

Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015 No 41

[2015-41]



New South Wales

Status Information

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Note**

Amending Acts and amending provisions are subject to automatic repeal pursuant to sec 30C of the [Interpretation Act 1987 No 15](#) once the amendments have taken effect.

Authorisation

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Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015 No 41



New South Wales

An Act to amend the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* in relation to land access mediation and arbitration processes; and for related purposes.

1 Name of Act

This Act is the *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of *Mining Act 1992 No 29*

[1] Section 31 Dwelling-houses, gardens and significant improvements

Insert after section 31 (5):

- (6) The holder of the exploration licence is to pay the costs of the owner of the dwelling-house, garden or improvement (or occupant of the dwelling-house) in those proceedings in the Land and Environment Court.
- (7) This section does not apply to the holder of an exploration licence who carries out a seismic survey on a road within the meaning of the *Road Transport Act 2013*, but only if the holder has given written notice of at least 21 days (or such other period as is prescribed by the regulations) of the carrying out of the seismic survey to the owner of the dwelling-house, garden or significant improvement concerned (and, in the case of a dwelling-house, the occupant).

[2] Section 49 Dwelling-houses, gardens and significant improvements

Insert after section 49 (5):

- (6) The holder of the assessment lease is to pay the costs of the owner of the dwelling-

house, garden or improvement (or occupant of the dwelling-house) in those proceedings in the Land and Environment Court.

- (7) This section does not apply to the holder of an assessment lease who carries out a seismic survey on a road within the meaning of the *Road Transport Act 2013*, but only if the holder has given written notice of at least 21 days (or such other period as is prescribed by the regulations) of the carrying out of the seismic survey to the owner of the dwelling-house, garden or significant improvement concerned (and, in the case of a dwelling-house, the occupant).

[3] Section 62 Dwelling-houses, gardens and significant improvements

Insert after section 62 (6A):

- (6B) The applicant for the mining lease is to pay the costs of the owner of the dwelling-house, garden or improvement (or occupant of the dwelling-house) in those proceedings in the Land and Environment Court.

[4] Section 139

Omit the section. Insert instead:

139 Arbitration Panel

- (1) There is to be an Arbitration Panel.
- (2) When appointing a person as a member of the Arbitration Panel, the Minister must comply with any processes or procedures for such appointments set out in the regulations.
- (3) A person is not eligible for appointment as a member of the Arbitration Panel unless the person meets the eligibility criteria (if any) set out in the regulations.
- (4) A person is to be appointed as a member of the Arbitration Panel for the term of office specified in the person's instrument of appointment, being a term not exceeding the maximum period prescribed by the regulations. However, a person may be appointed for an additional term or terms of office if:
 - (a) the person is eligible for appointment, and
 - (b) the Minister considers it appropriate to do so.
- (5) The appointment of a member of the Arbitration Panel is subject to such conditions as are determined by the Minister from time to time.
- (6) Without limiting subsection (5), the Minister may determine conditions relating to the following:

- (a) remuneration and travelling and subsistence allowances,
 - (b) the disclosure to the Secretary of information, including any actual and potential conflicts of interest,
 - (c) performance requirements to be met by the members of the Arbitration Panel.
- (7) The Secretary is to keep and maintain a register of the following:
- (a) the name, business address and contact information of each member of the Arbitration Panel,
 - (b) the qualifications and experience of each member (as at the time of the member's most recent appointment),
 - (c) details of any actual and potential conflicts of interest disclosed to the Secretary in compliance with a condition of the member's appointment (if such a condition has been imposed),
 - (d) any other matter relating to members of the Arbitration Panel as the regulations may prescribe.
- (8) The register must be made available for public inspection on the Department's website.

[5] Section 141 Matters for which access arrangement to provide

Omit section 141 (2A).

[6] Section 141 (4)

Insert "or the holder of a prospecting title" after "by the landholder".

[7] Sections 141A and 141B

Insert after section 141:

141A Access code

- (1) The regulations may prescribe a code (an **access code**) containing provisions relating to access to land by the holder of a prospecting title and the carrying out of activities on that land by the holder.
- (2) The regulations may designate any or all of the provisions of an access code as mandatory provisions.
- (3) An access code may contain non-binding guidelines relating to negotiating and agreeing access arrangements.

141B Application of mandatory provisions of access codes

- (1) An access arrangement is taken to include provisions in the same terms as the mandatory provisions of the access code.
- (2) A provision of an access arrangement has no effect to the extent that it contains obligations on the holder of the prospecting title that are less stringent than those in a mandatory provision.

Note—

See also section 141 (3) which deals with inconsistency between provisions of access arrangements and provisions of regulations.

[8] Section 142 Holder of prospecting title to seek access arrangement

Insert after section 142 (2):

- (2A) The holder of the prospecting title must pay the reasonable costs of the landholder of the land concerned in participating in negotiating the access arrangement.
- (2B) The maximum amount of reasonable costs payable by the holder of the prospecting title is the amount set out by the Minister by order published in the Gazette.
- (2C) In making the order, the Minister must have regard to the following:
 - (a) time spent participating in negotiating the access arrangement,
 - (b) legal costs of negotiating the access arrangement,
 - (c) costs of engaging experts as part of the negotiation process.
- (2D) Nothing in this section prevents a holder of a prospecting title, at the holder's discretion, paying other amounts to a landholder.
- (2E) An order relating to costs may:
 - (a) apply generally or be limited in its application by reference to specified exceptions or factors, or
 - (b) apply differently according to different factors of a specified kind, or
 - (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,or may do any combination of those things.
- (2F) The regulations may make provision for or with respect to the payment of costs

under this section, including, but not limited to, the following:

(a) the timing or frequency of payments,

(b) evidence of costs incurred to be provided to the holder of the prospecting title.

