# 4 Land access issues

|  |
| --- |
| Key points |
| * Governments regulate land access for exploration to: * manage and protect the property rights of land holders, traditional owners, lessees and explorers * address externalities arising from exploration activities. * Government decisions to declare a new national park or conservation reserve should draw on the guiding principles contained in the Multiple Land Use Framework endorsed by the Standing Council on Energy and Resources to analyse the costs and benefits of alternative or shared land use, including exploration. * Governments should, where they allow for consideration of exploration activity, assess applications by explorers to access a national park or conservation reserve according to the risk and the potential impact of the proposed activity on the environmental and heritage values and other users of that park or reserve. * The likelihood of conflict between exploration and other (predominantly agricultural) activities varies with the intensity of land use. In low‑density grazing areas, land owner concerns with exploration activity tend to be less than in areas of intensive cropping and irrigation. * Land access agreements are achieved through negotiations between explorers and land holders regarding the terms and conditions of access and the compensation payable by explorers. * Some jurisdictions explicitly provide for the reasonable legal costs of land holders in negotiating agreements to be compensable and paid by the explorer. In others, such costs are not explicitly ‘ruled out’. All jurisdictions should ensure that land owners are made aware that such support is available. * Governments have adopted different regulatory approaches to land access for coal seam gas (CSG) exploration (and extraction) in response to: opposition by some groups; a rapid expansion of the industry; and scientific uncertainty as to its impacts. Some of the recent changes to the regulatory framework have been introduced with little consultation with affected parties. * The development of CSG exploration regulation should be informed by evidence and be proportionate to the level of risk. It should consider the economic, social and environmental costs and benefits for those directly affected as well as for the whole community. * Although not a regulatory requirement, there is a wide acceptance that explorers should aim to acquire a ‘social licence to operate’ through the development of good relations with land holders and the wider community. |
|  |
|  |

This chapter first outlines the regulatory arrangements governing access by explorers to different types of land tenure. The chapter then discusses exploration restrictions on Crown land set aside as parks and reserves, the decision‑making process employed when considering establishing parks or reserves and the potential for land use conflicts between agriculture and exploration, with a particular emphasis on the coal seam gas (CSG) industry.

## 4.1 Land access regimes

Land access for exploration is primarily regulated by state and territory governments. The Australian Government is limited to regulating access to Commonwealth land and offshore waters.

The state and territory governments regulate access by explorers to land to:

* manage and protect the property rights of land owners, lessees and traditional land owners
* manage and protect the property rights of the explorers (the conditions attached to the relevant exploration licence or permit)
* address externalities arising from exploration activities by prohibiting exploration on particular land or placing conditions on the access to land.

Land access regimes vary by tenure type — Crown land, land leased from the Crown, private land, Aboriginal freehold land and land subject to native title — and to a lesser extent they vary across jurisdictions. Regulation regarding access to each of these different types of land tenure is discussed below.

### Crown Land

The majority of Crown land in Australia is under the control of the states and territories. This Crown land is used for various purposes — pastoral lease arrangements, national parks, conservation reserves, recreation reserves, state forests — or left as vacant or unallocated. Commonwealth land holdings are more limited and are primarily used for defence and aviation (airports) purposes.

#### Commonwealth land

Access to undertake exploration activities on Commonwealth land is regulated under the Lands Acquisition Act 1989. This requires an explorer to apply to the Department of Finance and Deregulation (DoFD) setting out details of the exploration proposed, the minerals sought, the duration of access and the exploration activities proposed.

Depending on the application, DoFD may consult with other Australian Government agencies, such as the Department of Defence, the Department of Sustainability, the Environment, Water, Population and Communities (SEWPaC) and the Department of Resources, Energy and Tourism (DRET). DoFD also consults with the relevant state or territory agencies responsible for exploration and resource extraction activities.

Any terms or conditions attached to the access are typically set out in a deed of access between the Commonwealth and the explorer. The Special Minister of State is currently the relevant decision maker in relation to exploration on Commonwealth land.

The Commonwealth also regulates access to exploration in offshore waters — this is discussed further in chapter 6.

#### *State and territory land*

The level of access provided to explore on state and territory Crown land depends on the current usage of that land.

Generally, there is a hierarchy of conservation value attached to the different types of parks and reserves with exploration prohibited on the most environmentally sensitive or highest environmentally valued land. This land is usually reserved as a national park. Key features of the regimes in regard to exploration are as follows.

* New South Wales — Exploration is not permitted in national parks, but is permitted on state conservation reserves subject to the proposal having regard to the natural and cultural values of the reserve.
* Victoria — Exploration is prohibited in national parks and state parks. Exploration in coastal parks and reserves and forest parks requires the consent of both the Minister for Energy and Resources and the Minister for Climate Change (Economic Development and Infrastructure Committee 2012).
* Queensland — Exploration is not permitted in national parks and conservation reserves, but can be permitted on nature refuges provided the exploration activity complies with the management principles of the area.
* South Australia — Exploration and resource extraction are prohibited in reserves dedicated under the *National Park and Wildlife Act 1972* and the *Wilderness Protection Act 1992*, in the Arkaroola protection area and on land reserved for the preservation of heritage and tourism areas (SA DMITRE 2012).
* Western Australia — Exploration leases cannot be granted in a national park or class A nature reserve without the consent of both houses of the Western Australian Parliament (Environmental Defender’s Office of Western Australia 2011).
* Tasmania — Land categorised as national parks, state reserves, nature reserves and game reserves is excluded from an exploration licence. Exploration licences can be granted on land categorised as nature recreation areas, state forests and public reserves not yet proclaimed (Mineral Resources Tasmania 2011).
* Northern Territory — Exploration on land declared as a national park or reserve requires the Minister for Mines and Energy to consult with the Minister administering the *Territory Parks and Wildlife Conservation Act 2006* and take into account their opinion before a tenement can be issued.

