

February 2024

Fact sheet

Land access framework: Mediation and arbitration

This document should be read in conjunction with the relevant fact sheets prepared by Mining, Exploration and Geoscience to help explain the land access framework under the *Mining Act 1992* (the Act) for landholders and explorers. These are:

- The fact sheet *Land access framework: Landholder rights and obligations*, and
- The fact sheet *Land access framework: Explorer rights and obligations*.

In this fact sheet, an ‘explorer’ is a party holding an exploration licence or an assessment lease, granted under Part 3 of the Act.

The *Land access framework* requires landholders and explorers to negotiate in good faith to try and reach an agreement on the terms of a land access arrangement. Most land access arrangements are successfully negotiated without the need for mediation or arbitration.

If the explorer wants to access land for exploration then the explorer must first negotiate a land access arrangement with the landholder. If an access arrangement is agreed, exploration can commence as long as the terms of the access arrangement are met.

If an access arrangement cannot be agreed, and the explorer chooses to pursue land access, then the law provides for a process of mediation and potentially arbitration.

An explorer may issue a notice of intent to the landholder to enter into an access arrangement.

In circumstances where the parties are unable to negotiate an agreement, the Act provides for three subsequent dispute resolution stages each with an escalating level of authority entrusted to impartial third parties, and ultimately the NSW Land and Environment Court (LEC). A flow chart outlining this process is included in Attachment A – Mediation and arbitration framework.

Mediation

Appointment of arbitrator

While an appointed arbitrator acts as the mediator of a land access arrangement, this process should not be confused with arbitration as a dispute resolution method.

An explorer is entitled to make a written request to a landholder seeking their agreement to the appointment of an arbitrator if the parties have been unable to agree to a land access arrangement within 28 days of the landholder receiving the notice of intent (in line with section 142 of the Act). The explorer and the landholder can agree on any person being appointed as an arbitrator.

If a notice of intent is sent by mail, the date of receipt is 7 working days after the notice was posted, unless there is evidence that the notice was delivered earlier. The 28-day notice period starts from the day after the notice is received. For other methods of delivery, refer to the [Land access arbitration procedure](#).

If following a further 28 days after the receipt of the notice requesting the appointment of an arbitrator (allowing for postage as above), the parties are unable to agree on the appointment of an arbitrator, then either party can apply to MEG for the appointment of an arbitrator from the Arbitration Panel. Download the [AD1 Application to appoint and arbitrator form](#).

For further detail relating to the selection criteria for members of the Arbitration Panel refer to the frequently asked questions section below.

Conduct of mediation

As soon as practicable after being appointed, an arbitrator must conduct a mediation between the landholder and the explorer. Mediation is a dispute resolution process where the arbitrator, as an impartial third party, seeks to facilitate an agreement between the parties by encouraging the landholder and the explorer to generate solutions based on their mutual interests.

The landholder and explorer are required to participate in the mediation process in good faith. Both parties are entitled to be heard during the mediation and are entitled to have legal representation.

A key advantage of mediation is that the power to make decisions relating to the dispute remains within the control of the parties. The arbitrator manages the mediation process but has no decision-making power at this stage. Mediation can also preserve a positive relationship between a landholder and an explorer.

Mediation ends if:

- the parties reach an agreement on an access arrangement, or
- the parties agree to terminate the mediation, or
- either party terminates the mediation, by notice in writing, served on the other party and the arbitrator, or
- the arbitrator terminates the mediation.

Arbitration

If mediation is unsuccessful in achieving agreement between the parties, the matter proceeds to arbitration. Arbitration is a more formal dispute resolution process where an arbitrator hears each party, examines and evaluates the facts and evidence, and makes a determination to resolve the parties' dispute.

The arbitrator who acted as mediator in the unsuccessful mediation cannot be used for the arbitration stage unless all parties (including the arbitrator) give their written consent. If this consent is not given, the parties may agree to appoint a substitute arbitrator. If the parties cannot agree on a substitute arbitrator within 7 days of the mediation being terminated, MEG may appoint an arbitrator.