(2G) The holder of a prospecting title and the landholder of the land concerned must negotiate on an access arrangement in good faith.

[9] Section 144 Appointment of arbitrator in default of agreement

Omit section 144 (2). Insert instead:

(2) At the same time as, or after, an application is made under this section, but before an arbitrator is appointed, the holder of the prospecting title concerned must pay the application fee prescribed by the regulations for the purposes of this section.

[10] Sections 145, 145A and 145B

Omit section 145. Insert instead:

145 Arbitration process—mediation before arbitration hearing

(1) As soon as practicable after having been appointed, an arbitrator:

(a) must fix a time and place for conducting a mediation of the question of access to the land concerned, and

(b) must cause notice of his or her appointment, and of the time and place fixed for conducting the mediation, to be given to the holder of the prospecting title and to each landholder.

(2) The arbitrator may, by a further notice served on the holder of the prospecting title and on each landholder, vary the time or place fixed for conducting the mediation.

(3) The arbitrator must, at the time and place fixed under this section, conduct a mediation of the question of access to the land concerned.

145A Mediation

(1) An arbitrator conducting a mediation under this Division:

(a) must use his or her best endeavours to bring the parties to a settlement acceptable to all of them, and

(b) may communicate with the parties collectively or separately, and

- (c) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees.
- (2) The parties to a mediation must participate in the mediation in good faith.
- (3) A mediation terminates if:
 - (a) the parties agree to terminate the mediation, or
 - (b) any party terminates the mediation, by notice in writing, served on the other parties and the arbitrator, or
 - (c) the arbitrator terminates the mediation, or
 - (d) the parties agree on an access arrangement.
- (4) An arbitrator who has acted as mediator in a mediation that is terminated under subsection (3) (a)–(c):
 - (a) may refuse to conduct the subsequent arbitration, and
 - (b) must not conduct the subsequent arbitration unless, at the time of or after the termination of the mediation, all the parties to the arbitration (including the arbitrator) consent in writing.
- (5) If:
 - (a) an arbitrator has obtained confidential information from a party during a mediation, and
 - (b) the mediation has been terminated under subsection (3) (a)–(c), and
 - (c) the parties have consented to the arbitrator conducting the subsequent arbitration,

the arbitrator must, as soon as reasonably practical after that consent has been given, disclose to all other parties to the arbitration so much of the information as the arbitrator considers material to the arbitration.
- (6) If the parties consent under subsection (4) (b), no objection may be taken to the conduct of the subsequent arbitration by the arbitrator solely on the ground that he or she has previously conducted a mediation in accordance with this section.
- (7) If the arbitrator refuses to conduct the subsequent arbitration under subsection (4) (a) or the parties do not consent under subsection (4) (b), the arbitrator's mandate is taken to have been terminated and a substitute arbitrator may be appointed:

- (a) by the parties, or
 - (b) by the Secretary, but only if the parties have been unable to agree on the appointment of an arbitrator by the end of 7 days after the termination of the mediation.
- (8) Before a substitute arbitrator is appointed under this section, the holder of the prospecting title concerned must pay the application fee prescribed by the regulations for the purposes of this section.
- (9) The substitute arbitrator is not required to conduct a mediation under this Division.

145B Arbitration hearing

- (1) If the mediation is unsuccessful, the arbitrator must, as soon as practicable after its conclusion:
- (a) fix a time and place for conducting a hearing of the question of access to the land concerned, and
 - (b) cause notice of the time and place fixed for conducting the hearing to be given to the holder of the prospecting title and to each landholder.
- (2) The arbitrator may, by a further notice served on the holder of the prospecting title and on each landholder, vary the time or place fixed for conducting the hearing.
- (3) The arbitrator must, at the time and place fixed under this section, conduct a hearing into the question of access to the land concerned.

[11] Section 146

Omit the section. Insert instead:

146 Right of appearance

At any mediation of, or hearing into, the question of access to any land by the holder of a prospecting title, the holder and each landholder:

- (a) are entitled to appear and be heard, and
- (b) may be represented by an agent or by an Australian legal practitioner.

[12] Section 147 Conciliation

Omit the section.

[13] Section 148 Conduct of arbitration

Omit section 148 (1). Insert instead:

- (1) The parties to an arbitration must participate in the arbitration in good faith.
- (1A) An arbitrator may terminate an arbitration at any time at the request of the parties.

[14] Sections 148A, 148B and 148C

Insert after section 148:

148A Approved arbitration procedures

- (1) The Secretary may, by order published in the Gazette, approve arbitration procedures for the conduct of mediations and arbitrations under this Division (***approved arbitration procedures***).
- (2) The approved arbitration procedures may include guidance materials for the benefit of the parties and arbitrators.
- (3) The approved arbitration procedures may also include, but are not limited to, the following:
 - (a) objectives and principles for arbitration,
 - (b) responsibilities of parties and the arbitrator in the arbitration process,
 - (c) stages and timeframes for the arbitration framework,
 - (d) processes for dealing with significant improvements,
 - (e) confidentiality,
 - (f) suspension of mediation or arbitration proceedings in certain circumstances,
 - (g) production of evidence of costs incurred by landholders.
- (4) Unless the parties and the arbitrator agree otherwise, mediation and arbitration under this Division is to be conducted in accordance with the provisions of the approved arbitration procedures.
- (5) In the event of an inconsistency between a provision of the approved arbitration procedures and a provision of this Act or of the regulations, the provision of this Act or of the regulations prevails.
- (6) If a matter is not provided for in this Act, the regulations or the approved

arbitration procedures, the procedure at a mediation or a hearing is to be as determined by the arbitrator.

