commencement**

This Order commences on 1 December 2016.

**3 Maximum amount of reasonable costs for negotiation**

The maximum amount of reasonable costs payable by the holder of a prospecting title for a landholder participating in negotiating an access arrangement is:

- (a) \$1,500.00 for exempt prospecting activities, exclusive of GST, and
  - (b) \$2,500.00 for assessable prospecting activities, exclusive of GST.
- 

**APPROVED ARBITRATION PROCEDURES ORDER 2016**

under the

MINING ACT 1992 and the PETROLEUM (ONSHORE) ACT 1991

I, Simon A Y Smith, Secretary for the NSW Department of Industry, Skills and Regional Development, pursuant to section 148A of the *Mining Act 1992* and section 69KA of the *Petroleum (Onshore) Act 1991*, make the following order.

Dated this 30th day of November 2016.

SIMON A Y SMITH  
Secretary of the NSW Department of Industry, Skills and Regional Development

**Explanatory note**

This Order is made pursuant to section 148A of the *Mining Act 1992* and section 69KA of the *Petroleum (Onshore) Act 1991*. The object of this Order is to approve the arbitration procedures set out in the Schedule below.

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**APPROVED ARBITRATION PROCEDURES ORDER 2016**

under the

MINING ACT 1992 and the PETROLEUM (ONSHORE) ACT 1991

**1 Name of Order**

This Order is the *Approved Arbitration Procedures Order 2016*.

**2 Commencement**

This Order commences on 1 December 2016.

**3 Arbitration Procedures**

The Arbitration Procedures set out in the Schedule to this instrument are the approved arbitration procedures for the conduct of mediations and arbitrations under Division 2 of Part 8 of the *Mining Act 1992* and Part 4A of the *Petroleum (Onshore) Act 1991*.

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GUIDELINE

# Land access arbitration procedure

**Mediations and arbitrations under the *Mining Act 1992*  
and the *Petroleum (Onshore) Act 1991***

Published by NSW Department of Industry, Skills and Regional Development, Division of Resources and Energy

**Title:** Land access arbitration procedure

**First published:** December 2016

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Disclaimer: The information contained in this publication is based on knowledge and understanding at the time of writing (December 2016). However, because of advances in knowledge, users are reminded of the need to ensure that information upon which they rely is up to date and to check currency of the information with the appropriate officer of the NSW Department of Industry, Skills and Regional Development or the user's independent advisor.

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# Section 1: General arbitration procedure

## Part A: Preliminary matters

### 1. Purpose

- 1.1 In his 2014 Examination of the Land Access Arbitration Framework, Mr Brett Walker SC recommended that the Division of Resources and Energy develop appropriate guidance on the governance arrangements pertaining to land access arbitration.
- 1.2 This document implements the Government's response to Mr Walker SC's recommendation to develop guidance including around maintaining qualifications and on managing conflict of interest or bias in the arbitration process.
- 1.3 This document is made under section 148A of the *Mining Act 1992* and section 69KA of the *Petroleum (Onshore) Act 1991* and covers both mediation and arbitration.
- 1.4 It is anticipated that the primary audience for this document will be arbitrators, but also landholders who want to better understand mediation and arbitration procedures.

### 2. Interpretation

- 2.1 Section 1 of this document is referred to as the 'arbitration procedure'.
- 2.2 Words and expressions that are defined in the definitions section, appended to this arbitration procedure, have the meaning set out in the definitions.
- 2.3 Unless otherwise defined in this document, words and expressions that are defined in the Acts, or in Regulations made under the Acts, have the same meaning in this arbitration procedure.
- 2.4 For the purposes of this document, references to Acts and Regulations means either:
  - (a) the *Mining Act 1992* and its Regulation for arbitrations conducted under that Act; or
  - (b) the *Petroleum (Onshore) Act 1991* and its Regulation for arbitrations conducted under that Act.

### 3. Objective of arbitration under the Acts

- 3.1 The broad objective of arbitration under the Acts is to provide a less formal legal setting in which a determination on the conditions of land access, and the amount of any compensation payable, may be made under the Acts in a just, affordable and efficient manner. This is to minimise, as much as possible, the need to apply to the court for a determination on access arrangements.

### 4. Objective of this arbitration procedure

- 4.1 The objective of the arbitration procedure is to provide guidance on the conduct of mediations and arbitrations over:
  - (a) the terms on which access to land is granted to titleholders to exercise rights granted under the Acts;

- (b) any compensation to be paid to landholders under the Acts;<sup>1</sup> and
  - (c) the assessment of landholders' costs to be paid by titleholders.
- 4.2 This arbitration procedure is intended to assist the arbitrator and the parties in meeting the objective set out in clause 4.1, with a view to providing consistency, transparency and certainty of process and timing. It:
- (a) sets out matters to be considered by the arbitrator in conducting a mediation or an arbitration for the purposes of land access under the Acts;
  - (b) provides guidance to the arbitrator with regards to managing the timeframes involved in mediation and arbitration;
  - (c) provides some general information and guidance regarding the land access arbitration process, to inform landholders and titleholders about what they can expect and what is expected from them; and
  - (d) is intended to facilitate a more efficient arbitration process.
- 4.3 It is not the purpose of this arbitration procedure to provide legal advice to any party and this arbitration procedure should not be construed as legal advice.
- 4.4 The approval of this arbitration procedure by the Secretary is contemplated by the Acts that also identify matters which the approved arbitration procedure may include (without limitation).<sup>2</sup>

## 5. Application of arbitration procedure

- 5.1 This arbitration procedure is not intended to apply in any arbitration proceedings where the notice of intention to seek an access arrangement, under section 142 of the *Mining Act 1992* or sections 69E or 69X of the *Petroleum (Onshore) Act*, was given before commencement of the *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015*.
- 5.2 This arbitration procedure relates to mediations and arbitrations conducted under:
- (a) Part 8 Division 2 of the *Mining Act 1992*;
  - (b) Part 4A of the *Petroleum (Onshore) Act 1991*; and
  - (c) Part 4B of the *Petroleum (Onshore) Act 1991*.
- 5.3 Except where this arbitration procedure expressly provides otherwise, all arbitrators who carry out land access mediations or arbitrations, whether privately agreed to between the parties or appointed by the Secretary, are required to apply this arbitration procedure.
- 5.4 Notwithstanding clause 5.3:
- (a) The arbitrator and the parties may agree to depart from the strict adherence to this arbitration procedure.
  - (b) The arbitrator may, at the arbitrator's discretion or on the request of a party, dispense with any strict adherence to legal form and technicality that would otherwise be required.
- 5.5 Any departures under clause 5.4 shall be:
- (a) reasonable in all the circumstances or
  - (b) necessary to render the process fair.

<sup>1</sup> Parties negotiating a land access arrangement are free to approach and structure compensation arrangements as they see fit. A useful starting point for negotiation may be the benchmark compensation model developed by IPART in its final report on *Landholder benchmark compensation rates*, November 2015. A copy of this report may be downloaded or reviewed at <http://www.ipart.nsw.gov.au>. Note that references made in that report to compensation provisions in the *Petroleum (Onshore) Act 1991* have now been superseded to align with the compensation provisions in the *Mining Act 1992*. Matters to which an arbitrator or the Land and Environment Court must take into account with assessing and determining compensation are now contained in section 107A of the *Petroleum (Onshore) Act 1991*.

<sup>2</sup> Section 148A *Mining Act 1992*; section 69KA *Petroleum (Onshore) Act 1991*.



- 5.6 The arbitrator shall endeavour to minimise the extent and impact of any departures under clause 5.4 on the parties.
- 5.7 Where this arbitration procedure conflicts with provisions of the Acts or Regulations, then the provisions of the Acts or Regulations prevail to the extent of the inconsistency.
- 5.8 This arbitration procedure begins on the day it is published in the gazette or, if a later day is specified, on that later day,<sup>3</sup> but only applies to mediations and arbitrations where the notice of intention to seek land access was given by the titleholder after the commencement of the *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015*.

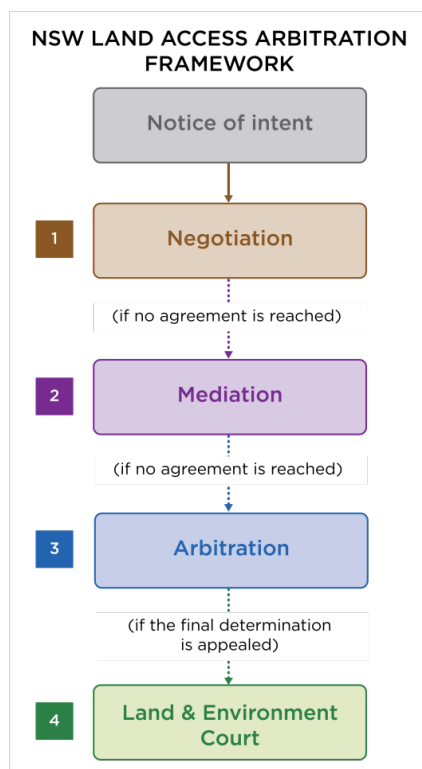
## 6. Application to small scale titles

- 6.1 This arbitration procedure does not apply to small-scale titles under Part 10A of the *Mining Act 1992*.

## 7. Overview of the land access arbitration framework

- 7.1 The land access arbitration framework adopted by the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* has been developed specifically to deal with land access disputes.
- 7.2 A high level overview of the land access framework is shown in **Figure 1**. The diagram divides the framework generally into the major stages of the land access process: negotiation [1], mediation [2], arbitration [3] and proceedings at the Land and Environment Court [4].
- 7.3 Note that an access arrangement may be reached between the parties at any of the stages identified in Figure 1.

**Figure 1: Overview of the land access framework**



<sup>3</sup> Section 148A(7) *Mining Act 1992*; section 69KA(7) *Petroleum (Onshore) Act 1991*.

7.4 A summary of the key legislative provisions is provided in Annexure 1.

## 8. Guidelines as to timeframes

8.1 The arbitrator shall ensure that all stages of the arbitration process, including the pre-hearing matters, be conducted in a manner that provides a fair process for resolving the parties' disputes while avoiding unnecessary delay and expense.

8.2 Subject to clause 8.1:

- (a) A mediation should take no longer than one week from its commencement until an arrangement is reached or it is terminated, whichever is the earlier.
- (b) An arbitration should take no longer than three months from the arbitrator's appointment date until termination or final determination, whichever is the earlier.
- (c) Timeframes for the preparation and exchange of pre-hearing documentation shall be set by the arbitrator and should reflect an objective assessment of the reasonable time that a party requires, but should not exceed 14 days in total.

8.3 The timeframes set out in clause 8.2 are intended to provide a strong indication of the desired time limits for each stage, which the parties and the arbitrator should strive to achieve.<sup>4</sup>

8.4 Nevertheless:

- (a) notwithstanding clause 8.2(b), if a titleholder is seeking land access to undertake exempt prospecting operations only, it would be expected that the time for arbitration would be significantly shortened, reflecting the more straightforward nature of the proposed access; and
- (b) the arbitrator may, after consulting with the parties, extend or shorten the timeframes in clause 8.2 at his or her discretion. Any changes to timeframes should be reasonable and take into account such matters as the arbitrator considers relevant, including:
  - (i) the complexity of the matter or impact of the proposed activity on the land;
  - (ii) the level of relevant knowledge or experience of parties in land access matters;
  - (iii) the extent and accessibility of the information that needs to be provided by a party;
  - (iv) the individual circumstances, time and resources available to each party;
  - (v) whether any party would be unfairly disadvantaged in the setting of a timeframe; and
  - (vi) any other factors that the arbitrator considers relevant.