Conduct of arbitration

As soon as practicable after unsuccessful mediation, the arbitrator must arrange a hearing and provide notice to both parties regarding the proposed time and place for the hearing. Both parties are entitled to be heard at the hearing and are entitled to have legal representation.

The parties are obliged to participate in the arbitration in good faith. The arbitrator may still conduct the hearing even if either of the parties fails to attend. The arbitrator must act according to equity, good conscience and the substantial merits of the case.

The Act provides that MEG may publish approved arbitration procedures for the conduct of arbitrations and mediations. The version of the approved procedures is set out in the land access arbitration procedure which:

- establishes the matters to be considered by the arbitrator in conducting mediation or arbitration for land access under the Act
- guides the arbitrator with regards to managing the timeframes involved in mediation and arbitration
- 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
- is intended to facilitate a more efficient arbitration process by, for example, clearly setting out the documentation that should be provided by parties before an arbitration hearing.

All parties, including the arbitrator, must follow the approved procedures unless they agree otherwise.

Interim determination

As soon as practicable after concluding a hearing the arbitrator must make an interim determination as to whether the explorer should have a right of access to the land. If so, the arbitrator must prepare a draft access arrangement in respect of the land. The arbitrator must provide each party with copies of the interim determination and draft access arrangement.

The parties then have 14 days to request that the arbitrator review the interim determination or amend the draft access arrangement. Upon receiving such a request, the arbitrator must make arrangements for a 'continued hearing' and provide notices to both parties regarding the proposed time and place.

Final determination

A final determination and a final access arrangement are made in either of the following situations:

- if within 14 days of the interim determination being issued neither party requests a review of the interim determination or an amendment to the draft access arrangement, or
- as soon as practicable after concluding a 'continued hearing' the arbitrator provides each party with a copy of a final determination and a final access arrangement.

A final access arrangement is taken to have effect when each party receives a copy, or 14 days after the arbitrator issues an interim determination and neither party has requested a review of the interim determination.

The explorer must provide a copy of the final access arrangement determined by the arbitrator to MEG as soon as practicable after it has been issued by the arbitrator. Failure to do so may result in the explorer receiving a fine of up to \$11,000 for a corporation or up to \$5,500 for an individual. MEG maintains a public register of all arbitrated access arrangements.

Review

If either party feels aggrieved by the arbitrator's final determination, they may apply to have it reviewed by the LEC. The aggrieved party must lodge an application with the LEC to commence this process, accompanied by a copy of the arbitrator's final determination and the access arrangement used to form that final determination. The applicant must file the application with the LEC within 14 days of the applicant being issued with the final determination.

An application cannot be made to the LEC within the 14-day review period following the issuing of an interim determination. The LEC can only review final determinations. The applicant must also provide a copy of the application to the other party in the determination.

If an application for review is lodged, the related access arrangement does not usually come into effect until the LEC makes a decision on the review, unless the LEC makes an order stating otherwise. In undertaking a review, the LEC has the same functions as an arbitrator and will undertake a rehearing including consideration of any new or additional material that was not considered by the arbitrator. The LEC's decision is final and is to be given the same effect as if it were an arbitrator's determination.

Explorer to pay landholder's costs

The explorer must pay the reasonable costs of the landholder in participating in the mediation and arbitration stages. The Act allows for the Minister to set a maximum amount of reasonable costs taking into consideration the landholder's time spent participating, legal costs and the costs of engaging experts as part of the process. There is currently no maximum amount of reasonable costs set by the Minister.

If the parties are unable to agree on the amount of the landholder's cost for participating in the negotiation, arbitration and mediation stages, an arbitrator will determine the costs. The explorer must also pay MEG the arbitrator's cost for participating in the mediation and arbitration stages.