Other conditions placed on accessing Crown land are to minimise the impact on the activities of existing land users. In South Australia, in the Woomera Prohibited Area — most of the land in this area is South Australian Crown land — a zoning system is used which limits the number of days per year exploration activities are permitted in each zone. For example, the exclusion periods for 2012–2013 require that in the ‘continuous defence use zone’ all exploration is prohibited apart from government geological surveys collecting pre‑competitive geoscientific data. In other zones, mineral and resource exploration and production is excluded from between 14 to 70 days in a year. These arrangements are agreed by a joint Australian and South Australian Government coordination office established to administer non‑defence use of the Woomera Prohibited Area (Woomera Prohibited Area Coordination Office 2012).

The conditions surrounding access to Crown land leased for pastoral purposes more closely resemble the conditions placed on explorers to access private land (see below). There are also codes of conduct in place for exploration on pastoral leases and provisions to make good any damages resulting from exploration activities.

### Native title

The native title regime provides a further overlay to land access for explorers. The native title regime provides for Indigenous communities to claim their native title rights and interests in the land through the *Native Title Act 1993* (Cth) (NTA). Indigenous people can be granted exclusive possession of, or limited access to, their traditional lands for a wide range of purposes that could include hunting, fishing, medicine, accommodation, religion and culture.

The NTA also provides the mechanisms for processing future acts, such as the granting of an exploration licence which may affect native title rights. The NTA is designed to allow a cooperative regime between the Australian Government and the states and territories. While states and territories can elect to use the Australian Government’s native title regime, the NTA also enables them to enact complementary regimes provided they are consistent with the requirements of the NTA.

In effect, the native title regime requires explorers to have negotiated an agreement with any native title holders and registered claimants to enable an exploration permit or licence to be issued. If the relevant parties cannot reach agreement through negotiation after six months, any party may apply to the National Native Title Tribunal (or other recognised body) for a determination. The NTA provides native title holders and registered claimants with a ‘right to negotiate’ with those seeking an exploration tenement, but it does not provide a right to veto exploration.

### Aboriginal freehold land in the Northern Territory

Access arrangements for exploration on Aboriginal freehold land in the Northern Territory provide the land owners with effective veto rights over exploration.

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)*,* enables traditional owners to refuse access to exploration activities. If refused, the exploration licence is placed in moratorium for five years after which the applicant can reapply. Alternatively, the relevant Land Council can apply at any time to recommence negotiation (Northern Territory Department of Primary Industry, Fisheries and Mines 2006; Northern Land Council 2012).

### Private land

Access to private or freehold land for exploration varies by jurisdiction. However, in general terms, there are a number of common features across jurisdictions. These include:

* a requirement to notify the landholder prior to the commencement of exploration
* the negotiation of an access agreement between the landholder and the explorer which determines the terms and conditions of access
* compensation payable by the explorer to the landholder for any loss arising from the exploration activities
* arbitration where landholders and explorers are unable to come to an agreement over land access and, failing that, recourse through the relevant court or tribunal.

Further details of the land access arrangements relating to exploration on private land are discussed in box 4.1.

In each jurisdiction, exploration is prohibited within specified distances of buildings, bores, dams and other improvements. Land holders generally do not have the right to veto exploration activities on land outside of these prohibitions. However, in some jurisdictions, high‑value agricultural land is also protected either by providing the land holder with additional property rights over specified agricultural land or through the use of specific legislation or planning policies.

For example, in South Australia, the *Mining Act 1971* requires land holder consent for exploration on cultivated land, orchards, plantations and vineyards. This usually requires the explorer to reach an agreement with the land holder over compensation and other conditions. Where no agreement is reached, the explorer has the option of seeking a determination through the Environment, Resources and Development Court (PIRSA 2011).

In Western Australia, farmers have an effective veto right on exploration for minerals on agricultural land. The Western Australian *Mining Act 1978* requires the written consent of both the owners and occupiers of the land before an exploration or mining tenement can be granted on agricultural land used for cropping or pasture. This consent only applies to land down to 30 metres below the natural surface of that private land.

Oil and gas tenements are treated differently. The Western Australian *Petroleum and Geothermal Energy Resources Act 1967* limits the requirement to obtain the land holder’s consent. Consent is only required from the land holder for exploration on those properties less than 2000 square metres in area, burial grounds and cemeteries and within 150 metres of reservoirs or substantial improvements (Bodenmann et al. nd); (Western Australian Farmers Federation 2011).

|  |
| --- |
| Box 4.1 Accessing private land for exploration |
| **New South Wales:** The *Mining Act 1992*, the *Petroleum Act 1991* and the *Environmental Planning and Assessment Act 1979* regulate access to private land in New South Wales. Explorers are required to have negotiated a land access arrangement with the land holder before entering the land. These arrangements cover issues such as where the exploration will occur, at what times of the day and year, for how long and under what conditions as well as any special terms and conditions agreed to between the parties. Land holders are also entitled to compensation for any loss arising from exploration on their land and reimbursement for a set amount to cover any legal fees incurred in making the access arrangement. Where arrangements cannot be reached there is scope for arbitration and, failing successful arbitration, there is recourse through the Land and Environment Court. There is also provision in the legislation that requires land holder consent to allow exploration activities within certain distances of buildings, gardens and significant improvements.  **Victoria:** Access to private land is mainly regulated through the *Mineral Resources (Sustainable Development) Act 1990* and the *Petroleum Act 1990*. Written consent from the land holder is required prior to the exploration commencing and a compensation agreement is required to be registered. For low impact exploration, informed verbal consent is sufficient. For exploration activities that involve ground disturbance, a works approval and a rehabilitation bond are required. Compensation may be payable for loss of amenity, use of land, damage to land or depreciation of land value or any other agreed matter. Where the parties cannot agree to access or compensation, either party can take the matter to the Victoria Civil and Administrative Tribunal (VCAT) or can seek to take the matter to the Supreme Court.  **Queensland:** The Queensland Land Access Code regulates land access under all Queensland resource Acts (*Mineral Resources Act 1989, Petroleum and Gas Production and Safety Act 2004, Petroleum Act 1923* and the *Geothermal Energy Act 2010*). It places mandatory conditions on explorers and land holders and provides best practice guidelines. For example, the Code places mandatory conditions on explorers in relation to access points, roads and tracks, weeds and pests, damages to livestock and property and items being brought onto the property. Under the code, preliminary exploration activities (low impact exploration) only require the explorer to provide 10 days’ notice before initial entry. More advanced activities require a Conduct and Compensation Agreement to be completed with the land holder before an explorer can access the land. Compensation is payable for damage and loss of land, severance of land and reduction in land value as well as the land holder’s legal fees. Dispute resolution includes a graduated process of arbitration through departmental officers, independent third parties and, finally, to the Land Court.  (continued next page) |
|  |
|  |