## 9. Suspension of mediation or arbitration

9.1 The arbitrator shall avoid, as far as practicable, conducting mediation or arbitration at times that are likely to cause unreasonable inconvenience to either party, with regards to availability and business activities.

9.2 The arbitrator may suspend mediation or arbitration, as the case may be if, in the reasonable opinion of the arbitrator, there are other exceptional circumstances that warrant such action being taken in order to alleviate or mitigate unforeseen hardship.

9.3 The period of any such suspension shall be reasonable in all the circumstances, and shall not be taken into account for the purposes of the timeframes specified in this arbitration procedure.

<sup>4</sup> General compliance with the timeframes is one of the criteria against which a panel arbitrator's performance is assessed. The performance assessment criteria for panel arbitrators may be viewed on the department's website.

- 9.4 Where the mediation or arbitration is suspended, the arbitrator shall notify the parties in writing of the suspension.
- 9.5 Suspension also occurs when a party applies to the court for a determination under section 158A of the *Mining Act 1992* or section 69V of the *Petroleum (Onshore) Act 1991*. A mediation or an arbitration, as the case may be, is suspended from the date a party applies to the court for the determination. If the court decides to accept the application, the mediation or arbitration is terminated.<sup>5</sup>
- 9.6 If a mediation or arbitration is suspended as a result of an application to the court, the period of the suspension shall not be taken into account for the purposes of the timeframes specified in this arbitration procedure.

## Part B: General information

### 10. Responsibilities of the parties

- 10.1 The parties shall participate in the mediation and arbitration in good faith, with honesty and integrity.
- 10.2 The parties shall at all times be courteous to each other, and to the arbitrator, and allow the other party to present its case.
- 10.3 Where a party is required by the arbitrator to perform an action, then that party shall endeavour to do so promptly and in a way that is consistent with the objectives of arbitration.
- 10.4 The parties shall be responsible for ensuring that:
- (a) all the directions they seek:
    - i. are relevant to the matter to be dealt with;
    - ii. will assist in the matter being dealt with at the hearing with as little formality and technicality as is practicable; and
    - iii. will assist in the matter being dealt with as promptly and efficiently as is practicable;
  - (b) they and their representatives are, as far as practicable, available to fulfil any directions in the mediation or arbitration that the arbitrator proposes or makes;
  - (c) they comply with any direction which the arbitrator makes; and
  - (d) any document they provide or prepare for the mediation or the arbitration is prepared in such a way as to assist the mediation or arbitration, and focuses on the matters which are relevant to the mediation or arbitration or the issues which that party believes must be resolved in the mediation or arbitration.
- 10.5 If a party reasonably believes that he or she will not be able to comply with a direction of the arbitrator or a time limit in this arbitration procedure, that party shall inform the arbitrator as soon as practicable after first holding that belief.

### 11. Representation of the parties

- 11.1 Each party has a right to representation at mediation and arbitration.<sup>6</sup>
- 11.2 If a party does not appear to have appointed a representative before the first appearance in mediation or arbitration, the arbitrator may raise and discuss the prospect of representation with that party.

<sup>5</sup> Section 158A(5)(b) *Mining Act 1992*; section 69V(5)(b) *Petroleum (Onshore) Act 1991*.

<sup>6</sup> Section 146 *Mining Act 1992*; section 69I *Petroleum (Onshore) Act 1991*.

## 12. Appointment of the arbitrator

- 12.1 An arbitrator may be appointed:
- (a) by agreement of the parties, in which case, there will be no specific criteria for such appointment; or
  - (b) on application by a party, by the Secretary.<sup>7</sup>

## 13. Site inspection

- 13.1 If the arbitrator considers that a site inspection is necessary, the arbitrator shall, as far as possible, organise for it take place at an appropriate time in the mediation or arbitration process.
- 13.2 The purpose of the site inspection is, generally, to provide the arbitrator with:
- (a) an opportunity to examine the proposed access land;
  - (b) context to the issues being raised by either party; and
  - (c) an opportunity for the arbitrator to ask questions of the landholder or the titleholder with respect to the proposed access land.
- 13.3 The landholder shall use all reasonable endeavours to provide access to any part of the proposed access land which the arbitrator considers is reasonable to inspect for the purposes of the mediation or the arbitration.
- 13.4 The landholder shall inform the arbitrator and the other party if the landholder cannot or will not provide access to the proposed access land, and the reasons for this, as far as possible in advance of the time of the proposed inspection of that land.

## 14. Baseline information

- 14.1 The purpose of baseline information is to provide a snapshot, or an initial baseline, of the condition of particular features of the proposed access land at a specified date, against which the impact of the proposed activities could be assessed.
- 14.2 Baseline information is required by the Department as part of the activity approval application process.
- 14.3 The extent of baseline information that is required differs depending on the level of risk of the proposed activity.
- 14.4 Some activities are 'exempt development' under the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* and these activities have minimal environmental impact. As such, these activities can proceed in the absence of an environmental assessment and baseline reports are not required. These activities include the following:
- geological mapping and airborne surveying;
  - sampling and coring using hand-held equipment;
  - geophysical (but not seismic) surveying and downhole logging; and
  - accessing of areas by vehicle that does not involve the construction of an access way such as a track or road.
- 14.5 For any activity that is not 'exempt development', there are two categories of activity approval:
- Common Exploration Activity (CEA) – These activities have been identified as being unlikely to have a significant environmental impact if carried out in a particular manner. A

<sup>7</sup> Section 144(3) *Mining Act 1992*; section 69G *Petroleum (Onshore) Act 1991*.

streamlined assessment pathway has been developed for these activities, if they satisfy specific requirements. CEA applications form the majority of applications received.

- Non-Common Exploration Activity (non-CEA) – Applications to undertake activities that do not meet the CEA criteria must be accompanied by additional environmental impact assessment information.
- 14.6 Further detail about exempt development, CEA and non-CEA categories can be found in ESG5: Assessment Requirements for Exploration Activities on the Division of Resources and Energy's website ([resourcesandenergy.nsw.gov.au](http://resourcesandenergy.nsw.gov.au)).
- 14.7 Operations that seek approval for CEA and non-CEA are required to provide a range of baseline information to the Department as part of the activity approval process. All information provided to the Department as part of this process is made publicly available on the DIGs website ([digsopen.minerals.nsw.gov.au](http://digsopen.minerals.nsw.gov.au)).
- 14.8 Operations that seek approval for CEA are required to provide information on factors including:
- photographs of the site;
  - maps of any Aboriginal and European heritage sites;
  - locations of any critical habitats, threatened fauna and flora;
  - preparation of a groundwater monitoring and modelling plan<sup>8</sup>; and
  - rehabilitation objections and completion criteria that is developed in consultation with the landholder.
- 14.9 Operations that seek approval for non-CEA are required to provide the same information as outlined above and, in addition (where relevant depending on the risk of the activity proposed) provide:
- an Agricultural Impact Statement (AIS);
  - a Review of Environmental Factors (REF); and
  - an Environmental Impact Statement (EIS) or a Species Impact Statement (SIS). Environmental Impact Statements are required to address all potential impacts of the proposal, including potential impacts on water resources, biodiversity, air quality and local communities. Documents are publicly exhibited, and public submissions are sought, before any application is considered by the determining authority.
- 14.10 For CEA and non-CEA, given the extent and quality of baseline information that is publicly available, landholders may rely on the baseline information provided by an explorer as part of their activity approval application, and may not consider it necessary to obtain further baseline reports.

## 15. Access arrangement

- 15.1 An access arrangement sets out the terms and conditions of access by the titleholder, onto the proposed access land, to undertake activities of a nature set out in the access arrangement.
- 15.2 An access arrangement may be reached by agreement between the parties, or determined by an arbitrator or the court.
- 15.3 An access arrangement shall include:
- (a) such provisions as is necessary to give effect to the matters agreed to by the parties, or as determined by an arbitrator or the court;
  - (b) the mandatory provisions imposed by any relevant land access code applicable at that time or identified in the Acts;

<sup>8</sup> Note that this requirement applies to coal title holders only; petroleum activities are not classified as CEA under the activity approvals process.

- (c) if arbitrated under the *Mining Act 1992*, the compensation that the arbitrator has assessed to be payable to the landholder;<sup>9</sup> and
  - (d) if agreed to by the parties or arbitrated under the *Petroleum (Onshore) Act 1991*, the compensation that parties have agreed, or that the arbitrator has assessed, to be payable to the landholder.<sup>10</sup>
- 15.4 The access arrangement may include other matters as set out in the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*.<sup>11</sup>

## Part C: Mediation before arbitration

### 16. Introduction to mediation

- 16.1 Mediation is a dispute resolution process where an impartial third-party, the mediator, facilitates the negotiations between the parties to help them reach their own solution, in as amicable a manner as possible.
- 16.2 A key advantage of mediation is that the parties can make their own decisions. While the mediator controls the process of the mediation, he or she does not make any decisions about actions or outcomes: the decision making power remains with the parties to the dispute.
- 16.3 Before reaching these decisions parties are encouraged, with the support of a mediator, to identify the issues, develop options, and consider reasonable alternatives.

### 17. Role and responsibilities of the mediator

- 17.1 The role of the mediator is not to provide legal advice or to adjudicate between the parties, but rather to manage the mediation process and provide support to the parties, assisting them to resolve the dispute themselves.
- 17.2 The mediator is instrumental in guiding the parties towards a mutually agreeable settlement by providing appropriate guidance within the mediation framework. For example, the mediator may assist the parties to identify the substantive issues, clarify their underlying interests and concerns, generate options and alternatives to consider, and encourage compromise and trade-offs.
- 17.3 The mediator may meet with each party privately to explore more fully the facts and issues of each side. Confidential information that is obtained during these private meetings shall not be disclosed to the other party, other than with the express consent of the party from whom the information has been obtained.
- 17.4 The mediator shall remain impartial throughout the process and shall not seek to impose any solutions or decisions on the parties.
- 17.5 The mediator shall conduct the mediation in an informal and flexible manner that best facilitates negotiation and dialogue between the parties, with a view to reaching a mutually acceptable outcome.
- 17.6 The mediator shall outline, and ensure that the parties understand, the aims and format of the mediation process before the mediation commences.

<sup>9</sup> Section 141(2) and Part 13 Division 1 *Mining Act 1992*.