The explorer must also pay the reasonable costs of the landholder participating in a LEC review of a determination. The LEC determines these costs and in doing so must consider whether the landholder has acted unreasonably in the negotiation, mediation, arbitration or review stages.

The decision of the LEC is final.

Frequently asked questions

How are arbitrators appointed to the Arbitration Panel?

The Minister appoints members of the Arbitration Panel. The person appointed must meet the following eligibility criteria set out in the Mining Regulation 2016, that the person:

- is an accredited mediator under the National Mediator Accreditation System or holds practitioner membership, or advanced practitioner membership, with LEADR & IAMA
- has extensive agricultural or resources industry experience or is an Australian legal practitioner of at least 7 years, and
- has extensive arbitration experience.

The term of office as a member of the Arbitration Panel is 3 years. Arbitrators may be reappointed to the panel for more than one term.

Who pays the cost of the mediation, arbitration and review stages?

The explorer must pay the reasonable costs of the landholder and the costs of the arbitrator in participating in the mediation and arbitration stages. The explorer must also pay the reasonable costs of the landholder participating in a review of a determination by the LEC.

Can the parties withdraw during the arbitration process?

Yes, but only if parties agree in writing and serve notice to the arbitrator. In this event, the explorer must still cover the reasonable costs of the landholder up until the point of withdrawal.

What liability does the arbitrator have?

As long as the arbitrator has acted in good faith, they cannot be held liable for any determination, publication or any other action.

How do I register an arbitrated access arrangement?

Where an arbitrator appointed by the Minister has determined an access arrangement, the explorer must provide MEG with a copy of the final access arrangement. MEG maintains a public register of final access arrangements arbitrated by an arbitrator appointed by the Minister.

Can an access arrangement be varied?

Yes, an access arrangement can be varied in one of the following circumstances:

- in accordance with terms of the arrangement regarding variations, or
- by agreement of both parties, or
- by an arbitrator, including in circumstances where the arrangement was finalised during the negotiation stage with no involvement from an arbitrator, or
- by an order from the LEC, if the arrangement was determined by the LEC or an arbitrator.

Either party may serve written notice on the other party requesting the appointment of an arbitrator regarding a proposed variation to the access arrangement. The process for appointing an arbitrator regarding a variation is the same process described above in Appointment of an Arbitrator.

Each party must bear his or her own costs in relation to participating in an arbitration hearing regarding a proposed variation to an access arrangement.

How do I make a complaint if I feel an arbitrator is not being fair?

MEG may remove an arbitrator if, after an investigation following a formal complaint, it is satisfied that:

- circumstances exist that support doubt over the arbitrator's impartiality, or
- the arbitrator is considered incapable of conducting proceedings, or that there is justifiable doubt over the arbitrator's capacity to do so, or
- the arbitrator has refused or failed to properly conduct proceedings.

MEG must also be satisfied that substantial injustice has been caused or will be caused to one or more of the parties.

To initiate an investigation, a complaint must be made in writing to MEG and must be made within 14 days after the matter of the complaint has occurred. If MEG considers that special circumstances exist, it may accept a complaint being lodged after more than 14 days.

Complaints may be lodged with the MEG Assessments and Systems Team.

Once a complaint is lodged, MEG must provide written notice to the other party to the arbitration and the arbitrator setting out the details of the complaint including any evidence provided by the complainant. The arbitrator must be provided with a reasonable opportunity to make a submission in response to the complaint. After consideration of any submission from the arbitrator, MEG must make a determination regarding the complaint and provide a written copy setting out the reasons for its determination to the complainant and the arbitrator.

If MEG's determination is that the arbitrator should be removed, a substitute arbitrator is to be appointed either by the collective parties or by MEG if the parties are unable to agree on the appointment within 7 days.

More information

Further information on land access and the mediation and arbitration processes can be found at www.regional.nsw.gov.au/meg

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