|  |
| --- |
| Box 4.1 continued |
| **South Australia:** Land access arrangements in South Australia are regulated under the *Mining Act 1971* and the *Petroleum Act 2000*. Authorisation to enter private land can be provided through the written agreement of the land holder or by the serving of a statutory form. Land holders are entitled to seek compensation for economic loss, hardship and inconvenience due to exploration activities and for costs incurred in negotiating the agreement. Dispute resolution is provided through the Warden’s Court. There are also ‘exempt land’ provisions in the legislation which require the land holder to provide approval before exploration can commence in these areas. Exempt land is generally cultivated land, vineyards or orchards, or land within a defined proximity of a structure.  **Western Australia:** ThePetroleum and Geothermal Energy Resources Act 1967 and the Mining Act 1978 provide the legislative underpinning of the land access arrangements. For low‑impact exploration, access can proceed on the issuing of an access permit by the Mining Warden or the Department of Mines and Petroleum. This allows access for 30 days. For more invasive exploration activities, the explorer is required to seek the consent of the land holder and negotiate an access agreement to establish the timing, duration and extent of the exploration and for compensation for any damages or depreciation in land values. Dispute resolution is undertaken by the Mining Warden.  **Tasmania:** The Mineral Resource Development Act 1995 sets out the access arrangements for exploration on private land. No formal agreement is required before exploration commences on private land and the exploration licence holder is only required to give 14 days’ notice to the land holder. However, if the exploration activity is likely to involve ground disturbance, departmental officers organise discussions between the land holder and the explorer. Officers from the Department of Infrastructure, Energy and Resources are generally involved in the oversight of exploration activities on private land and to ensure that the exploration activities adhere to the work program approved by the Department. Land holders can object to the granting of an exploration licence and, where mediation fails, the matter is referred to the Mining Tribunal. Compensation is payable to the land holder for any loss of use, severance or damage caused by the exploration or other matters negotiated between the parties.  **Northern Territory:** Most private land in the Northern Territory is restricted to cities and towns. Outside of the urban areas, around half of all land is Aboriginal land and the other half is Crown Land under pastoral lease. |
| *Sources*: NSW DTI (2012); Vic DPI (2010a); Queensland Department of Employment, Economic Development and Innovation (2012); PIRSA (2011); CMEWA (2011); WA DMP (2011); Department of Infrastructure, Energy and Resources, Mineral Resources Tasmania (2009); Northern Land Council (2012). |
|  |
|  |

In other jurisdictions, specific legislation and planning policies have been introduced to protect high‑value agricultural land. For example, in Queensland, Strategic Cropping Land legislation requires that any development activities, including exploration, taking place on such land are required to be assessed by the Queensland Department of Natural Resources and Mines as to the permanent impact on the land.

## 4.2 National parks and conservation reserves

National parks and conservation reserves protect specific bioregions, maintain plant and animal diversity, protect rare and threatened species and preserve specific natural and cultural heritage. As noted in section 4.1, jurisdictions vary in their procedures for approving exploration access to parks and reserves.

### Declaration of new parks and reserves

Jurisdictions use multiple, but varying, criteria to decide whether to declare a national park or conservation reserve. In general terms, however, they include the conservation values of the area, its natural diversity, its uniqueness, existing cultural heritage features, the degree of disturbance to the area and whether the shape and size of the area are appropriate for its intended purpose.

There is also variation in how governments use these criteria to evaluate the wider costs and benefits of declaring a national park or conservation reserve, as there is in the scope and focus of consultation. For example:

* In Victoria, prior to declaring a national park, the Minister is provided with independent advice from the Victorian Environmental Assessment Council (VEAC) as to alternative land uses. This advice is developed following a public investigation process (VEAC 2012).
* In New South Wales, where conducted, a regional assessment provides for the impact of a new national park on the local community to be considered (NSW Parliament 2013). The National Parks and Wildlife Service consults with other government agencies that may have an interest in the land proposed as a national park or reservation. Industry bodies such as the NSW Minerals Council may also be consulted.
* In Queensland, there are consultations with interested government departments and other stakeholders before a national park is gazetted (Queensland Department of National Parks, Recreation, Sport and Racing 2011).
* The Australian Government, when establishing marine reserves, consults with industry, the community and scientific experts. They also provide for the Australian Bureau of Agricultural and Resource Economics and Sciences to assess the social and economic impact of creating a reserve (SEWPaC 2012b).