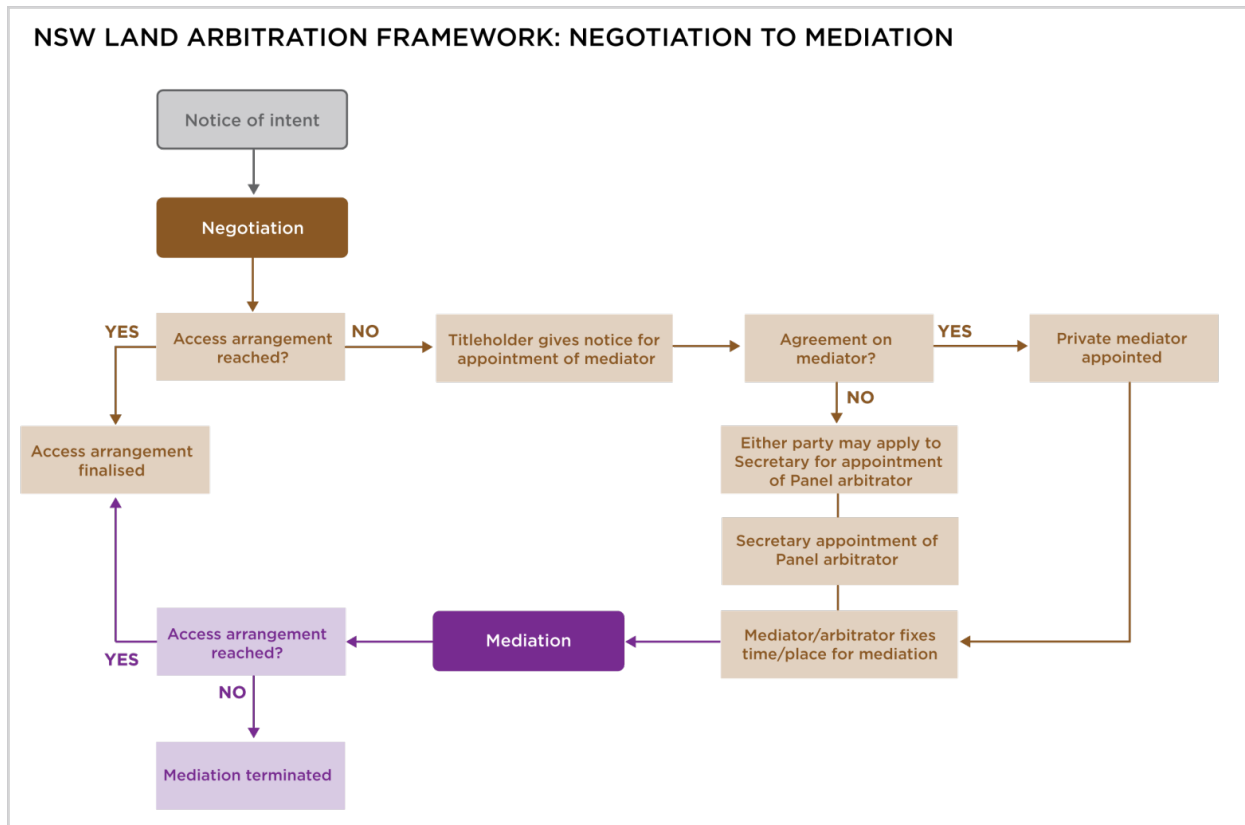
<sup>10</sup> Sections 69D(2) and 69X, and Part 11 *Petroleum (Onshore) Act 1991*.

<sup>11</sup> Section 141(1) *Mining Act 1992*; section 69D(1) *Petroleum (Onshore) Act 1991*

## 18. Mediation process

- 18.1 A high level overview of the land access process from negotiation to mediation is depicted in Figure 2.
- 18.2 The parties shall comply with any direction relating to the mediation given by the mediator.
- 18.3 If, during mediation, the parties reach agreement on the terms of an access arrangement, the mediation is concluded once the access arrangement is signed by each party.
- 18.4 If:
  - (a) the mediation is terminated other than by acceptance by a court of an application under section 158A of the *Mining Act 1992* or 69V of the *Petroleum (Onshore) Act 1991*; and
  - (b) the parties have not reached agreement on the terms of an access arrangement; and
  - (c) an access arrangement is still sought
 then the provisions of clause 0 are to apply, and arbitration may begin.

**Figure 2: Overview of the process from negotiation to mediation**





## 19. Moving from mediation to arbitration: confidentiality

- 19.1 The mediator can only continue to conduct arbitration following mediation on the same subject matter, if all parties to the mediation, including the mediator, provide consent to this continuation in writing.<sup>12</sup>
- 19.2 In deciding whether or not to give this consent, parties should have particular regard to the nature and extent of any confidential knowledge or information that was communicated to the arbitrator in the course of the mediation. This is because the legislation states that if all parties, including the mediator, consent to the mediator continuing, then the mediator will be required to disclose to all of the parties such of the confidential information, that was communicated to them, as he or she considers to be material to the arbitration.
- 19.3 Consent for a mediator to continue to conduct the subsequent arbitration shall be written and signed by all parties, including the mediator.
- 19.4 If the mediation is terminated and the parties have not reached agreement on the terms of an access arrangement, the mediator will confirm in writing:
- (a) the termination of the mediation;
  - (b) the termination date;
  - (c) the next step in the process and the timeframe for initiating/completing that step;
  - (d) whether the mediator will also be the arbitrator in the arbitration process, and if not, the steps that shall be taken by the parties to appoint a substitute arbitrator; and
  - (e) if necessary, any other actions that the parties shall undertake or complete.

## Part D: Arbitration: pre-hearing matters

### 20. Introduction to arbitration

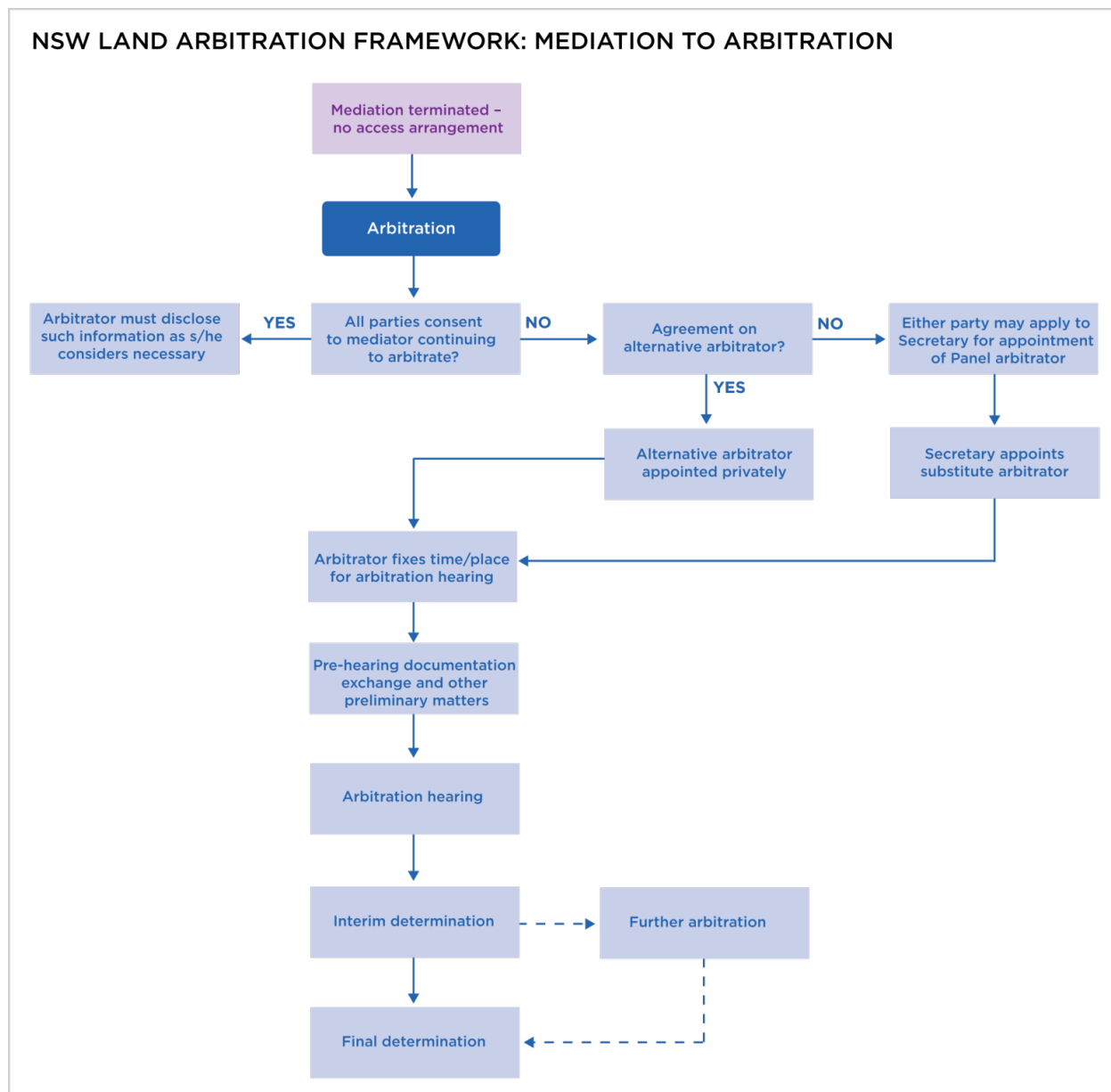
- 20.1 Where the parties are unable to reach an agreement through mediation and the titleholder still intends to seek access to the proposed access land, the legislation provides for arbitration to take place.<sup>13</sup>
- 20.2 An overview of the transition from mediation to arbitration is shown in Figure 3.
- 20.3 Arbitration is a dispute resolution process that is comparatively more formal than other forms of alternative dispute resolution, and is therefore often referred to as 'hearings'. The arbitrator hears each party, examines and evaluates the facts and evidence, and makes a determination to resolve the parties' dispute.
- 20.4 However, the procedural rules for arbitration are generally more simplified, and arbitration generally allows the participants greater flexibility than a court proceeding.

<sup>12</sup> Section 145A(4) *Mining Act 1992*; section 69HA(4) *Petroleum (Onshore) Act 1991*.

<sup>13</sup> Section 145B *Mining Act 1992*; section 69HB *Petroleum (Onshore) Act 1991*.



Figure 3: Overview of the transition from mediation to arbitration



## 21. Role and responsibilities of the arbitrator

- 21.1 In relation to access arrangements, the role of the arbitrator is to determine the conditions upon which a titleholder may enter, access and undertake activities on and in another person's land pursuant to a statutory authorisation to do so. At the conclusion of the process the arbitrator is required to write an access arrangement between the parties to the arbitration.
- 21.2 In conducting the arbitration, the arbitrator shall:
- (a) comply with the provisions of section 148(2) of the *Mining Act 1992* or section 69K(2) of the *Petroleum (Onshore) Act*;
  - (b) conduct the arbitration in a manner that best facilitates, in the circumstances, the minimisation of legal complexity;

- (c) treat the parties with equality, and provide an equal and reasonable opportunity for each to present their case;
  - (d) determine all issues relating to land access, which are put before the arbitrator, which arise under the relevant provisions, and that the arbitrator considers necessary to resolve in order to conduct the arbitration; and
  - (e) make a determination based on the arbitrator's reasonable assessment of the facts and the evidence before him or her.
- 21.3 The arbitrator will also make an assessment of the landholder's reasonable costs in participating in the mediation and arbitration that the titleholder shall pay.<sup>14</sup>
- 21.4 The arbitrator shall outline, and ensure that the parties understand, the aims and format of the arbitration hearing before the hearing begins.