- (7) Approved arbitration procedures take effect on the day on which the procedures are published in the Gazette or, if a later day or days are specified for that purpose, on the later day or days so specified.
- (8) Sections 40 and 41 of the *Interpretation Act 1987* apply to the approved arbitration procedures under this section in the same way as they apply to statutory rules within the meaning of that Act.

148B Site inspection by arbitrator

An arbitrator conducting a mediation or a hearing may enter the land concerned and inspect it at a reasonable time after giving reasonable notice to the landholder.

148C Costs of landholder participation in mediation and arbitration

- (1) The holder of the prospecting title must pay the reasonable costs of the landholder of the land concerned in participating in the mediation and arbitration.
- (2) The maximum amount of reasonable costs is the amount set out by the Minister by order published in the Gazette.
- (3) In making the order, the Minister must have regard to the following:
 - (a) time spent participating in the mediation and arbitration,
 - (b) legal costs in participating in the mediation and arbitration,
 - (c) costs of engaging experts as part of the mediation and arbitration process.
- (4) Nothing in this section prevents a holder of a prospecting title, at the holder's discretion, paying other amounts to a landholder.
- (5) An order relating to costs may:
 - (a) apply generally or be limited in its application by reference to specified exceptions or factors, or
 - (b) apply differently according to different factors of a specified kind, or
 - (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,or may do any combination of those things.

[15] Section 151A

Insert after section 151:

151A Determination as to costs

- (1) This section applies to an arbitrator in the following circumstances:
 - (a) as soon as practicable after an interim determination is taken to be a final determination,
 - (b) on making a final determination under this Division,
 - (c) before terminating an arbitration at the request of the parties.
- (2) The arbitrator must determine the following:
 - (a) if the parties have disputed a payment to cover the landholder's costs in negotiating the access arrangement, the amount of that payment (in accordance with section 142), and
 - (b) the reasonable costs of the landholder in participating in the mediation and arbitration (in accordance with section 148C).
- (3) When determining a payment to cover the reasonable costs of the landholder in participating in the mediation and arbitration, the arbitrator must:
 - (a) consider whether or not the landholder has acted unreasonably in the negotiation, mediation or arbitration, and
 - (b) deduct an amount that in the opinion of the arbitrator represents the amount by which the unreasonable conduct increased the costs of the negotiation, mediation or arbitration.

[16] Section 152 Costs of mediation and arbitration hearing

Omit section 152 (1).

[17] Section 154 Liability

Insert "a mediation or" after "purposes of".

[18] Section 155 Review of determination

Omit "(other than a determination referred to in section 147 (2))" from section 155 (1).

[19] Section 155 (8) and (9)

Insert after section 155 (7):

- (8) The holder of the prospecting title must pay the reasonable costs of the landholder of the land concerned in a review of a determination under this section.
- (9) The Land and Environment Court, in determining those reasonable costs, must consider whether or not the landholder has acted unreasonably in the negotiation, mediation, arbitration or review proceedings.

[20] Section 156A

Insert after section 156:

156A Register of arbitrated access arrangements

- (1) As soon as is practicable after an access arrangement is determined by an arbitrator, the holder of the prospecting title must provide the Secretary with a copy of the final access arrangement.

Maximum penalty: 100 penalty units (in the case of a corporation) or 50 penalty units (in the case of an individual).
- (2) The Secretary is to keep and maintain a register of all final access arrangements provided to him or her.
- (3) The Secretary is not required to include in the register:
 - (a) personal information (within the meaning of the *Privacy and Personal Information Protection Act 1998*) about an individual, or
 - (b) any other information prescribed by the regulations, or
 - (c) any other information that the Secretary determines should be kept confidential.
- (4) The register is to be made available for public inspection on the Department's website.

[21] Section 157

Omit the section. Insert instead:

157 Variation of access arrangements

- (1) An access arrangement may be varied:
 - (a) in accordance with the terms of the arrangement relating to its variation, or
 - (b) by the agreement of the parties to the arrangement, or

- (c) by an arbitrator under this section (whether or not the access arrangement was determined by an arbitrator), or
 - (d) on application by any of the parties to the arrangement, by order of the Land and Environment Court if the arrangement was determined by a court or an arbitrator.
- (2) A party to an access arrangement may, by written notice served on all the other parties to the arrangement, request the parties to agree to the appointment of an arbitrator.
- (3) The parties to an access arrangement may agree to the appointment of any person as an arbitrator.
- (4) Sections 144–151 and 152–156 apply, with all necessary changes, in relation to an arbitration under this section, subject to the following modifications:
- (a) in the application of section 144 (1), the reference to a notice served in accordance with section 143 is taken to be a reference to a notice served in accordance with subsection (2),
 - (b) section 144 (2) does not apply and instead the following applies:
 - (2) Before an arbitrator is appointed under this section, the party requesting the appointment of an arbitrator must pay the application fee prescribed by the regulations for the purposes of this section.
 - (c) section 148C does not apply and instead the following provision applies:

148C Costs

Each party to the mediation and hearing conducted by the arbitrator is to bear his or her own costs in relation to the hearing.

- (d) any other modification prescribed by the regulations.
- (5) In this section, **vary** includes terminate.

[22] Sections 158A and 158B

Insert after section 158:

158A Court may determine access arrangement if already considering significant improvements etc

- (1) If:

- (a) a party applied to the Land and Environment Court for a determination of a matter under section 31 (5) or 49 (5), and
 - (b) no access arrangement relates to the land concerned,
- either party to those Court proceedings may apply to the Court to have the Court determine an access arrangement under this Division in relation to the land.
- (2) An application under this section must not be lodged within 28 days after the holder of the prospecting title has served notice under section 142 of an intention to obtain an access arrangement in respect of the land concerned.
 - (3) The Land and Environment Court may accept or reject the application.
 - (4) Subject to any order of the Land and Environment Court, an application under this section operates to stay any other access arrangement mediation or arbitration in relation to the land until the decision of the Land and Environment Court on the application.
 - (5) If the Land and Environment Court decides to accept the application:
 - (a) the Land and Environment Court is, subject to the regulations, to determine an access arrangement under this Division in relation to the land, and
 - (b) any other access arrangement mediation or arbitration in relation to the land is terminated.