Some participants to this inquiry raised concerns about these decision‑making processes and about the regulations governing access to parks and reserves for exploration. For example, the Minerals Council of Australia (MCA) had general concerns with how decisions are made that limit access to land for exploration. In particular, they referred to:

* the failure of governments to appropriately assess all land values in an area and to engage relevant stakeholders in the decision‑making framework;
* the lack of reference to multiple and sequential land use options in land use decision making processes. (sub. 27, p. 27)

The Standing Council on Energy and Resources (SCER) has developed guiding principles under a Multiple Land Use Framework. In relation to ensuring the best use of resources, the Framework states:

Governments should seek to maximise the economic and social benefits of regulated land use for all Australians and future generations through encouraging the multiple use of regulated land, while respecting and protecting environmental, cultural and heritage values. (SCER 2012c, p. 11)

The Framework also recommends that decisions on land use should be evidence based, use risk‑based approaches that make clear the consequences of different land uses, and involve the participation of the community and affected land holders (SCER 2012c). The Multiple Land Use Framework is outlined in box 4.2.

The principles underpinning the Framework can be used to inform assessments on whether or not to declare an area of land as a national park or conservation reserve. Any assessment should weigh up the costs and benefits to all Australians of the use of the land as a park or reserve (including any permitted shared use) against the costs and benefits of alternative land uses. Again with reference to the Framework, any assessment should be conducted in a consultative and transparent manner and involve participation of local communities and land holders and other interested and affected parties. Only then should declarations include prohibitions on other land uses.

|  |
| --- |
| Box 4.2 The Multiple Land Use Framework guiding principles |
| **Coexistence:** The rights of all land users and the potential of all regulated land uses should be acknowledged and respected, while ensuring that regulated land is not restricted to a sole use without considering the implications or consequences for other potential land uses, and the broader benefits to all Australians.  **Best use of resources:** Governments should seek to maximise the economic and social benefits of regulated land use for all Australians and future generations through encouraging the multiple use of regulated land, while respecting and protecting environmental, cultural and heritage values.  **Coordinated preparation informed by effective planning:** Governments should coordinate planning (involving government and industry) to recognise the community’s expectations and capacity to adapt to land use change. Effective regional‑scale planning establishes clear spatial parameters for multiple and sequential land use over time, providing community and investor certainty while retaining the flexibility to adapt to change.  **Tailored participation of communities and land holders in decision making on land use change:** Participation of communities and land holders should be tailored, targeted and timely. Genuine participation involves communities having the capacity to shape how land use change occurs. Directly affected land holders should be meaningfully informed and consulted in a timely way on multiple land use options and potential for coexistence to promote a greater understanding of mutual benefits and to resolve concerns.  **Engagement and education are paramount to informed debate:** Open and constructive debate and analysis of different multiple land use options should be informed by facts. Stakeholders should be genuine in their willingness to listen and appreciate the views, concerns and needs of other land use stakeholders.  **Decision making:** Evidence based decision making on land use should be informed by risk‑based approaches that make transparent the consequences of different land uses. Accountabilities regarding decision making should be clear and enduring.  **Efficient processes:** Governments should work towards streamlined, transparent and consistent legislated approvals processes in which land access for multiple use is handled in accordance with risk. This includes ensuring that processes define multiple and sequential land use of cross‑cutting issues (water, heritage and cultural values) based on the best available evidence and sustainable development principles.  **Access to relevant information:** Relevant information about land and resource capability and values, current and proposed multiple and sequential land use, and land management performance should be accessible to all stakeholders. |
| *Source*: SCER (2012c). |
|  |
|  |

### Assessing proposals to explore in parks and reserves

The Framework principles can also be used for assessing proposals for exploration in parks and reserves, where jurisdictions allow for consideration of such activity. The assessment process, in drawing on the Framework principles, should undertake a risk‑based analysis of the impacts of the various exploration activities on areas of environmental and heritage significance:

Evidence‑based decision‑making on land use should be informed by risk‑based approaches that make transparent the consequences of different land uses. (SCER 2012c, p. 11)

The Tarkine National Coalition drew attention to the significant differences in impact of the various forms of exploration activity:

Early stages of mineral exploration, including aerial reconnaissance, surveys and mapping and stream sampling, cause little environmental disturbance. However, the later stages of exploration, which involve cutting of grid lines, and drilling at certain sites, involves the clearing and disturbance of vegetation and the construction of access tracks for drilling equipment. (Tarkine National Coalition 2012)

Gaps in geoscience knowledge can limit the ability of governments to consider the benefits of other land uses in areas where pre‑declaration exploration was incomplete or where subsequent exploration is prohibited. The Association of Mining and Exploration Companies (AMEC) argued:

Restricted access to the conservation estate leaves significant gaps in our knowledge of our mineral resources. AMEC is aware of an example where a series of aerial surveys excluded a conservation estate resulting in a blank spot in the data set. Aerial surveys are a low impact exploration activity. (sub. 24, p. 19)

The Commission considers that restrictions on access to parks and reserves should be proportionate to the likely level of impact of that activity on the environmental and heritage values of the park or reserve as well as on other shared users, such as tourism operators and park visitors. A risk‑based approach to access would preserve the values of the park or reserve and, where appropriate, provide wider benefits to the community from additional activities having access to that land. The Commission endorses the view that:

Governments should work towards streamlined, transparent and consistent legislated approvals processes in which land access for multiple use is handled in accordance with risk. This includes ensuring that processes define multiple and sequential land use of cross‑cutting issues (water, heritage and cultural values) based on the best available evidence and sustainable development principles. (SCER 2012c, p. 11)

draft Recommendation 4.1

Drawing on the guiding principles of the Multiple Land Use Framework endorsed by the Standing Council on Energy and Resources, Governments should, when deciding to declare a new national park or conservation reserve in recognition of its environmental and heritage value, use evidence-based analyses of the economic and social costs and benefits of alternative or shared land use, including exploration.