## 22. Preparation for the arbitration hearing

- 22.1 Where mediation has not resulted in the making of an access arrangement, and the titleholder still intends to seek access to the proposed access land, the matter shall proceed to an arbitration hearing.
- 22.2 The arbitrator shall fix a time and place for the hearing of the arbitration to take place as soon as practicable after the arbitrator's appointment, but should, in any case, be within 20 days of the arbitrator's appointment date.
- 22.3 Prior to the hearing:
- (a) the arbitrator shall set the dates for the parties to exchange their pre-hearing documentation; and
  - (b) the arbitrator may organise a site inspection in accordance with the Acts and this arbitration procedure.
- 22.4 The parties shall avoid providing the arbitrator or each other with any material that is not necessary for the proper conduct of the arbitration.
- 22.5 Any expert report on which a party proposes to rely in the arbitration, and to which the arbitrator has given leave, shall:
- (a) be prepared in accordance with Part 31 and Schedule 7 of the *Uniform Civil Procedure Rules 2005*; and
  - (b) be as brief as possible.
- 22.6 A party subsequently may amend or supplement its position statement or response but only with leave of the arbitrator.

## 23. Titleholder's position statement

- 23.1 The titleholder shall serve on the landholder and the arbitrator a position statement which:
- (a) specifies the names and contact details of the titleholder (including the address for service) and the titleholder's preferred means of contact;
  - (b) specifies the names and contact details of the titleholder's authorised representative in relation to the arbitration, if any;
  - (c) attaches a copy of the notice of intention served on the landholder under section 142(1) of the *Mining Act 1992* or section 69E(1) of the *Petroleum (Onshore) Act 1991*;

<sup>14</sup> Section 151A *Mining Act 1992*; section 69NA *Petroleum (Onshore) Act 1991*.

- (d) provides a detailed description of the proposed activities which the titleholder proposes to carry out on the land;
  - (e) identifies on a map the areas of the proposed access land on which the titleholder proposes:
    - i. to carry out activities in connection with the title; and
    - ii. to obtain access and travel for the purposes of those activities;
  - (f) specifies the compensation which the titleholder proposes, whether in monetary or non-monetary (e.g. works) form, or both, and how it has been determined;
  - (g) attaches the titleholder's proposed draft access arrangement, containing complete provisions such that the document is ready for execution by the parties; and
  - (h) provides a summary of the negotiations that have been undertaken with the landholder, including a timeline and any relevant documentation from those negotiations but only to the extent that the negotiations or documentation were not on a 'without prejudice' basis.
- 23.2 The titleholder shall also provide:
- (a) written details of the titleholder's public liability insurance cover;
  - (b) written confirmation that the cover is adequate and appropriate to cover damage that may arise in the course of exercising any rights under an access arrangement;
  - (c) written confirmation that that the titleholder has met all other statutory requirements and obligations required; and
  - (d) a copy of any relevant land access code.
- 23.3 Where a titleholder proposes to rely on expert reports in the arbitration, the titleholder shall submit those reports to the arbitrator together with the titleholder's position statement. In this case, the position statement shall include the reasons for that reliance, including the relevance of the report to the issues which the titleholder believes will arise in the arbitration. The arbitrator shall, within four business days of the date of service of the titleholder's position statement and reports, inform the parties in writing whether the arbitrator will allow the titleholder to rely on those expert reports in the arbitration.

## 24. Landholder's response

- 24.1 Following receipt of the titleholder's position statement, the landholder shall serve on the titleholder, and the arbitrator, a response which:
- (a) specifies the names and contact details of the landholder (including the address for service) and the landholder's preferred means of contact;
  - (b) specifies the names and contact details of the landholder's representative in relation to the arbitration, if any;
  - (c) identifies any existing obligations of the landholder that may be affected by the proposed access area (e.g. a carbon farming initiative agreement or a bio-banking agreement);
  - (d) states whether the landholder accepts the draft access arrangement proposed by the titleholder and, if not:
    - i. identifies the terms of the access arrangement which the landholder does not accept;
    - ii. provides a brief summary of the reasons why the landholder does not accept each of those terms;
    - iii. specifies the way in which the landholder proposes that those terms be amended or deleted; and

- iv. specifies the additional terms, if any, which the landholder proposes be included in the access arrangement.
  - (e) in relation to information provided by the titleholder under clause 23.1, states whether the landholder considers that the information is sufficiently clear, and, if not, sets out where further clarification or information is required;
  - (f) states whether the landholder agrees with the amount of compensation which the titleholder has proposed and, if not:
    - i. identifies the aspects of that proposed compensation which the landholder does not accept;
    - ii. provides a brief summary of the reasons why the landholder does not accept each of those aspects;
    - iii. specifies the compensation which the landholder proposes as acceptable, whether in monetary or non-monetary (e.g. works) form, or both, and how it has been determined; and
  - (g) identifies on a map, and attaches photographs of any matters that the landholder claims are relevant improvements and provides the reasons why the landholder believes each of those matters is a relevant improvement, whether or not the prospecting titleholder also claims any of those matters is a relevant improvement.
- 24.2 The landholder should use best endeavours to identify all relevant improvements, in relation to a proposed access route, in the landholder's response.
- 24.3 For the avoidance of doubt, if, during arbitration, an alternative access route is proposed then the landholder may identify other relevant improvements, in relation to the alternative access route.
- 24.4 If the landholder's response identifies particular areas as a relevant improvement, then the relevant provisions of Part F of this arbitration procedure apply.
- 24.5 Where a landholder proposes to rely on expert reports in the arbitration, the landholder shall submit those reports to the arbitrator together with the landholder's response. In this case, the landholder's response shall include the reasons for that reliance, including the relevance of the report to the issues that the landholder believes will arise in the arbitration. The arbitrator shall, within four business days of the date of service of the landholder's response, inform the parties in writing whether the arbitrator will allow the landholder to rely on those expert reports in the arbitration.

## Part E: Arbitration hearing

### 25. The hearing

- 25.1 If practicable, the hearing shall be conducted on or near the proposed access land, or at a place that is otherwise convenient for all parties.
- 25.2 Parties may seek leave of the arbitrator to have the hearing conducted, in whole or in part, via telephone conference or video conference.
- 25.3 Only the arbitrator, the parties and their representatives may attend the hearing.
- 25.4 Expert and other witnesses may attend such part of the hearing as necessary to present their evidence, only with leave of the arbitrator.
- 25.5 Each party shall bear the burden of establishing the facts relied on to support that party's position. At any time during the hearing, the arbitrator may require a party to produce

- documents, exhibits or other evidence as the arbitrator considers reasonable to produce, and which are relevant to the matters being disputed.
- 25.6 The arbitrator shall determine the admissibility, relevance, materiality and weight of any evidence that is put forward by a party; however the arbitrator is not bound by the rules of evidence.
- 25.7 Parties may, with leave of the arbitrator:
- (a) present lay witnesses to testify on their behalf on any issue of fact that is relevant to the dispute; and
  - (b) present expert witnesses to give evidence on any issue within the expert's area of expertise, but only if that expert has prepared an expert report in the dispute which has been admitted into evidence by the arbitrator.
- 25.8 A party may ask questions of a witness only with the leave of the arbitrator. The arbitrator should not grant leave unless he or she is satisfied that questioning the witness is necessary or appropriate.
- 25.9 The arbitrator shall otherwise conduct the hearing with as little formality and technicality, and with as much expedition as is practicable.

## 26. Recording of hearing

- 26.1 A party to an arbitration may make an audio recording of part or all of the arbitration hearing, subject to the following conditions:
- (a) The party must advise the arbitrator and the other party of the intention to make such recording, prior to the commencement of the hearing. Where such advice is not given prior to commencement, then the arbitrator may use his or her discretion as to whether or not to allow it.
  - (b) The audio recorder must be placed in a position where it is continuously visible to all parties and to the arbitrator.
  - (c) A party may only record during the hearing, and may not record when the hearing is not in session. The arbitrator should make it clear during when the session is starting and when it is ending. If a party continues to record after the ending of a session then the arbitrator may use his or her discretion as to whether or not to allow the recording to continue.
- 26.2 For clarity, the making of any audio recording is not permitted during any mediation.

# Part F: Relevant improvements at arbitration

## 27. General information

- 27.1 The Acts provide landholders with a right to refuse access over areas of land on which dwelling houses, gardens<sup>15</sup> and significant improvements are located.<sup>16</sup> These features are referred to collectively as 'relevant improvements' in this arbitration procedure.
- 27.2 Titleholders cannot exercise rights under a title within areas on which relevant improvements are located other than with the landholder's written consent.<sup>17</sup>

<sup>15</sup> For convenience, the reference to 'garden' in this Part F of the arbitration procedure should be taken to include a reference to vineyards and orchards under the *Petroleum (Onshore) Act 1991*.

<sup>16</sup> See section 31 and 49 of the *Mining Act 1992*; section 72 of the *Petroleum (Onshore) Act 1991*. Additional guidance on the definition of 'significant improvement' is provided on the department's website.

<sup>17</sup> *Ibid.*

- 27.3 Once a landholder has given this consent, it is irrevocable.<sup>18</sup>
- 27.4 Any party may, at any time, apply to the Land and Environment Court for the determination of a relevant improvement dispute under sections 31(5) or 49(5) of the *Mining Act 1992*, or section 72(4) of the *Petroleum (Onshore) Act 1991*, as the case may be.
- 27.5 Subject to clause 27.4, the arbitrator can make a preliminary determination in relation to any such dispute, in accordance with clause 28.

## 28. Preliminary determination by arbitrator

- 28.1 Pre-hearing documentation is designed to assist the arbitrator and parties to identify the nature of any relevant improvements claimed by the landholder, early in the arbitration process.
- 28.2 If the landholder's response in clause 24.1 includes a list of particular features identified by the landholder as relevant improvements, the titleholder shall provide further written notice to the landholder and the arbitrator stating whether the titleholder agrees, or not, that the things identified in the landholder's response are relevant improvements.
- 28.3 If the titleholder does not agree with the landholder then, subject to clause 27.4, the arbitrator may make a preliminary determination as to whether those things are relevant improvements.
- 28.4 In making any preliminary determination, the arbitrator:
- (a) may request additional information and submissions from the parties about whether and why a particular thing is a relevant improvement. The parties must comply with that request within the time frame specified by the arbitrator;
  - (b) shall issue a written notice to the parties setting out the preliminary determination and the reasons for it, within 14 days after receiving the titleholder's written notice; and
  - (c) shall set a date by which parties must accept or reject the preliminary determination. This date shall be no longer than 14 days from the date on which the preliminary determination was provided in accordance with clause 28.4(b).
- 28.5 If the parties accept the arbitrator's preliminary determination, the acceptance must be given in writing and the arbitration will continue in accordance with this arbitration procedure.
- 28.6 If any party to the arbitration does not accept the arbitrator's preliminary determination, any of those parties may apply to the court for a determination under sections 31(5) or 49(5) of the *Mining Act 1992*, or section 72(4) of the *Petroleum (Onshore) Act 1991*, as the case may be.