158B Removal of Arbitration Panel arbitrator

- (1) The Secretary may, subject to the regulations, remove an arbitrator who has been appointed under section 144 or 145A (7) (b) if, after an investigation by the Secretary following a complaint, the Secretary is satisfied:
 - (a) that:
 - (i) circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, or
 - (ii) the arbitrator is incapable of conducting the proceedings or there are justifiable doubts as to the arbitrator's capacity to do so, or
 - (iii) the arbitrator has refused or failed properly to conduct the proceedings, and
 - (b) that substantial injustice has been caused or will be caused to one or more of the parties.
- (2) If an arbitrator has been removed under subsection (1), the arbitrator's mandate

is taken to have been terminated and a substitute arbitrator is to be appointed:

(a) by the parties, or

(b) by the Secretary, but only if the parties have been unable to agree on the appointment of an arbitrator by the end of 7 days after the removal.

(3) The regulations may make provision for or with respect to the removal of arbitrators under this section, including, but not limited to:

(a) the making of complaints to the Secretary, and

(b) investigations by the Secretary of complaints.

[23] Section 383C General immunity of landholders

Insert after section 383C (1) (a):

(a1) by or under any other Act in connection with any activity under an authority, mineral claim, opal prospecting licence or permit under this Act, or

[24] Section 383C (1A)

Insert after section 383C (1):

(1A) For the avoidance of doubt, subsection (1) does not apply to the extent that the action, liability, claim or demand arose from anything done by the landholder:

(a) with the intention to cause harm, or

(b) recklessly.

[25] (Repealed)

[26] Schedule 6

Insert at the end of the Schedule with appropriate Part and clause numbering:

Part Provisions consequent on enactment of [Mining and Petroleum Legislation Amendment \(Land Access Arbitration\) Act 2015](#)

Definition

In this Part, **2015 amending Act** means the [Mining and Petroleum Legislation Amendment \(Land Access Arbitration\) Act 2015](#).

Application of amendments relating to general arbitration procedures to existing access arrangements and proposed access arrangements

- (1) This clause applies to a proposed access arrangement for which notice had been given under section 142 before the commencement of this clause, but which was not agreed or determined before that commencement.
- (2) Sections 144 (2), 145, 146, 147, 148 (1) and 155 (1), as in force immediately before their amendment, substitution or repeal by the 2015 amending Act continue to apply to access arrangements and proposed access arrangements to which this clause applies.
- (3) Sections 145A, 145B, 148B and 156A do not apply to access arrangements and proposed access arrangements to which this clause applies.

Application of amendments relating to costs to existing access arrangements and proposed access arrangements

- (1) This clause applies to a proposed access arrangement for which notice had been given under section 142 before the commencement of this clause, but which has not been agreed or determined before that commencement.
- (2) Sections 141 (2A) and 152 (1) as in force immediately before their repeal by the 2015 amending Act continue to apply to access arrangements and proposed access arrangements to which this clause applies.
- (3) Sections 142 (2A)–(2D), 148C, 151A and 158A do not apply to access arrangements and proposed access arrangements to which this clause applies.

Application of amendments relating to costs in Land and Environment Court

Sections 31 (6), 49 (6), 62 (6B) and 155 (8) and (9), as inserted by the 2015 amending Act, do not apply to proceedings in the Land and Environment Court commenced, but not finally determined, before the commencement of this clause.

Application of amendments relating to the definition of “significant improvement”

The substitution of the definition of *significant improvement* in the Dictionary to the Act by the 2015 amending Act does not apply in relation to the following:

- (a) any proceedings in the Land and Environment Court under section 31, 49, 62 or 188 of the Act, or
- (b) any proceedings in that Court in relation to a dispute concerning an access arrangement for which notice had been given under section 143 before the commencement of this clause,

that were commenced, but not finally determined, before the commencement of this clause.

[27] Dictionary

Omit the definition of **significant improvement**. Insert instead:

significant improvement on land, in relation to an authorisation or an access arrangement, means a work or structure that:

- (a) is a substantial and valuable improvement to the land, and
- (b) is reasonably necessary for the operation of the landholder's lawful business or use of the land, and
- (c) is fit for its purpose (immediately or with minimal repair), and
- (d) cannot reasonably co-exist with the exercise of rights under the authorisation or the access arrangement without hindrance to the full and unencumbered operation or functionality of the work or structure, and
- (e) cannot reasonably be relocated or substituted without material detriment to the landholder,

and includes any work or structure prescribed by the regulations for the purposes of this definition, but does not include any work or structure excluded from this definition by the regulations.

Schedule 2 Amendment of [Petroleum \(Onshore\) Act 1991 No 84](#)

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

access arrangement means an access arrangement under Part 4A or 4B.

[2] Section 19 Renewal of title

Insert after section 19 (5):

- (6) The area of land over which an exploration licence or assessment lease is renewed may differ from the area of land over which the renewal of the licence or lease is sought, but not so as to include any land that was not subject to the licence or lease immediately before the renewal.
- (7) If an exploration licence or assessment lease is renewed as to part only of the land

to which the application for renewal relates, the licence or lease ceases to have effect in relation to the remainder of the land on the date on which the renewal takes effect.