Governments should, where they allow for consideration of exploration activity, assess applications by explorers to access a national park or conservation reserve according to the risk and the potential impact of the specific proposed activity on the environmental and heritage values and on other users of that park or reserve.

## 4.3 Native title and Aboriginal freehold land

### Native title

There have been concerns raised by explorers that the native title negotiation process can be lengthy and complex and can often involve multiple parties, which in turn can lead to significant delays in gaining access to land.

The Australian Institute of Mining and Metallurgy said:

Where native title agreements are in place and publicly documented, minerals explorers can successfully access land by entering into Indigenous Land Use Agreements. However, where claims are before the courts, difficulties can be experienced in accessing information and in the negotiation process. Many explorers struggle with the regulatory burden placed upon them in relation to native title. Much of the cost is borne before explorers are able to determine whether recoverable mineral resources are present. This presents a significant disincentive to minerals exploration where there is uncertainty about native title status. (sub. 12, pp. 6–7)

The Association of Mining and Exploration Companies (AMEC) commented:

Despite the fact that the *Native Title Act 1993* (Cth) is nearly 20 years old, AMEC understands there are still approximately 450 native claims throughout Australia requiring resolution. Various attempts have been made by governments to streamline the process, however more work needs to be done to reduce the current timeframes and subsequent costly delays. (sub. 24, p. 13)

The Government of Western Australia noted that while there had been a significant increase in average times taken to grant an exploration licence in Western Australia following the introduction of the native title regime, delays are now back to levels similar to those in the early 1990s:

Prior to the introduction of the Commonwealth *Native Title Act 1993* (NTA), in 1994, the average time taken for the grant of an exploration licence in WA was 205 days. After 1994, the average time increased to 542 days. Timelines are now around 200 days but there is a growing cost to industry to achieve this. (sub. 29, p. 3)

A related issue is that the interaction between the native title regime and the protection of Indigenous heritage adds further complexity to land access. This is discussed in chapter 5. The terms of reference for this inquiry specifically precludes the Commission from making an assessment of the impacts of native title arrangements on exploration.

### Aboriginal freehold land

The Aboriginal freehold land tenure in the Northern Territory provides for right of veto over exploration by land holders. The Northern Territory Department of Mines and Energy said:

Resource companies seeking to work in the Northern Territory are faced with unique legislation in the form of ALRA [*Aboriginal Land Rights (Northern Territory) Act 1976*], which applies to approximately 50% of the Territory. Under this Act, Aboriginal clan groups hold inalienable freehold rights to the land and can veto mining. (sub. 2, p. 3)

The Department was critical of the impact of this legislation on exploration:

… the *Aboriginal Land Rights [Northern Territory] Act 1976* (ALRA) is considered to be the foremost non‑financial barrier to exploration in the Northern Territory. …

As at 31 January 2013, there were 815 outstanding exploration licence applications, of which 282 were in moratorium (compared with 212 outstanding exploration applications on non‑Aboriginal freehold land). (sub. 2, p. 2)

This legislation, including Part IV of the Act which deals with exploration and mining, has been subject to several reviews which, among other things, addressed access to Aboriginal freehold land. In response to the various findings, the legislation was amended in 2006 to introduce negotiating periods and timelines for the negotiations between Aboriginal land owners and access seekers. The amendments required a further review of Part IV after five years. This review is currently being undertaken by the Aboriginal Land Commissioner and the report is yet to be released (FaCHSIA 2012).

There has been, and continues to be, scrutiny of the *Aboriginal Land Rights (Northern Territory) Act 1976.* However, the impact of this legislation (and state indigenous land rights) on exploration activity are outside the terms of reference of this inquiry.

## 4.4 Managing conflict between land uses

Some groups in the agricultural sector, and elsewhere in the community, have expressed objection to explorer’s rights to access land, in part out of concern that exploration will in turn result in resource extraction activities. They refer to the potential disruption of agricultural activities and negative impact on soil, water availability and water quality.

The view that exploration is a precursor to resource extraction has more validity where the location, scale and quality of the resource is known, such as large coal seams in well‑known geological basins. Exploration is undertaken in these areas primarily to prove up the size and quality of the resource and there is high probability that extraction will proceed subject to gaining the relevant approvals.

However, for most resources, only a very small percentage of land on which exploration is undertaken ever proceeds to an extraction operation (DTI NSW 2012). Resource Futures commented that:

Very few exploration licences transform over time into mining leases, possibly fewer than one in a hundred or even a thousand. (sub. 14, p. 4)

In the case of exploration and agriculture, the exploration activities of the licensee (the holder of the resource rights) can impact on the property rights of a land holder or lessee (the holder or user of the surface rights). As the Association of Mining and Exploration Companies (AMEC) said:

Landholder rights relate to the use of the surface of the land. However access to those mineral rights often means infringing on the rights of the landholder. Therefore negotiation between the owner of the mineral rights and the landholder rights takes place such that the infringement on the rights is appropriately compensated. (sub. 24, p. 8)

The potential for conflict between exploration and agricultural activities tends to rise with the intensity of land use and the magnitude of the potential impact. In sparsely stocked grazing areas land holder concerns about exploration activity on their land are not as great as in areas where land is intensively cropped and irrigated. Resolution is normally reached through negotiated agreements between land holders and explorers as to the conditions of access and the compensation payable to the land holder. These agreements are common in all agricultural areas. For example, nearly 3500 land access agreements had been negotiated between land holders and CSG companies across the Surat and Bowen basins in Queensland as at 2012 (APPEA 2012).

Early consultations between the explorer and the land holder as to the scale and scope of the proposed exploration prior to any formal negotiations commencing are important in diffusing any potential conflict. In highlighting the importance of the initial contact between explorers and land holders, the Minerals Council of Australia, Victorian Division said:

… it is accepted that the first approach to a landowner should be in person and at the front door where the project can be explained and the intentions of the explorer discussed. (2011, p. 34)

### The land holder’s perspective

One of the sources of land holder concerns is uncertainty. Uncertainty may relate to whether exploration will result in resource extraction, over the potential impacts of exploration activities on agricultural production and to how farmers plan their future agricultural activities.