## Part G: Determination

### 29. Interim determination

- 29.1 As soon as practicable and, in any event, within 14 days after concluding the hearing, the arbitrator shall make an interim determination as to whether or not the titleholder should have a right of access to the proposed access land, having regard to the existence or otherwise of relevant improvements.
- 29.2 If the arbitrator determines that the prospecting titleholder should have such a right of access to some or all of the proposed access land, he or she shall prepare a draft access arrangement in respect of that land.<sup>19</sup>

<sup>18</sup> Ibid.

<sup>19</sup> Section 149(1) *Mining Act 1992*; section 69L(1) *Petroleum (Onshore) Act 1991*.

- 29.3 The draft access arrangement shall include the arbitrator's interim determination as to compensation to be paid to the landholder under the access arrangement.
- 29.4 As soon as practicable after making an interim determination, the arbitrator shall:
- (a) serve notice on the parties that an interim determination has been reached; and
  - (b) include with the notice a copy of the interim determination and a copy of any draft access arrangement.<sup>20</sup>

## 30. Further arbitration

- 30.1 A party to the hearing may, no later than 14 days after being served with a copy of the arbitrator's notice of interim determination, apply to the arbitrator:
- (a) for reconsideration of the question of access to any part of the proposed access land; or
  - (b) for variation of any draft access arrangement prepared by the arbitrator in respect of that land.<sup>21</sup>
- 30.2 As soon as practicable after receiving such an application, the arbitrator shall:
- (a) fix a time and place for continuing the hearing into the question of access to the proposed access land; and
  - (b) notify the parties of the time and place fixed for continuing the hearing to be given.
- 30.3 The arbitrator may, by a further notice served on the titleholder and on the landholder, vary the time or place fixed for continuing the hearing.<sup>22</sup>
- 30.4 The arbitrator shall, at the time and place fixed, continue the hearing into the question of access to the proposed access land.<sup>23</sup>

## 31. Final determination

- 31.1 If a party has not made an application of the type referred to in clause 30.1, then:
- (a) the interim determination is taken to be the arbitrator's final determination; and
  - (b) any draft access arrangement provided with the notice of interim determination is taken to be a final access arrangement.<sup>24</sup>
- 31.2 If a party has made an application of the type referred to in clause 30.1, then as soon as practicable and, in any event, within 14 days after concluding the continued hearing, the arbitrator:
- (a) shall make a final determination as to whether or not the titleholder should have a right of access to the proposed access land (having regard to the existence or otherwise of relevant improvements); and
  - (b) if the arbitrator determines that the titleholder should have such a right of access to some or all of the proposed access land, must determine a final access arrangement in respect of that land.<sup>25</sup>
- 31.3 The final access arrangement shall include the arbitrator's final determination as to compensation to be paid to the landholder under the access arrangement.

<sup>20</sup> Section 149(2) *Mining Act 1992*; section 69L(2) *Petroleum (Onshore) Act 1991*.

<sup>21</sup> Section 150(1) *Mining Act 1992*; section 69M(1) *Petroleum (Onshore) Act 1991*.

<sup>22</sup> Section 150(3) *Mining Act 1992*; section 69M(3) *Petroleum (Onshore) Act 1991*.

<sup>23</sup> Section 150(4) *Mining Act 1992*; section 69M(3) *Petroleum (Onshore) Act 1991*.

<sup>24</sup> Section 151(1) *Mining Act 1992*; section 69N(1) *Petroleum (Onshore) Act 1991*.

<sup>25</sup> Section 151(2) *Mining Act 1992*; section 69N(2) *Petroleum (Onshore) Act 1991*.



- 31.4 As soon as practicable after making a final determination, the arbitrator shall:
- (a) serve notice on the parties that a final determination has been reached; and
  - (b) include with the notice a copy of the final determination and a copy of the final access arrangement.<sup>26</sup>

## 32. Summary of reasons for decisions

- 32.1 The arbitrator shall provide the parties with a written summary of the reasons for decisions made in the final determination.
- 32.2 The summary shall be served on each of the parties together with service of the final determination.
- 32.3 The summary shall provide sufficient and detailed reasons to explain to the parties how and why the arbitrator has made each aspect of a final determination (including each material clause of the access arrangement).

## 33. Review of final determination

- 33.1 A party to an arbitration may appeal the final determination to the court.<sup>27</sup>
- (a) in the case of an interim determination that has become a final determination, within 28 days after a copy of the interim determination was served on the applicant; or
  - (b) in the case of a final determination, within 14 days after a copy of the final determination was served on the applicant.
- 33.2 An application to the court for review may not be made:
- (a) during the period of 14 days within which an application may be made to an arbitrator or
  - (b) if such an application is made, until the arbitrator has made a final determination with respect to the application.
- 33.3 Subject to any order of the court to the contrary, an application for review of a determination stays the effect of any related access arrangement from the time when a copy of the access arrangement has been served on the party until the date of the decision of the Court on the review.
- 33.4 In reviewing the determination, the court has the relevant functions of the arbitrator as well as its other functions.
- 33.5 The review of the determination shall be by way of a rehearing and the court can consider fresh material given in addition to, or in substitution of, the material considered by the arbitrator in making his or her determination.
- 33.6 The titleholder shall pay the reasonable costs of the landholder in an appeal of the final determination under clause 34.1, and those costs will be determined by the court having regard to whether or not the landholder has acted reasonably in the negotiation, mediation, arbitration or review proceedings.

## 34. Costs

- 34.1 Before the occurrence of any of the events listed in section 145A(3) of the *Mining Act 1992* or 69HA(3) of the *Petroleum (onshore) Act 1991*, the parties may agree to the arbitrator making a determination of:

<sup>26</sup> Section 151(3) *Mining Act 1992*; section 69N(3) *Petroleum (Onshore) Act 1991*.

<sup>27</sup> Section 155 *Mining Act 1992*; section 69R *Petroleum (Onshore) Act 1991*.



- (a) the reasonable costs of the landholder in participating in the mediation; or
- (b) any disputes between the parties that have arisen over the landholder's costs incurred during negotiations.
- 34.2 If the mediation is terminated and the parties do not proceed to arbitration, then either party may apply to the court for a determination of the matters listed in clause 34.1.<sup>28</sup>
- 34.3 If a dispute has proceeded to arbitration and a determination of the costs set out in clause 34.1 has not occurred, then the arbitrator shall make a determination of:
- (a) the reasonable costs of the landholder in participating in the mediation and the arbitration; and
- (b) any disputes between the parties that have arisen over the landholder's costs incurred during negotiations.<sup>29</sup>
- 34.4 The matters set out in clause 34.3 shall be determined:
- (a) as soon as practicable after the interim determination is taken to be a final determination; or
- (b) on making a final determination; or
- (c) before the arbitration is terminated at the request of the parties.<sup>30</sup>
- 34.5 The maximum amount of a landholder's costs payable by the titleholder for the negotiation, mediation, and arbitration stages may be set by Ministerial Order.<sup>31</sup> If applicable, these operate as a cap on recovery so that, if the actual cost or expense to the landholder is less than the specified maximum, only the actual amount will be potentially recoverable.
- 34.6 However a titleholder, at its own discretion, may agree to pay more than the maximum amount.<sup>32</sup>
- 34.7 The landholder shall provide to the titleholder and the arbitrator (if requested by the arbitrator) evidence<sup>33</sup> of:
- (a) the actual costs incurred; and
- (b) as part of any claim for costs for their time, a statutory declaration which specifies the total period of time which the landholder (or the landholder's agent) spent on the mediation and/or arbitration.
- 34.8 The Acts impose an obligation on the landholder and the titleholder to participate in the negotiation, mediation and arbitration in good faith.<sup>34</sup> In making any determination of reasonable costs, the arbitrator is required to consider any unreasonable conduct of the landholder during the negotiation, mediation and arbitration and deduct such amounts as, in the arbitrator's opinion, represents the amount by which the unreasonable conduct increased the costs.<sup>35</sup> This is because the obligation on the titleholder is to meet only the reasonable costs of the landholder (and not any unreasonable costs).
- 34.9 Where a party has applied to the court for a determination (e.g. relating to a significant improvement) under section 158A of the *Mining Act 1992* or 69V of the *Petroleum (Onshore) Act 1991* and notice has been received that the Court has accepted the application, thereby terminating the arbitration, the parties can:

<sup>28</sup> Section 293(1)(v) *Mining Act 1992*; section 115(1)(o)(ii) *Petroleum (Onshore) Act 1991*.

<sup>29</sup> Section 151A *Mining Act 1992*; sections 69NA and 69X *Petroleum (Onshore) Act 1991*.

<sup>30</sup> Section 151A(1) *Mining Act 1992*; section 69NA(1) of the *Petroleum (Onshore) Act 1991*.

<sup>31</sup> For negotiation, see section 142 *Mining Act 1992*; section 69E *Petroleum (Onshore) Act 1991*. For mediation and arbitration, see section 148C *Mining Act 1992*; section 69KC *Petroleum (Onshore) Act 1991*.

<sup>32</sup> Sections 142(2D) and 148C(4) *Mining Act 1992*; sections 69E(2D) and 69KC(4) *Petroleum (Onshore) Act 1991*.

<sup>33</sup> Section 148A(3)(g) *Mining Act 1992*; section 69KA(3)(g) *Petroleum (Onshore) Act 1991*.

<sup>34</sup> Sections 142(2G), 145A(2) and 148(1) *Mining Act 1992*; sections 69E(2G), 69HA(2), 69K(1) and 69X(1) *Petroleum (Onshore) Act 1991*.

<sup>35</sup> Section 151A(3) *Mining Act 1992*; section 69NA(3) *Petroleum (Onshore) Act 1991*.

- (a) agree the costs for the process undertaken to date (e.g. the negotiation, mediation or arbitration); or
- (b) agree that the arbitrator shall determine the costs payable by the titleholder for negotiation, mediation and arbitration; or
- (c) either party can apply to the court to make a determination as to costs.<sup>36</sup>

## 35. Publication of arbitrated agreement

- 35.1 As soon as practicable after service of the final determination, or an interim determination is taken to be a final determination, the titleholder shall provide a copy of the arbitrated access arrangement to the Secretary for the purpose of keeping and maintaining in a publicly available register.<sup>37</sup>
- 35.2 For clarity, the requirement imposed on the Secretary to keep a register of arbitrated access arrangements:<sup>38</sup>
- (a) applies to all arbitrated access arrangements, including those arbitrated by non-panel appointed arbitrators; but
  - (b) does not apply to access arrangements reached through private negotiation or mediation.

# Part H: LEC determination of relevant improvements

## 36. Relevant improvements

- 36.1 This clause applies if an application referred to in clause 27.4 has been made by a party, but no application has been made under section 158A of the *Mining Act 1992* or sections 69V or 69X of the *Petroleum (Onshore) Act 1991* for the court to combine the determination of a relevant improvement matter with the determination of the access arrangement.
- 36.2 The party that lodged the application shall notify the arbitrator and the other party in writing:
- (a) that the party has made the application, as soon as practicable after the party has made the application, and shall attach a copy of the application to the notice; and
  - (b) of the court's determination, as soon as practicable after the party has received a copy of the written reasons for the determination by the court.
- 36.3 On receipt of the notice, and subject to clause 37.1, the arbitrator shall determine whether to:
- (a) suspend the mediation or arbitration, and to recommence when the court has issued its determination of the relevant improvement matter; or
  - (b) continue the mediation or arbitration in relation to the other access arrangement matters relating to the proposed access land.
- 36.4 In making this determination, the arbitrator may consult with the parties, and shall consider whether either a suspension or continuation of the mediation or arbitration is in the best interests of the parties, having regard to:
- (a) the remaining matters to be determined;

<sup>36</sup> Section 293(1)(v) *Mining Act 1992*; section 115(1)(o)(ii) *Petroleum (Onshore) Act 1991*.