[3] Section 41

Omit the section. Insert instead:

41 Rights of holders of production leases

- (1) The holder of a production lease may, in accordance with the conditions of the lease:
 - (a) prospect in and on the land comprised in the lease for petroleum, and
 - (b) conduct petroleum mining operations in and on the land comprised in the lease, and
 - (c) construct and maintain on the land such works, buildings, plant, waterways, roads, pipelines, dams, reservoirs, tanks, pumping stations, tramways, railways, telephone lines, electric powerlines and other structures and equipment as are necessary for the full enjoyment of the lease or to fulfil the lessee's obligations under it.
- (2) While a production lease is in force, the holder of the lease and any person acting as agent or employee of the holder, or delivering goods or providing services to the holder, for the purpose of a requirement of or an activity authorised by the lease may:
 - (a) for that purpose enter and be on the land included in the lease, and
 - (b) do anything so authorised or required.
- (3) Despite subsections (1) and (2), a holder of a production lease may carry out activities on the land comprised in the lease only in accordance with an access arrangement applying to that land.

[4] Section 69D Matters for which access arrangement to provide

Omit section 69D (1) (f).

[5] Section 69D (2)

Omit the subsection. Insert instead:

- (2) An access arrangement must specify the compensation that is payable to each landholder of the land concerned as a consequence of the holder of the prospecting

title carrying out prospecting operations on the land.

[6] Section 69D (2A)

Omit the subsection.

[7] Section 69D (4)

Insert “or the holder of a prospecting title” after “by the landholder”.

[8] Sections 69DA and 69DB

Insert after section 69D:

69DA Access code

- (1) The regulations may prescribe a code (an **access code**) containing provisions relating to access to land by the holder of a prospecting title and the carrying out of activities on that land by the holder.
- (2) The regulations may designate any or all of the provisions of an access code as mandatory provisions.
- (3) An access code may contain non-binding guidelines relating to negotiating and agreeing access arrangements.

69DB Application of mandatory provisions of access codes

- (1) An access arrangement is taken to include provisions in the same terms as the mandatory provisions of the access code.
- (2) A provision of an access arrangement has no effect to the extent that it contains obligations on the holder of the prospecting title that are less stringent than those in a mandatory provision.

Note—

See also section 69D (3) which deals with inconsistency between provisions of access arrangements and provisions of regulations.

[9] Section 69E Holder of prospecting title to seek access arrangement

Insert after section 69E (2):

- (2A) The holder of the prospecting title must pay the reasonable costs of the landholder of the land concerned in participating in negotiating the access arrangement.
- (2B) The maximum amount of reasonable costs payable by the holder of the

prospecting title is the amount set out by the Minister by order published in the Gazette.

(2C) In making the order, the Minister must have regard to the following:

- (a) time spent participating in negotiating the access arrangement,
- (b) legal costs of negotiating the access arrangement,
- (c) costs of engaging experts as part of the negotiation process.

(2D) Nothing in this section prevents a holder of a prospecting title, at the holder's discretion, paying other amounts to a landholder.

(2E) An order relating to costs may:

- (a) apply generally or be limited in its application by reference to specified exceptions or factors, or
- (b) apply differently according to different factors of a specified kind, or
- (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,

or may do any combination of those things.

(2F) The regulations may make provision for or with respect to the payment of costs under this section, including, but not limited to, the following:

- (a) the timing or frequency of payments,
- (b) evidence of costs incurred to be provided to the holder of the prospecting title.

(2G) The holder of a prospecting title and the landholder of the land concerned must negotiate on an access arrangement in good faith.

[10] Section 69G Appointment of arbitrator in default of agreement

Omit section 69G (2) and (3). Insert instead:

- (2) At the same time as, or after, an application is made under this section, but before an arbitrator is appointed, the holder of the prospecting title concerned must pay the application fee prescribed by the regulations for the purposes of this section.

[11] Sections 69H, 69HA and 69HB

Omit section 69H. Insert instead:

69H Arbitration process—mediation before arbitration hearing

- (1) As soon as practicable after having been appointed, an arbitrator:
 - (a) must fix a time and place for conducting a mediation of the question of access to the land concerned, and
 - (b) must cause notice of his or her appointment, and of the time and place fixed for conducting the mediation, to be given to the holder of the prospecting title and to each landholder.
- (2) The arbitrator may, by a further notice served on the holder of the prospecting title and on each landholder, vary the time or place fixed for conducting the mediation.
- (3) The arbitrator must, at the time and place fixed under this section, conduct a mediation of the question of access to the land concerned.

69HA Mediation

- (1) An arbitrator conducting a mediation under this Part:
 - (a) must use his or her best endeavours to bring the parties to a settlement acceptable to all of them, and
 - (b) may communicate with the parties collectively or separately, and
 - (c) must treat information obtained by the arbitrator from a party with whom he or she communicates separately as confidential, unless that party otherwise agrees.
- (2) The parties to a mediation must participate in the mediation in good faith.
- (3) A mediation terminates if:
 - (a) the parties agree to terminate the mediation, or
 - (b) any party terminates the mediation, by notice in writing, served on the other parties and the arbitrator, or
 - (c) the arbitrator terminates the mediation, or
 - (d) the parties agree on an access arrangement.
- (4) An arbitrator who has acted as mediator in a mediation that is terminated under subsection (3) (a)–(c):
 - (a) may refuse to conduct the subsequent arbitration, and
 - (b) must not conduct the subsequent arbitration unless, at the time of or after

the termination of the mediation, all the parties to the arbitration (including the arbitrator) consent in writing.

(5) If:

- (a) an arbitrator has obtained confidential information from a party during a mediation, and
- (b) the mediation has been terminated under subsection (3) (a)–(c), and
- (c) the parties have consented to the arbitrator conducting the subsequent arbitration,

the arbitrator must, as soon as reasonably practical after that consent has been given, disclose to all other parties to the arbitration so much of the information as the arbitrator considers material to the arbitration.