There was also some concern from land holders that the legislation places limits on what the compensation payments cover. Some participants argued that the loss of visual amenity in regard to the location of exploration wells and the time and stress of dealing with explorers proposing to access their property should be compensable (sub. 18). The NSW Farmers Federation, for instance, was concerned that compensation in that state for legal costs was capped and limited to the initial stages of the negotiation of an access agreement (sub. 21).

There are also calls for compensation to take into account the involuntary nature of the arrangements on the land holder’s part as it is the explorer who initiates the arrangements (SSCRAT 2011). The Basin Sustainability Alliance (sub. 18) similarly noted the involuntary nature of the arrangements.

### The explorer’s perspective

Some explorers argued that the restrictions on their ability to access all the available land on an exploration lease, such as land near structures and on land used for certain agricultural purposes, limits their property rights relative to the those of the land holder. SACOME said:

Contrary to the perception that the rights of exploration companies exceed the importance of food and fibre production and that farmers have little option but to agree to this ‘interference’, mining legislation does give farmers options and does protect farmland (i.e. the exempt land provisions in section 9 of the *Mining Act 1971*). (sub. 9, p. 5)

Explorers have pointed out that exploration activities generally have a low impact on the surrounding environment. SACOME commented:

Exploration and farming are not necessarily mutually exclusive. Early exploration activities are relatively flexible and short lived, involve relatively few people, mobile equipment and can be managed so that activities occur outside critical farm programs or the cropping season. (sub. 9, p. 4)

The Queensland Resource Council considered that the land access framework contained in the Queensland Land Access Code — the Code contains both mandatory conditions for explorers as well as voluntary guidelines — focused on maximising compensation rather than on building effective working relationships between resource companies and land holders:

Unfortunately, a perverse outcome of Queensland’s land access laws is that the land access process has become focused on maximizing compensation with little priority on building effective working relationships to ensure there is a minimal impact on the landholder business or enjoyment of the land. (sub. 13, p. 3)

### Negotiations between explorers and land holders

In general, across jurisdictions, agreements are reached between explorers and land holders through negotiations on the conditions of access and the compensation payable to the land holder. The requirement to provide compensation for any damage or loss of earnings gives the explorer a financial incentive to minimise the impact of their activities.

As noted by the Senate Standing Committee on Rural Affairs and Transport (SSCRAT 2011), land access is based on a business arrangement between two entities, both with legal rights and reasonable expectations. Such arrangements can be assisted through early consultation between the parties to ensure the land holder is aware of the nature and extent of the proposed exploration prior to entering into negotiations. Where negotiations break down, there is recourse to the relevant Land Court or Mining Court to seek enforceable outcomes.

Land Court or Mining Court decisions are limited to the conditions of access and compensation matters and not to the explorer’s access to the property as such. The rights generally conferred on land holders over their land do not provide for them to deny access to exploration activities, but only to negotiate the conditions of access.

However, it appears that few access‑related matters end up being determined in the relevant Mining or Land Court. SACOME said:

The ERD [Environment, Resources and Development] Court has the powers to authorise access, subject to conditions and make determinations relating to compensation. However since 1994 there are very few examples of companies seeking such orders either from the ERD or Wardens Courts. (sub. 9, p. 5)

That few matters are referred to the relevant court process may indicate that, from the explorer’s perspective, court action could be detrimental to establishing good relations with the land holder and to acquiring a ‘social licence’ to operate from the broader community. This is discussed further in section 4.5.

Most rural land holders are at some disadvantage in undertaking negotiations with explorers. There is an asymmetry of experience as most land holders will have little or no previous experience in negotiating access agreements and compensation — such negotiations will most likely be a ‘one‑off’. There is also an asymmetry of information regarding the potential impact of the exploration activity. The land holder will have limited knowledge and experience from which to evaluate the impact of exploration activities on rural land.

Further, there is an imbalance of power due to the involuntary nature of the negotiations. In most jurisdictions the legislative framework requires land holders to allow explorers to access their land, subject to the negotiated terms and conditions of the access agreement.

The regulatory framework in Western Australia is the exception to this imbalance of power. Western Australian legislation requires the consent of the individual land holder to mineral exploration on land used for cropping or pasture. Bodenmann et al. (nd) claimed that the Western Australian legislation has provided an avenue for land holders to negotiate substantial payments with resource companies, with compensation more likely to reflect the value of the resources than the value of personal disturbance and the agricultural activity that has been displaced.

A number of jurisdictions explicitly require explorers to compensate land holders for the legal costs of assistance with negotiations (in addition to the compensation payable by the explorer for any loss or damages resulting from the exploration activities). Under the New South Wales, Queensland and South Australian regimes there is specific reference to the financial compensation available to the land holder. The Western Australian *Mining Act 1978* provides for reasonable legal or other costs of negotiation for private land under cultivation. In Victoria and Tasmania, although there is no specific reference to such compensation in the legislation, the provision of such compensation is not ‘ruled out’.

Given the asymmetries in experience and information and the involuntary nature of the negotiations, the Commission considers that compensation should be available to meet the reasonable legal costs incurred by land holders in making any access agreement.

All jurisdictions should ensure that the guidelines and information provided to land holders explicitly state that such compensation is available.

draft Recommendation 4.2

State and territory governments should ensure that land holders are informed that reasonable legal costs incurred by them in negotiating a land access agreement are compensable by explorers.