<sup>37</sup> Section 156A(1) *Mining Act 1992*; section 69SA(1) *Petroleum (Onshore) Act 1991*.

<sup>38</sup> See section 156A(2) *Mining Act 1992*; section 69SA(2) of the *Petroleum (Onshore) Act 1991*.

- (b) the impact of additional time and cost on a party;
  - (c) the extent to whether the finding by the court will affect the access arrangement; and
  - (d) any other matter that the arbitrator considers relevant.
- 36.5 If the arbitrator determines to continue the mediation or arbitration in relation to the other access matters the arbitrator shall notify the parties and continue the mediation or arbitration in accordance with this arbitration procedure.
- 36.6 If the arbitrator determines to suspend mediation or arbitration, the arbitrator shall notify the parties as provided for in clause 9.4.
- 36.7 The final determination of the arbitrator may incorporate the court's determination, if this is available.

## 37. Relevant improvements and determination of the access arrangement

- 37.1 This clause applies if the application of the kind referred to in clause 27.4 relates to a relevant improvement, and a party has applied to the Land and Environment Court under section 158A of the *Mining Act 1992* or section 69V or 69X of the *Petroleum (Onshore) Act 1991*, for the court to combine the determination of the relevant improvement matter with the determination of the access arrangement.
- 37.2 The application made to the court referred to in clause 27.4 will operate to suspend any mediation or arbitration in respect of the access arrangement, until the court has decided whether to accept or reject the application.<sup>39</sup>
- 37.3 The arbitrator shall notify the parties of the suspension in accordance with clause 9.4.
- 37.4 If the court decides to accept the application, then the mediation or the arbitration will be terminated on the date of notification from the court of its acceptance, and the court will determine the access arrangement, including the relevant improvements.<sup>40</sup>
- 37.5 If the court decides to reject the application then:
- (a) the mediation or the arbitration will recommence on a date set by the arbitrator, to reach an access arrangement on all other matters other than relevant improvements; and
  - (b) the court will determine the relevant improvements dispute.

## Part I: Other matters

### 38. 1. Conflict and bias – all arbitrations

- 38.1 Annexure 2: Conflicts of interest and bias – overview:
- (a) provides general guidance to arbitrators and parties to determine when a conflict of interest or bias may exist, procedures for declaring any conflict of interest or bias, and procedures by which an arbitrator may excuse him or herself from acting as arbitrator in a particular matter; and
  - (b) sets out the procedures by which a party to arbitration can object to the appointment of a panel arbitrator to its particular arbitration, based on a perceived or asserted conflict of interest or bias.

<sup>39</sup> Section 158A(4) *Mining Act 1992*; section 69V(4) *Petroleum (Onshore) Act 1991*.

<sup>40</sup> Section 158A(5) *Mining Act 1992*; section 69V(5) *Petroleum (Onshore) Act 1991*.

## 39. Notices and service of documents

- 39.1 A notice, including a notification or communication is effective if it is:
- (a) in writing, signed by or on behalf of the person giving it;
  - (b) addressed to the person to whom it is to be given; and
  - (c) either:
    - i. delivered or sent by pre-paid mail (by airmail, if the addressee is overseas) to that person's mailing address;
    - ii. sent by fax to that person's fax number and the machine from which it is sent produces a report that states that it was sent in full; or
    - iii. subject to the express consent of the parties to the dispute, sent by email in the form of a .pdf file of a letter (with or without attachments) to that person's email address.
- 39.2 A notice, including a notification or communication that complies with this arbitration procedure is regarded as given and received (or served):
- (a) If it is delivered or sent by fax:
    - i. by 5 pm (local time in the place of receipt) on a business day – on that day; or
    - ii. after 5 pm (local time in the place of receipt) on a business day, or on a day that is not a business day – on the next business day.
  - (b) If it is sent by mail:
    - i. within Australia – five business days after posting; or
    - ii. to or from a place outside Australia – 10 business days after posting.
  - (c) If it is sent by email (subject to the express consent of the parties to the dispute to the notice being served by email):
    - i. by 5pm (local time in the place of receipt) on a business day – at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient; or
    - ii. after 5pm (local time in the place of receipt) on a business day, or a day that is not a business day – on the business day following the date on which it is sent equivalent to the date shown on the automatic receipt notification received by the party sending the email from the recipient.

# Section 2: Additional procedures for panel arbitrators

## Part 2A: Preliminary matters

### 1. Purpose

- 1.1 This section sets out some additional procedures relevant to arbitrators appointed to the arbitration panel.
- 1.2 It is intended to be read in conjunction with the arbitration procedure.

### 2. Application

- 2.1 This section is to be known as the 'panel arbitration procedure'.
- 2.2 This panel arbitration procedure applies only to mediations and arbitrations conducted by a Panel arbitrator under:
  - (a) Part 8 Division 2 of the *Mining Act 1992*;
  - (b) Part 4A of the *Petroleum (Onshore) Act 1991*; and
  - (c) Part 4B of the *Petroleum (Onshore) Act 1991*.
- 2.3 Panel arbitrators are required to apply, and comply with both the arbitration procedure and this panel arbitration procedure in undertaking any arbitration process.
- 2.4 Unless otherwise specified, a reference in this section to a 'clause' is a reference to a clause in this panel arbitration procedure.

## Part 2B: Appointment to undertake arbitration

### 3. Rotational appointment process

- 3.1 Where:
  - (a) a party makes an application to the Secretary for the appointment of an arbitrator from the arbitration panel; and
  - (b) provided that the requisite application fee has been paid and received by the department,<sup>41</sup>then the Secretary may appoint a member of the arbitration panel.<sup>42</sup>

<sup>41</sup> Section 144(2) *Mining Act 1992*; section 69G(2) *Petroleum (Onshore) Act 1991*.

<sup>42</sup> Section 144(3) *Mining Act 1992*.

- 3.2 The Secretary will select the arbitrator on the basis of a rotational appointment process, which requires moving continually through the list of available arbitrators and then starting again.
- 3.3 The intention of adopting this process is to:
- (a) randomise the selection of individual arbitrators from the panel; and
  - (b) minimise the potential for influencing the appointment of any particular arbitrator.
- 3.4 Once an arbitrator has been selected in accordance with clause 0, the Secretary will notify the arbitrator of his or her selection.
- 3.5 The arbitrator must, as soon as practicable, but in any event within five days of the notification by the Secretary:
- (a) confirm his or her availability to accept such appointment; or
  - (b) advise the Secretary that he or she:
    - i. is unavailable to accept such appointment; or
    - ii. has, or could have, a conflict of interest relevant to the proposed arbitration.
- 3.6 Where the conflict of interest referred to in clause 3.5(b)ii has not been disclosed in accordance with clause 4, then the department may add it to the register referred to in clause 4.4, in accordance with that provision.
- 3.7 If an arbitrator withdraws from undertaking arbitration because of a conflict of interest, or is otherwise unavailable to undertake arbitration, the Secretary will select and notify the next arbitrator on the list.
- 3.8 If an arbitrator is unavailable to accept such appointment for whatever reason, that arbitrator automatically becomes the number one selection on the next occasion the Secretary is required to appoint a member of the arbitration panel.
- 3.9 Where an arbitrator confirms his or her availability to accept an appointment, the Secretary will:
- (a) appoint the arbitrator; and
  - (b) notify the applicant of the details of the appointment.

## Part 2C: Conflict and bias

### 4. Disclosure by panel arbitrators

- 4.1 This provision sets out additional requirements for panel arbitrators in relation to conflict and bias.
- 4.2 Upon appointment to the arbitration panel, each panel arbitrator must disclose to the department any relevant matters that a reasonable person may consider could influence that person's role as an arbitrator under the Acts, and put the arbitrator at risk of having a conflict of interest, or give rise to actual or apprehended bias on the part of the arbitrator.
- 4.3 The matters referred to in clause 4.12 may include, but are not limited to, current, previous or historic:
- (a) financial dealings;
  - (b) employment; or
  - (c) memberships or other interests in any organisations or bodies.
- 4.4 The department may publish the information disclosed in clause 4.12 in a register of interests on the department's website, subject to any requirements of legislation relating to privacy.

- 4.5 Disclosure:
- (a) is a condition for appointment of the arbitrator as a panel arbitrator; and
  - (b) need not include any material which is properly characterised as commercial-in-confidence, where the disclosure would, but for this paragraph, require the disclosure of commercial-in-confidence material; and
  - (c) is a continuing obligation, requiring a panel arbitrator to update their disclosure whenever the arbitrator becomes aware of a matter which ought to be disclosed.

## 5. Objection by a party

- 5.1 Upon receipt of notification of the panel arbitrator who has been assigned to arbitrate a landholder access arrangement, and the associated further disclosure by the panel arbitrator, if any, each party has 14 days to request that the panel arbitrator excuse himself or herself from the arbitration on the basis of a conflict of interest or bias. Such an objection must be made in writing to the panel arbitrator and must set out the grounds and evidence upon which the party believes a conflict of interest or bias exists. A copy of the request and supporting evidence must be sent to the Secretary and the other party to the arbitration.
- 5.2 If the arbitrator does not agree that he or she has a conflict of interest, and declines to excuse him or herself, then he or she will notify the parties of the decision, and provide a copy of the notice to the Secretary, including reasons.
- 5.3 On the occurrence of the matters identified in clause 5.2 of this panel arbitration procedure, the matter will be remitted to the Secretary for a determination as to whether another panel arbitrator should be appointed to the arbitration. The Secretary:
- (a) will make a determination as soon as possible; and
  - (b) may direct that the arbitration procedure should be suspended or continued following remittance and, if necessary, may appoint another panel arbitrator to conduct the arbitration immediately; or
  - (c) may direct that the arbitration continue and that the objection be disregarded if the Secretary forms a view that insufficient evidence has been provided in support of the objection, or that the objection is vexatious or without substance. In this case, written reasons must be provided to all parties.
- 5.4 If the Secretary:
- (a) directs that the arbitration procedure be suspended; and
  - (b) appoints another panel arbitrator who is not objected to by any party to the arbitration,
- then the arbitration procedure will recommence immediately after 14 days from the date the parties have been notified of the replacement panel arbitrator have elapsed.
- 5.5 Without limiting the power of the Secretary to make a determination:
- (a) where a panel arbitrator is found to have an actual conflict of interest or be relevantly actually biased, the Secretary will ordinarily (and subject to clause 5.4(b)) appoint a replacement arbitrator; and
  - (b) where a perceived or potential conflict of interest, or actual or apprehended bias, is found to exist the Secretary will ordinarily consider whether the arbitrator can continue to act, having regard to the public interest in decisions being made by persons who are not influenced by conflicts of interest or actual or apprehended bias.
- 5.6 In making a determination, the Secretary must consider all relevant facts and matters, including whether the arbitrator can continue to act as arbitrator in the particular arbitration. However, the Secretary is not bound to exercise any discretion in any particular way, even if a conflict of interest or actual or apprehended bias is found to exist.