- (6) If the parties consent under subsection (4) (b), no objection may be taken to the conduct of the subsequent arbitration by the arbitrator solely on the ground that he or she has previously conducted a mediation in accordance with this section.
- (7) If the arbitrator refuses to conduct the subsequent arbitration under subsection (4) (a) or the parties do not consent under subsection (4) (b), the arbitrator's mandate is taken to have been terminated and a substitute arbitrator may be appointed:
 - (a) by the parties, or
 - (b) by the Secretary, but only if the parties have been unable to agree on the appointment of an arbitrator by the end of 7 days after the termination of the mediation.
- (8) Before a substitute arbitrator is appointed under this section, the holder of the prospecting title concerned must pay the application fee prescribed by the regulations for the purposes of this section.
- (9) The substitute arbitrator is not required to conduct a mediation under this Part.

69HB Arbitration hearing

- (1) If the mediation is unsuccessful, the arbitrator must, as soon as practicable after its conclusion:
 - (a) fix a time and place for conducting a hearing of the question of access to the land concerned, and
 - (b) cause notice of the time and place fixed for conducting the hearing to be given to the holder of the prospecting title and to each landholder.

- (2) The arbitrator may, by a further notice served on the holder of the prospecting title and on each landholder, vary the time or place fixed for conducting the hearing.
- (3) The arbitrator must, at the time and place fixed under this section, conduct a hearing into the question of access to the land concerned.

[12] Section 69I

Omit the section. Insert instead:

69I Right of appearance

At any mediation of, or hearing into, the question of access to any land by the holder of a prospecting title, the holder and each landholder:

- (a) are entitled to appear and be heard, and
- (b) may be represented by an agent or by an Australian legal practitioner.

[13] Section 69J Conciliation

Omit the section.

[14] Section 69K Conduct of arbitration

Omit section 69K (1). Insert instead:

- (1) The parties to an arbitration must participate in the arbitration in good faith.
- (1A) An arbitrator may terminate an arbitration at any time at the request of the parties.

[15] Sections 69KA, 69KB and 69KC

Insert after section 69K:

69KA Approved arbitration procedures

- (1) The Secretary may, by order published in the Gazette, approve arbitration procedures for the conduct of mediations and arbitrations under this Part (***approved arbitration procedures***).
- (2) The approved arbitration procedures may include guidance materials for the benefit of the parties and arbitrators.
- (3) The approved arbitration procedures may also include, but are not limited to,

the following:

- (a) objectives and principles for arbitration,
 - (b) responsibilities of parties and the arbitrator in the arbitration process,
 - (c) stages and timeframes for the arbitration framework,
 - (d) processes for dealing with significant improvements,
 - (e) confidentiality,
 - (f) suspension of mediation or arbitration proceedings in certain circumstances,
 - (g) production of evidence of costs incurred by landholders.
- (4) Unless the parties and the arbitrator agree otherwise, mediation and arbitration under this Part is to be conducted in accordance with the provisions of the approved arbitration procedures.
- (5) In the event of an inconsistency between a provision of the approved arbitration procedures and a provision of this Act or of the regulations, the provision of this Act or of the regulations prevails.
- (6) If a matter is not provided for in this Act, the regulations or the approved arbitration procedures, the procedure at a mediation or a hearing is to be as determined by the arbitrator.
- (7) Approved arbitration procedures take effect on the day on which the procedures are published in the Gazette or, if a later day or days are specified for that purpose, on the later day or days so specified.
- (8) Sections 40 and 41 of the *Interpretation Act 1987* apply to the approved arbitration procedures under this section in the same way as they apply to statutory rules within the meaning of that Act.

69KB Site inspection by arbitrator

An arbitrator conducting a mediation or a hearing may enter the land concerned and inspect it at a reasonable time after giving reasonable notice to the landholder.

69KC Costs of landholder participation in mediation and arbitration

- (1) The holder of the prospecting title must pay the reasonable costs of the landholder of the land concerned in participating in the mediation and arbitration.
- (2) The maximum amount of reasonable costs is the amount set out by the Minister by order published in the Gazette.

- (3) In making the order, the Minister must have regard to the following:
 - (a) time spent participating in the mediation and arbitration,
 - (b) legal costs in participating in the mediation and arbitration,
 - (c) costs of engaging experts as part of the mediation and arbitration process.
- (4) Nothing in this section prevents a holder of a prospecting title, at the holder's discretion, paying other amounts to a landholder.
- (5) An order relating to costs may:
 - (a) apply generally or be limited in its application by reference to specified exceptions or factors, or
 - (b) apply differently according to different factors of a specified kind, or
 - (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,or may do any combination of those things.

[16] Section 69NA

Insert after section 69N:

69NA Determination as to costs

- (1) This section applies to an arbitrator in the following circumstances:
 - (a) as soon as practicable after an interim determination is taken to be a final determination,
 - (b) on making a final determination under this Part,
 - (c) before terminating an arbitration at the request of the parties.
- (2) The arbitrator must determine the following:
 - (a) if the parties have disputed a payment to cover the landholder's costs in negotiating the access arrangement, the amount of that payment (in accordance with section 69E), and
 - (b) the reasonable costs of the landholder in participating in the mediation and arbitration (in accordance with section 69KC).
- (3) When determining a payment to cover the reasonable costs of the landholder in participating in the mediation and arbitration, the arbitrator must:

- (a) consider whether or not the landholder has acted unreasonably in the negotiation, mediation or arbitration, and
- (b) deduct an amount that in the opinion of the arbitrator represents the amount by which the unreasonable conduct increased the costs of the negotiation, mediation or arbitration.

[17] Section 69O Costs of mediation and arbitration hearing

Omit section 69O (1).

[18] Section 69Q Liability

Insert “a mediation or” after “purposes of”.

[19] Section 69R Review of determination

Omit “(other than a determination referred to in section 69J (2))” from section 69R (1).