### Coal seam gas

Exploration for coal seam gas (CSG) is an activity where various land holder and other community groups have expressed concerns over land access. These concerns relate to the potential for contamination of groundwater, reduction in groundwater and the safe disposal of waste water on the surface. There is also concern as to the impact of gas wells and other related infrastructure on agricultural activities, particularly on intensively cropped land. In residential and urban areas the concerns tend to focus on subsidence, issues of amenity and contamination of groundwater resources in those areas where household water is sourced from groundwater.

Many people in the community do not differentiate between CSG exploration and CSG extraction, as both involve extensive drilling over large areas.

The CSG industry, unlike other resource activities, does not have a long history in Australia. It has been operating in Queensland since 1996 and is beginning to expand in New South Wales. In 2012, Queensland had nearly 4000 active CSG wells compared to just under 250 in New South Wales (APPEA 2012). In Victoria, the other jurisdiction potentially affected by CSG developments, there has been a moratorium on the issue of further CSG exploration licences since 2012 and there is currently no CSG extraction taking place in Victoria (Baillieu 2012). Exploration has been undertaken in other jurisdictions, but extraction has yet to commence.

The *Energy White Paper* (DRET 2012c) noted that most of the areas, and therefore the land holders and communities, where CSG exploration and extraction is now occurring have had little previous involvement with the resource sectors.

In Queensland, until more recently, CSG activity has been on land primarily used for grazing and broad acre cropping activities and there has been much less opposition. However, as CSG development has extended onto more intensively cropped land on the eastern Darling Downs, opposition to CSG has also increased (Basin Sustainability Alliance, sub. 18). The Queensland Department of Natural Resource and Mines advised that:

In Queensland the experience has been that a boom in CSG and coal exploration in more closely settled, and higher value agricultural areas of the Darling Downs has seen concern levels heightened with agricultural stakeholders and landholders. This is also compounded by the fact that unlike some other parts of the State (North West Queensland, Bowen Basin) there is not a significant history of co‑existence of the two sectors. (sub. 25, p. 17)

In New South Wales, CSG development has been on land used for intensive agriculture activities and on closely settled land. CSG development has centered on the Hunter Valley land that is widely used for wine production, tourism and horse breeding as well as in south‑west Sydney in proximity to residential areas. Further exploration is also being undertaken in northern New South Wales in the Gunnedah Basin as well as in north‑eastern areas of the state in the Clarence Moreton basin.

#### Different regulatory approaches

There are different approaches to the regulation of CSG development in Queensland and New South Wales. Queensland has mostly relied on generic resource and minerals regulation whereas in New South Wales there has been a focus on introducing regulation specifically directed at CSG exploration activities. However, both jurisdictions have established government bodies to specifically deal with CSG‑related issues.

Under the Queensland Land Access Code (see box 4.1), land holders retain veto rights over all exploration activities on land within 100 metres of buildings and within 50 metres of a stockyard, bore, dam, other water storage or place of burial. Queensland has also established urban restricted areas which prohibits all resource activity without the written consent of the relevant local government. These areas cover all towns with a population of over 1000, include a 2 kilometre buffer zone and are to be integrated into the planning system (Queensland Department of Employment, Economic Development and Innovation 2011).

In April 2013, the Queensland Parliament passed legislation to establish an independent statutory body, the Gas Fields Commission, to manage and improve coexistence between rural land holders, rural communities and the CSG industry. Its Commissioners are drawn from community leaders and rural land holders in areas where the CSG industry operates and includes gas industry representation. The Commission has no regulatory or policy role, although it can provide advice on proposed legislation for the onshore gas industry (Gas Fields Commission 2013).

The New South Wales Government, in September 2012, announced a strategic regional land use policy containing a number of specific measures to regulate land access by CSG explorers and other CSG‑related activities. This is in contrast with the generic regulatory response by the Queensland Government. A Land and Water Commissioner has been created in New South Wales to oversee implementation of a standard CSG land access agreement and advise on access issues.

Other requirements targeted at CSG exploration in NSW included the requirement for an Agricultural Impact Statement to be undertaken at the exploration stage to detail the impact of the activity on agricultural resources, farm businesses and regional communities. An Aquifer Interference Policy has also been introduced, requiring exploration activities taking in excess of 3 megalitres of water per year to hold a water access licence, as well as new drilling codes for CSG exploration and a draft code of practice for CSG explorers (New South Wales Department of Planning and Infrastructure 2012).

In February 2013, the New South Wales Government announced additional regulatory measures. They included a 2 kilometre exclusion zone around residential areas for new CSG exploration and production, exclusion zones for specific land uses such as viticulture and horse breeding and the establishment of a specialist regulator, the Office of CSG Regulation (O’Farrell 2013).

#### Concerns surrounding CSG regulation

The recent changes to the regulation of CSG activities in New South Wales have attracted criticism from some participants to this inquiry. The NSW Minerals Council advised that a number of these changes, such as the introduction of the Agricultural Impact Statements, had been made with little consultation or communication with industry:

An example was the introduction of the requirement for an Agricultural Impact Statement for activity approvals from the day the policy was announced. This applied to all approvals (even those where all the application documentation had been submitted) and guidelines on the requirements for the Statement were not released for over two months following the policy announcement. (sub. 11, p. 5)

The Australian Petroleum Production and Exploration Association (APPEA) commented that the introduction of the exclusion zones for specific land uses such as viticulture and horse breeding was reactive and without any scientific basis:

Decisions relating to exclusion zones are often politically driven (e.g. urban exclusion zones in Queensland and NSW, critical industry clusters in NSW) or based on anecdotal views or non‑scientific grounds. (sub. 22, p. 17)

However, environmental groups such as the Nature Conservation Council of New South Wales called for further action:

The government must seize the opportunity to respond to well‑founded community concerns about unrestrained mining and gas expansion by placing a moratorium on CSG development and delivering real protection for public health, water resources and natural areas. (Nature Conservation Council of New South Wales 2013, p. 1)

#### An evolving regulatory framework

The regulatory frameworks governing CSG exploration have been changing quickly. These changes stem from the pressures generated by the rapid expansion of the industry, uncertainty as to the impacts of CSG activities and concerns and opposition from some parties. Strongest opposition to resource exploration (and extraction) is usually from a number of the land holders directly impacted and some special interest groups. Little opposition or support has been expressed by the broader community, where any potential benefits, such as taxation and royalty payments, would be more widely dispersed.