- 5.7 If an objection is upheld by the Secretary on the basis of a panel arbitrator not having complied with their duties of disclosure (whether on appointment to the arbitration panel, on appointment to a particular arbitration, or the ongoing duty of disclosure), another panel arbitrator must be appointed.
- 5.8 If a panel arbitrator is appointed to an arbitration, and he or she believes that a conflict of interest, or actual or apprehended bias exists or may exist, then he or she should immediately advise the parties to the arbitration and the Secretary accordingly, and excuse himself or herself from the arbitration so that another panel arbitrator can be appointed to the arbitration, unless, following appropriate disclosure, all parties to the arbitration agree that the arbitrator may continue to act.

## Part 2D: Assessment of performance

### 6. Performance criteria

- 6.1 The Secretary assesses the performance of panel arbitrators with reference to the following criteria:
- (a) Compliance with arbitration procedure timeframes (if applicable) with a target of 80% compliance.
  - (b) Adverse judicial comment on appeal.
  - (c) Feedback received from parties who have participated in the arbitration process.
  - (d) A demonstrated unwillingness of a panel arbitrator to accept appointments when the panel arbitrator is due for appointment.
  - (e) A sustained complaint against the arbitrator from parties to a current or previous arbitration.

### 7. Procedural fairness

- 7.1 After considering the performance criteria, if the Secretary has formed an opinion that he or she is dissatisfied with the performance of a panel arbitrator, the Secretary may decide to take action against that panel arbitrator. In this case, the Secretary must advise the panel arbitrator in writing of the action being proposed.
- 7.2 The Secretary must not take any adverse action against a panel arbitrator under this clause 7 unless and until the panel arbitrator has been afforded an opportunity to respond.
- 7.3 Panel arbitrators will be given no less than 14 days to respond to any allegations and/or actions proposed to be taken by the Secretary.
- 7.4 After considering the response, if any, the Secretary may take the following actions:
- (a) Require the panel arbitrator to undergo further training prior to appointing him or her to further arbitrations.
  - (b) Decline to reappoint the panel arbitrator to the panel following the expiration of his or her three-year term.
  - (c) Remove the panel arbitrator from the current arbitration.
  - (d) Withdraw the panel arbitrator from the arbitration panel.



## Part 2E: Feedback

### 8. Feedback following arbitration

- 8.1 As soon as practicable after the issue of a final determination by a panel arbitrator:
- (a) the arbitrator shall provide the parties with an evaluation form prepared by the department, seeking the parties' feedback on the arbitration process;<sup>43</sup> and
  - (b) the parties may complete that form and provide it to the Secretary.
- 8.2 The Secretary may, at his or her discretion, make any feedback available to the arbitrator.
- 8.3 The parties' names and contact details on the feedback form will be confidential, except to the extent that they consent to the use of their names and contact details in connection with the arbitration scheme.

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<sup>43</sup> A copy of this form is provided in Annexure 3 to this document.



Mediation		Timeframe	Relevant legislative provision
(7)	Arbitrator to fix time and place for mediation	As soon as practicable after appointment	MA s145(1) POA s69H(1)
(8)	Arbitrator must conduct mediation	One week days from commencement	MA s145(3) POA s69H(3) and 69X AP cl 8
(9)	Parties must participate in mediation in good faith	-	MA s145A(2) POA s69HA(2) and 69X
(10)	Site inspection	On or before commencement of mediation	MA s148B POA s69KB and 69X AP cl 13
(11)	Access arrangement reached - Mediation concludes	-	-
(12)	Parties may agree for arbitrator to determine costs of mediation and any disputes over costs during negotiation	Before termination of mediation	AP cl 32

Arbitration		Timeframe	Relevant legislative provision
(13)	If no access arrangement reached and mediation is terminated, and access is still sought, parties and arbitrator to decide whether arbitrator to conduct subsequent arbitration: - if unanimous consent, arbitrator may continue - if no unanimous consent, arbitrator's mandate is terminated on termination of mediation	At the time of, or after, termination of the mediation	MA s145A(4) POA s69HA(4) and 69X
(14)	Mediation is terminated	-	-
(15)	Parties may agree on substitute arbitrator	-	MA s145A(7) POA s69HA(7) and 69X
(16)	If no agreement on substitute arbitrator, then either party may apply to Secretary for appointment of substitute panel arbitrator	Seven days after termination of mediation under item (12)	MA s145A(7) POA s69HA(7) and 69X

Arbitration		Timeframe	Relevant legislative provision
(17)	Arbitrator to fix time and place for arbitration	As soon as practicable after conclusion of mediation (if the same mediator) or appointment of substitute arbitrator, but within 30 days of appointment or confirmation of appointment	MA s145B POA s69HB and 69X AP cl 22
(18)	Parties to prepare and exchange preliminary documentation	Timeframes to be set by arbitrator but should not exceed 14days	AP cl 8
(19)	Site inspection	If considered necessary, on or before commencement of mediation or arbitration	MA s148B POA s69KB and 69X AP cl 13
(20)	Arbitrator must conduct arbitration hearing	Three calendar months from appointment of arbitrator until termination	MA s145B(3) POA s69HB(3) and 69X AP cl 8
(21)	Parties must participate in arbitration in good faith	-	MA s148(1) POA s69K(1)
(22)	Arbitrator may terminate the arbitration at the request of the parties	Any time	MA s148(1A) POA s69K(1A)
(23)	Interim determination	As soon as practicable after hearing but within 14days after the hearing	MA s149 POA s69L and 69X AP cl 27
(24)	Application by a party for reconsideration or variation of interim determination	Within 14 days of interim determination	MA s150(1) POA s69L(1) and 69X AP cl 27
(25)	Arbitrator to set time and place for further arbitration and conduct further arbitration	As soon as practicable after receiving notice at item (22) but to commence within 14 days	MA s150(2) POA s69L(2) and 69X AP cl 28
(26)	Final determination	14 days after issue of interim determination provided no objections raised  or  As soon as practicable after concluding the further hearing but within 14 days after the hearing	MA s151 POA s69N and 69X AP cl 29

Arbitration		Timeframe	Relevant legislative provision
(27)	Arbitrator must determine: <ul style="list-style-type: none"> <li>- Cost disputes arising from negotiation</li> <li>- Reasonable costs of landholder in participating in mediation and arbitration</li> </ul>	As soon as practicable after interim determination becomes final determination or on making final determination and before terminating arbitration or on termination of arbitration by agreement of parties	MA s151A POA 69KC and 69X
(28)	Titleholder to provide copy of arbitrated access arrangement to Secretary	As soon as practicable after determination of access arrangement	MA s156A POA s69SA and 69X

Land and Environment Court		Timeframe	Relevant legislative provision
(29)	Parties may apply to LEC to determine disputes in relation to relevant improvements (i.e. dwelling houses, gardens or significant improvements)	Any time	MA s31 and 49 POA s72
(30)	Parties may apply to LEC to combine determination of relevant improvements and access arrangement	Must not be within 28 days after notice served at (1)	MA s158A POA s69V and 69X
(31)	Parties may apply to LEC to review arbitrated decision	<ul style="list-style-type: none"> <li>- Where an interim determination has become a final determination, within 28 days of service of interim determination, or</li> <li>- 14 days after service of final determination</li> </ul>	MA s155 POA s69R and 69X

# Annexure 2: Conflicts of interest and bias – overview

## 1. General

- 1.1. This annexure has been developed in response to a recommendation made by Brett Walker SC that the Division of Resources and Energy develop guidance on practices and procedures for dealing with conflicts of interest and bias.
- 1.2. It is essential for arbitrators to be impartial and independent and remain so during the entire arbitration proceeding. Similarly, it is important that the public, and potential parties to arbitrations, have confidence that the arbitrator will be impartial and independent, and not be influenced by any external conflict of interest or bias in their role as an arbitrator.

## 2. Bias

- 2.1 In this document, bias means:
  - (a) a pre-existing favourable or unfavourable attitude to an issue, person or industry which may hinder or prevent an arbitrator from conducting the arbitration on an impartial and independent basis; or
  - (b) a situation where an arbitrator may not be actually biased, but a reasonable person would perceive the arbitrator to be biased, within the meaning of paragraph 2.2(b).
- 2.2 An arbitrator must be impartial and must not act in a manner which:
  - (a) displays bias (**actual bias**) or
  - (b) gives rise to a reasonable apprehension of bias (**apprehended bias**).

## 3. Conflict of interest

- 3.1 A conflict of interest in the context of land access arbitration applies when:
  - (a) an arbitrator is influenced by their private or business interests while acting within their role as arbitrator (**actual conflict of interest**); or
  - (b) an arbitrator appears to be influenced by their private or business interests while acting within their role as arbitrator, whether or not the arbitrator actually is influenced in this way (**perceived conflict of interest**); or
  - (c) an arbitrator could, in the foreseeable future, be influenced by their private or business interests while acting within their role as arbitrator (**potential conflict of interest**).
- 3.2 A conflict of interest can involve gaining personal advantage or avoiding personal disadvantage, or seeking to do so, and is not simply limited to circumstances when financial gains or losses may result.
- 3.3 A conflict of interest includes situations where an arbitrator's determination may be influenced by their families' or friends' private or business interests.

## 4. Examples of matters requiring disclosure

4.1 Examples of matters that ought to be disclosed include (but are not limited to):

- (a) Relevant financial and economic interests such as being an investor in:
  - i. a company which holds, or may reasonably be expected to apply to hold in the foreseeable future, a prospecting title pursuant to the *Mining Act 1992* and/or the *Petroleum (Onshore) Act 1991*; or
  - ii. a company which holds, or may reasonably be expected to hold in the foreseeable future, an interest in any land or business which may be the subject of, or affected by, activities under a prospecting title.
- (b) A relevant employment or consultation arrangement, for instance with:
  - i. an entity whose business involves activities that require it to apply for licences or leases within the scope of the *Mining Act 1992* and/or the *Petroleum (Onshore) Act 1991*; or
  - ii. an entity which is or could be adversely affected by the grant of such licences or leases.
- (c) Relevant (including current, previous and any potential) employment prospects or plans, for instance with:
  - i. an entity whose business involves activities that fall within the scope of agriculture, the *Mining Act 1992* and/or the *Petroleum (Onshore) Act 1991*; or
  - ii. an entity whose activities are or could be negatively affected by activities that fall within the scope of agriculture, the *Mining Act 1992* and/or the *Petroleum (Onshore) Act 1991*.
- (d) Relevant affiliations or memberships or other participation with an organisation (whether such organisation is for-profit, not-for profit, professional, or a representative organisation) which is or has been involved in campaigning or generating public interest for or against agriculture, protection of environmental or community values, exploration, mining, petroleum or similar development, whether or not the organisation or members of the organisation have any direct commercial interest which may be affected by agriculture, mining, petroleum or similar development.
- (e) Whether the person is, or has a familial or personal relationship with, a landholder who:
  - i. owns property which is subject to a current title; or
  - ii. has, in the past, been approached to provide land access to a company holding a title under the under the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*; or
  - iii. may be reasonably be expected in the foreseeable future to be approached to provide land access to such a company.
- (f) Any relevant personal or familial relationships, for example with a director of an agricultural company or a company which holds a title under the *Mining Act 1992* and/or the *Petroleum (Onshore) Act 1991*, or with a landholder as defined under those Acts.