[20] Section 69R (8) and (9)

Insert after section 69R (7):

- (8) The holder of the prospecting title must pay the reasonable costs of the landholder of the land concerned in a review of a determination under this section.
- (9) The Land and Environment Court, in determining those reasonable costs, must consider whether or not the landholder has acted unreasonably in the negotiation, mediation, arbitration or review proceedings.

[21] Section 69SA

Insert after section 69S:

69SA Register of arbitrated access arrangements

- (1) As soon as is practicable after an access arrangement is determined by an arbitrator, the holder of the prospecting title must provide the Secretary with a copy of the final access arrangement.

Maximum penalty: 100 penalty units (in the case of a corporation) or 50 penalty units (in the case of an individual).

- (2) The Secretary is to keep and maintain a register of all final access arrangements provided to him or her.
- (3) The Secretary is not required to include in the register:
 - (a) personal information (within the meaning of the *Privacy and Personal*

- Information Protection Act 1998*) about an individual, or
- (b) any other information prescribed by the regulations, or
 - (c) any other information that the Secretary determines should be kept confidential.
- (4) The register is to be made available for public inspection on the Department's website.

[22] Section 69T

Omit the section. Insert instead:

69T Variation of access arrangements

- (1) An access arrangement may be varied:
 - (a) in accordance with the terms of the arrangement relating to its variation, or
 - (b) by the agreement of the parties to the arrangement, or
 - (c) by an arbitrator under this section (whether or not the access arrangement was determined by an arbitrator), or
 - (d) on application by any of the parties to the arrangement, by order of the Land and Environment Court if the arrangement was determined by a court or an arbitrator.
- (2) A party to an access arrangement may, by written notice served on all the other parties to the arrangement, request the parties to agree to the appointment of an arbitrator.
- (3) The parties to an access arrangement may agree to the appointment of any person as an arbitrator.
- (4) Sections 69G–69N and 69O–69S apply, with all necessary changes, in relation to an arbitration under this section, subject to the following modifications:
 - (a) in the application of section 69G (1), the reference to a notice served in accordance with section 69F is taken to be a reference to a notice served in accordance with subsection (2),
 - (b) section 69G (2) does not apply and instead the following applies:
 - (2) Before an arbitrator is appointed under this section, the party requesting the appointment of an arbitrator must pay the application

fee prescribed by the regulations for the purposes of this section.

(c) section 69KC does not apply and instead the following provision applies:

69KC Costs

Each party to the mediation and hearing conducted by the arbitrator is to bear his or her own costs in relation to the hearing.

(d) any other modification prescribed by the regulations.

(5) In this section, **vary** includes terminate.

[23] Sections 69V and 69W

Insert after section 69U:

69V Court may determine access arrangement if already considering significant improvements etc

(1) If:

(a) a party applied to the Land and Environment Court for a determination of a matter under section 72 (4), and

(b) no access arrangement relates to the land concerned,

either party to those Court proceedings may apply to the Court to have the Court determine an access arrangement under this Part in relation to the land.

(2) An application under this section must not be lodged within 28 days after the holder of the prospecting title has served notice under section 69E of an intention to obtain an access arrangement in respect of the land concerned.

(3) The Land and Environment Court may accept or reject the application.

(4) Subject to any order of the Land and Environment Court, an application under this section operates to stay any other access arrangement mediation or arbitration in relation to the land until the decision of the Land and Environment Court on the application.

(5) If the Land and Environment Court decides to accept the application:

(a) the Land and Environment Court is, subject to the regulations, to determine an access arrangement under this Part in relation to the land, and

(b) any other access arrangement mediation or arbitration in relation to the land is terminated.

69W Removal of Arbitration Panel arbitrator

- (1) The Secretary may, subject to the regulations, remove an arbitrator who has been appointed under section 69G or 69HA (7) (b) if, after an investigation by the Secretary following a complaint, the Secretary is satisfied:
 - (a) that:
 - (i) circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, or
 - (ii) the arbitrator is incapable of conducting the proceedings or there are justifiable doubts as to the arbitrator's capacity to do so, or
 - (iii) the arbitrator has refused or failed properly to conduct the proceedings, and
 - (b) that substantial injustice has been caused or will be caused to one or more of the parties.
- (2) If an arbitrator has been removed under subsection (1), the arbitrator's mandate is taken to have been terminated and a substitute arbitrator is to be appointed:
 - (a) by the parties, or
 - (b) by the Secretary, but only if the parties have been unable to agree on the appointment of an arbitrator by the end of 7 days after the removal.
- (3) The regulations may make provision for or with respect to the removal of arbitrators under this section, including, but not limited to:
 - (a) the making of complaints to the Secretary, and
 - (b) investigations by the Secretary of complaints.

[24] Part 4B

Insert after Part 4A:

Part 4B Access arrangements for production leases

Note—

Section 41 (3) provides that a holder of a production lease may conduct activities on the land comprised in the lease only in accordance with an access arrangement applying to that land.

69X Part 4A extends to access arrangements for production leases

- (1) Part 4A (other than sections 69A–69C and 69D (4) and (5)) extends to access arrangements for the purpose of conducting petroleum mining operations under

a production lease as if references in that Part to:

- (a) a prospecting title were references to a production lease, and
- (b) prospecting operations were references to petroleum mining operations.

(2) The extension of Part 4A by this section is subject to any necessary changes and any other modification prescribed by the regulations.

[25] Section 72 Restrictions on rights of holders of titles over other land

Omit section 72 (1) (c). Insert instead:

- (c) on which is situated any significant improvement, other than an improvement constructed or used for mining or prospecting operations,

[26] Section 72 (3)

Omit the subsection.