Faced with these pressures, governments have searched for appropriate regulatory responses. The Australian, New South Wales and Queensland governments have commissioned a range of research into the environmental impacts of CSG exploration and extraction to inform improvements with the regulation of CSG. For example, an expert Committee on Coal Seam Gas has been established under the EPBC Act to provide independent scientific advice to governments. The National Water Commission is examining effects on groundwater. CSIRO, in conjunction with the gas industry, is undertaking a range of research on CSG activities. The Queensland Water Commission is developing regional groundwater models. Further research activities have been announced, such as the review by the New South Wales Chief Scientist and Engineer to identify any gaps in the known risks arising from CSG activities on human health, the environment and water catchments (O’Farrell 2013).

Governments are also improving their regulatory practices in relation to CSG activities. The Standing Council on Energy and Resources (SCER) has developed a framework of best practice CSG regulation to guide regulators, as well as the afore‑mentioned Multiple Land Use Framework (box 4.2).

SCER’s framework of best practice CSG regulation provides guidance on what constitutes leading practice in the core areas of well integrity, water management and monitoring, hydraulic fracturing and chemical use. This framework emphasises the importance of regulatory regimes to be informed by scientifically‑driven evidence and reflect a risk‑based approach to managing concerns (SCER 2012c).

The Commission supports efforts to improve the regulation of CSG exploration. Further regulatory changes should be based on the best available evidence of the impacts and be appropriate to the level of risk. As set out in the agreed Multiple Land Use Framework (box 4.2), land use decisions should be directed towards promoting the economic, environmental and social benefit of the use of the land for the whole community, including at the state and national level.

draft Recommendation 4.3

Governments should ensure that the development of coal seam gas exploration regulation is evidence-based and is appropriate to the level of risk. The regulation should draw on the guiding principles of the Multiple Land Use Framework endorsed by the Standing Council on Energy and Resources to weigh the economic, social and environmental costs and benefits for those directly affected as well as for the whole community, and should evolve in step with the evidence.

## 4.5 Social licence to operate

Throughout the course of this inquiry, the Commission has been informed of the need for explorers to achieve a social licence to operate (SLO). A SLO is not a regulatory requirement, but refers to community acceptance:

An operation is said to have a social licence when it achieves ongoing acceptance or approval from the local community and other stakeholders who can affect its profitability. (CSIRO 2012, p. 1)

While most explorers understand the importance of a social licence, the Commission is aware of situations where explorers or their subcontractors have lacked the skills or motivation to obtain a social licence. On Common Ground Consultants (2007) identified a number of reasons why this may be the case:

* In the past, it has been considered unnecessary for explorers to invest in activities not central to finding resource deposits, especially given limited capital.
* The training and experience of personnel who work in resource exploration is heavily weighted towards technical and scientific knowledge, with a lesser knowledge of social and socio‑economic matters. Many of the workers are also employed on a temporary subcontract basis and may have little incentive to develop and maintain relationships with the local community.
* Some (mainly junior) explorers view their work as transitory, selling on the rights to any discoveries they find, and therefore view a SLO as unimportant.
* In the past, explorers have had a need for secrecy and transparent discussions with stakeholders were viewed as being detrimental to this requirement.

Maintaining good working relations with neighbouring land holders and the wider community is good business practice, and the breakdown of such relationships can hamper exploration.

One global trend that has evolved rapidly over the last five years is the need for a new standard relationship between resource development and the populations directly impacted by the project. … Communities want a voice in their future, to participate from the earliest stages and, for a variety of reasons, feel empowered to demand performance from international companies. Coupled with this is a growing awareness by major companies, banks, and the multilateral financing institutions, that social problems pose significant risks of project disruption and delay, and therefore financial risk. (Thomson and Joyce nd, p. 1)

Ernst and Young (2012) identify the maintenance of a SLO as the sixth highest risk faced by mining and metal companies in 2012‑13, ahead of other risks such as price and currency volatility, capital management and access and competing demands for land use.

Through interviews with industry representatives, Lacey et al. explored whether there was a role for government in assisting firms in gaining a SLO and found that:

… government again was painted as a potentially problematic partner in SLO, with its involvement seen by respondents to complicate matters. (2012, p. 10)

The Commission agrees that the onus to develop a SLO lies with the resource explorers. However, there is merit in governments providing broad guidance on how to pursue a social licence.

#### Recent developments

In 2005, the Ministerial Council on Mineral and Petroleum Resources (MCMPR 2005) — comprising representatives from the Australian Government and the governments of each state and territory — released *Principles for Engagement with Communities and Stakeholders*. These principles were designed to ‘help people in the resources sector improve their engagement skills’.

The principles centre on five core themes and are subsequently expanded to identify good practices for companies to follow when engaging with communities and building a SLO. The five themes are:

* communication — open and effective engagement that involves both listening and talking
* transparency — clear and agreed information and feedback processes
* collaboration — working cooperatively to seek mutually beneficial outcomes
* inclusiveness — recognise, understand and involve communities and stakeholders early and throughout the process
* integrity — conduct engagement in a manner that fosters mutual respect and trust.

The Commission views these principles as a useful foundation for organisations which recognise the need to obtain a social licence to operate, but are seeking guidance as to what constitutes good stakeholder engagement.