## 5. Arbitrator's conduct

5.1 When an arbitrator is appointed to a particular arbitration, the arbitrator should disclose to the parties and, if a panel arbitrator to the Secretary, any matters which may lead to a conflict of interest, or to actual or apprehended bias, in that particular arbitration.

- 5.2 Further, arbitrators have an ongoing duty to disclose to the parties to an arbitration and, if a panel arbitrator, to the Secretary, any matters which subsequently arise and may lead to a conflict of interest, or to actual or apprehended bias, throughout the course of the arbitration.
- 5.3 If an arbitrator appointed by agreement of the parties considers that he or she has a conflict of interest, or there is a situation of actual or apprehended bias that prevents him or her from conducting the arbitration in an impartial and independent manner, the arbitrator shall notify the parties immediately:
- (a) disclosing any potential or perceived conflicts of interest or bias; and
  - (b) declining to act as arbitrator, or removing themselves from an arbitration, if an actual conflict of interest or bias arises unless:
    - i. the arbitrator makes an appropriate disclosure of the conflict of interest or bias; and
    - ii. all parties to the arbitration, including the arbitrator, then agree that the arbitrator may continue to act.

## 6. Disclosure by Panel arbitrators

- 6.1 Upon appointment to the arbitration panel, each panel arbitrator must disclose to the department any relevant (including current, previous or historic) financial dealings, employment history, memberships or interests of any organisations or bodies, and any other factor which a reasonable person may consider could influence that person's role as an arbitrator under the *Mining Act 1992* and/or the *Petroleum (Onshore) Act 1991*, and put the arbitrator at risk of having a conflict of interest, or give rise to actual or apprehended bias on the part of the arbitrator.
- 6.2 The department may publish the information disclosed in paragraph 6.1 in a register of interests on the department's website, subject to any requirements of legislation relating to privacy.
- 6.3 Disclosure:
- (a) will be a condition for appointment of the arbitrator as a panel arbitrator; and
  - (b) need not include any material which is properly characterised as commercial-in-confidence, where the disclosure required by paragraph 6.1 would, but for this paragraph 6.3, require the disclosure of commercial-in-confidence material; and
  - (c) is a continuing obligation, requiring a panel arbitrator to update their disclosure whenever the arbitrator becomes aware of a matter which ought to be disclosed.
- 6.4 Upon receipt of notification of the panel arbitrator who has been assigned to arbitrate a landholder access arrangement, and the associated further disclosure by the panel arbitrator, if any (referred to in paragraph 6.1 above), each party has 14 days to request that the panel arbitrator excuse himself or herself from the arbitration on the basis of a conflict of interest or bias (be it actual or apprehended). Such an objection must be made in writing to the panel arbitrator and the Secretary.
- 6.5 If the arbitrator does not agree that he or she has a conflict of interest, or an actual or apprehended bias and declines to excuse him or herself, the matter is remitted to the Secretary for a determination as to whether another panel arbitrator should be appointed to the arbitration. The Secretary will make a determination as soon as practicable, but in any event no later than 10 business days after the matter is remitted, and may direct that the arbitration should be suspended or continued following remittance and, if necessary, may appoint another panel arbitrator to conduct the arbitration immediately. The arbitration will recommence immediately after the Secretary has made his or her determination.



- 6.6 Without limiting the power of the Secretary to make a determination (as referred to in paragraph 6.5):
- (a) where a panel arbitrator is found to have an actual conflict of interest or be relevantly actually biased, the Secretary will ordinarily appoint a new arbitrator; and
  - (b) where a perceived or potential conflict of interest, or actual or apprehended bias, is found to exist the Secretary will ordinarily consider whether the arbitrator can continue to act, having regard to the public interest in decisions being made by persons who are not influenced by conflicts of interest, or actual or apprehended bias.
- 6.7 In making a determination under paragraph 6.5 or 6.6, the Secretary must consider all relevant facts and matters, including whether the arbitrator can continue to act as arbitrator in the particular arbitration. However, the Secretary is not bound to exercise any discretion in any particular way, even if a conflict of interest, or actual or apprehended bias is found to exist.
- 6.8 If an objection is upheld by the Secretary on the basis of a panel arbitrator not having complied with their duties of disclosure (whether on appointment to the arbitration panel, on appointment to a particular arbitration, or the ongoing duty of disclosure), another panel arbitrator must be appointed.
- 6.9 If a panel arbitrator is appointed to an arbitration, and he or she believes that a conflict of interest or actual or apprehended bias exists or may exist, then he or she should immediately advise the parties to the arbitration and the Secretary accordingly, and excuse himself or herself from the arbitration so that another panel arbitrator can be appointed to the arbitration, unless, following appropriate disclosure, all parties to the arbitration agree that the arbitrator may continue to act.

# Annexure 3:

## Panel arbitrator feedback form

1. Are you a landholder or a prospecting title holder?

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2. Who was the arbitrator appointed to conduct the arbitration?

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3. How long did the arbitration take (from the date of appointment of the arbitrator to the date of the arbitrator's final determination)?

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4. Please indicate whether you consent to the NSW Department of Industry, Division of Resources and Energy:

- (a) Contacting you to discuss your feedback; and  
 (b) Disclosing your name in connection with the arbitration scheme.

- No  
 Yes. If yes, please provide your name and contact details below:

Name

Email

Telephone

5. Please indicate on a **scale of 1 to 5** (1 being the lowest level of satisfaction, and 5 being the highest) the extent to which you were satisfied with the arbitrator on each of the following performance indicators.

Performance indicator	Rating 1 (lowest) to 5 (highest)
The arbitrator achieves the overriding objective of arbitration, that is, to resolve the dispute in a just, timely and efficient manner.	
The arbitrator manages the proceedings in a manner that facilitates their fair and timely disposal.	
The arbitrator acts according to equity and good conscience.	
The arbitrator understands the legal framework, jurisdiction and procedures relevant to the arbitration.	
The arbitrator demonstrates professionalism and shows commitment to high standards.	
The arbitrator is sufficiently knowledgeable and has sufficient relevant expertise.	

Performance indicator	Rating 1 (lowest) to 5 (highest)
The arbitrator demonstrates intellectual and analytical ability.	
The arbitrator writes determinations and access arrangements in a way that is professional and easy to understand.	
The arbitrator communicates effectively, with parties, representatives and experts, orally and in writing.	
The arbitrator conducts him/herself in a manner that establishes and maintains the independence and authority of his/her position as a member of the arbitration panel.	
The arbitrator adopts appropriate demeanour and behaviour in the conduct of the arbitration.	
The arbitrator undertakes necessary preparatory work.	

6. Please provide a brief summary of any comments you have on the performance of the arbitrator.

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# Definitions

In this document:

**Act** means:

- (a) the *Mining Act 1992* for arbitrations conducted under that Act; and
- (b) the *Petroleum (Onshore) Act 1991* for arbitrations conducted under that Act.

**arbitration** is a dispute resolution process in which two or more parties agree to refer their dispute to an independent third person (the **arbitrator**) for decision, or determination.

A reference to **arbitrator** in the arbitration procedure or the panel arbitration procedure may be a reference to either the arbitrator in his or her role as a mediator, or the arbitrator in his or her role as the arbitrator, as the case may be.

**arbitration process** in the context of this document, means the process of mediation and arbitration prescribed under the Act.

**arbitrator's appointment date** means the date on which all parties to the arbitration at the time at which the arbitrator is selected to conduct the arbitration have signed the terms of the arbitrator's appointment.

**assessable prospecting operations** means exploration activities that are not classified as exempt prospecting operations and require further information and approvals from the Minister (or delegate) before they can be carried out.

**baseline information** means information that records the condition of particular fixtures and features on a landholder's property, at a specific date.

**business day** means a day that is not a Saturday or a Sunday, or a public holiday in NSW.

**court** or **LEC** means the Land and Environment Court of New South Wales.

**day** means an ordinary day, including a Saturday or Sunday, regardless of whether that day falls on a public holiday in NSW,

**department** means the NSW Department of Industry, Skills and Regional Development or its successor, from time to time.

**exempt prospecting operations** means operations that are identified as exempt development under clause 10(2) of the *State Environment Planning Policy (Mining, Petroleum and Extraction Industries) 2007*, as having minimal environmental impact. These activities can be undertaken without further approval, or environmental impact assessment, provided that they meet certain criteria.

**impact assessments** means any environmental impact assessment, statement or plan including, but not limited to, a review of environmental factors, environmental impact statement, species impact statement, agricultural impact statement or groundwater monitoring and modelling plan that the titleholder is required to prepare and submit to the department as a condition of title or activity approval, as the case may be.

**mediation** is a dispute resolution process in which parties can resolve their own disputes, with the help of a neutral third party.

**proposed access land** means the land which is the subject of the proposed access arrangement proposed in the arbitration, or any part of it.

**relevant improvement** means:

- (a) for mediation or arbitration initiated under Part 8 Division 2 of the *Mining Act 1992*:
  - i) a dwelling-house that is the principal place of residence of the person occupying it within the prescribed distance; or

- ii) a garden within the prescribed distance; or
  - iii) a significant improvement other than an improvement constructed or used for mining purposes only,  
as described in section 31(1) of the *Mining Act 1992*; or
- (b) for mediation or arbitration initiated under Part 4A of the *Petroleum (Onshore) Act 1991*:
- i) a dwelling-house that is the principal place of residence of the person occupying it within the prescribed distance, or
  - ii) a garden, vineyard or orchard within the prescribed distance, or
  - iii) a significant improvement,  
as described in section 72(1) of the *Petroleum (Onshore) Act 1991*.

**Secretary** means the Secretary of the department.

**titleholder** means, for the purposes of this arbitration procedure, the holder of an authority under the *Mining Act 1992* or a title under the *Petroleum (Onshore) Act 1991* that is seeking an access arrangement over the proposed access land.



New South Wales

## **Rock Fishing Safety (Declared Areas) Order 2016**

under the

Rock Fishing Safety Act 2016

I, the Minister for Emergency Services, in pursuance of section 4 (1) of the *Rock Fishing Safety Act 2016*, make the following Order.

Dated, this 29th day of November 2016.

DAVID ELLIOTT, MP  
Minister for Emergency Services

Rock Fishing Safety (Declared Areas) Order 2016 [NSW]

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## **Rock Fishing Safety (Declared Areas) Order 2016**

under the

Rock Fishing Safety Act 2016

### **1 Name of Order**

This Order is the *Rock Fishing Safety (Declared Areas) Order 2016*.

### **2 Commencement**

This Order commences on 1 December 2016 and is required to be published in the Gazette.

### **3 Declared areas: section 4 (1)**

The areas specified in Schedule 1 are, for the purposes of section 4 (1) of the *Rock Fishing Safety Act 2016*, declared to be areas where high risk rock fishing takes place.

Rock Fishing Safety (Declared Areas) Order 2016 [NSW]  
Schedule 1 Declared areas

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## **Schedule 1    Declared areas**

Bare Island

City of Randwick local government area