[27] Section 72 (5)-(7)

Insert after section 72 (4):

- (5) The holder of the petroleum title is to pay the costs of the owner of the dwelling-house, garden, vineyard or orchard or improvement (or occupant of the dwelling-house) in those proceedings in the Land and Environment Court.
- (6) In this section, **significant improvement** on land, in relation to a petroleum title or an access arrangement, means a work or structure that:
 - (a) is a substantial and valuable improvement to the land, and
 - (b) is reasonably necessary for the operation of the landholder's lawful business or use of the land, and
 - (c) is fit for its purpose (immediately or with minimal repair), and
 - (d) cannot reasonably co-exist with the exercise of rights under the petroleum title or the access arrangement without hindrance to the full and unencumbered operation or functionality of the work or structure, and
 - (e) cannot reasonably be relocated or substituted without material detriment to the landholder,

and includes any work or structure prescribed by the regulations for the purposes of this definition, but does not include any work or structure excluded from this definition by the regulations.

- (7) This section does not apply to the holder of a petroleum title who carries out a seismic survey on a road within the meaning of the *Road Transport Act 2013*, but only if the holder has given written notice of at least 21 days (or such other period as is prescribed by the regulations) of the carrying out of the seismic survey to the owner of the dwelling-house, garden, vineyard, orchard or improvement concerned (and, in the case of a dwelling-house, the occupant).

[28] Section 107A

Insert before section 107:

107A Definition

In this Part:

compensable loss means loss caused, or likely to be caused, by:

- (a) damage to the surface of land, to crops, trees, grasses or other vegetation (including fruit and vegetables) or to buildings, structures or works, being damage which has been caused by or which may arise from prospecting or mining operations, or
- (b) deprivation of the possession or of the use of the surface of land or any part of the surface, or
- (c) severance of land from other land of the landholder, or
- (d) surface rights of way and easements, or
- (e) destruction or loss of, or injury to, disturbance of or interference with, stock, or
- (f) damage consequential on any matter referred to in paragraphs (a)–(e).

[29] Section 107 Compensation

Omit section 107 (1). Insert instead:

- (1) On the granting of a petroleum title, each person having any estate or interest in any land becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the person as a result of the exercise of the rights conferred by the title or by an access arrangement in respect of the title.

Note—

A **petroleum title** is an exploration licence, assessment lease, production lease or special prospecting authority in force under this Act.

[30] Section 108 Parties to agree as to compensation

Insert after section 108 (2):

- (3) Subsection (2) does not apply to compensation that is to be determined under an access arrangement that is required to be agreed or determined in accordance with Part 4A or 4B of this Act.

[31] Section 109 Measure of compensation

Omit section 109 (1).

[32] Section 109 (2)

Omit "Without affecting the generality of subsection (1), where:". Insert instead "Where:"

[33] Section 109 (2) (b)

Omit "by the Land and Environment Court". Insert instead "by any court, person or body".

[34] Section 109 (3)

Omit "the Land and Environment Court". Insert instead "a court, person or body".

[35] Section 109 (4)

Insert after section 109 (3):

- (4) In making an assessment of compensation regard is to be had to the matters (if any) prescribed by the regulations.

[36] Section 111 Additional assessment

Omit "further loss has been caused to the land to which the assessment relates, or to other land, being loss arising from any one or more of the causes mentioned in section 109 (1)" from section 111 (b).

Insert instead "further compensable loss has been caused to the land to which the assessment relates or to other land".

[37] Section 141 General immunity of landholders

Insert after section 141 (1) (a):

- (a1) by or under any other Act in connection with any activity under a petroleum title under this Act, or

[38] Section 141 (1A)

Insert after section 141 (1):

(1A) For the avoidance of doubt, subsection (1) does not apply to the extent that the action, liability, claim or demand arose from anything done by the landholder:

- (a) with the intention to cause harm, or
- (b) recklessly.

[39] (Repealed)

[40] Schedule 1

Insert at the end of the Schedule with appropriate Part and clause numbering:

Part Provisions consequent on enactment of Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015

Definition

In this Part, **2015 amending Act** means the *Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015*.

Application of amendments relating to general arbitration procedures to existing access arrangements and proposed access arrangements

- (1) This clause applies to a proposed access arrangement for which notice had been given under section 69E before the commencement of this clause, but which was not agreed or determined before that commencement.
- (2) Sections 69D (1) (f) and (2), 69G (2), 69H, 69I, 69J, 69K (1) and 69R (1) as in force immediately before their amendment, substitution or repeal by the 2015 amending Act continue to apply to access arrangements and proposed access arrangements to which this clause applies.
- (3) Sections 69HA, 69HB, 69KB and 69SA do not apply to access arrangements and proposed access arrangements to which this clause applies.

Application of amendments relating to costs to existing access arrangements and proposed access arrangements

- (1) This clause applies to a proposed access arrangement for which notice had been given under section 69E before the commencement of this clause, but which has

not been agreed or determined before that commencement.

- (2) Sections 69D (2A) and 69O (1) as in force immediately before their repeal by the 2015 amending Act continue to apply to access arrangements and proposed access arrangements to which this clause applies.
- (3) Sections 69E (2A)–(2D), 69KC, 69NA and 69V do not apply to access arrangements and proposed access arrangements to which this clause applies.

Application of amendments relating to costs in Land and Environment Court

Section 69R (8) and (9), as inserted by the 2015 amending Act, do not apply to proceedings in the Land and Environment Court commenced, but not finally determined, before the commencement of this clause.

Application of amendments relating to production leases

Section 41 (3) and Part 4B, as inserted by the 2015 amending Act, do not apply in relation to a production lease granted before the commencement of this clause.

Application of amendments relating to determination of compensation

The amendments to the Act made by Schedule 2 [27]–[34] to the 2015 amending Act do not apply to the following:

- (a) an arbitration commenced, but not completed, before the commencement of this clause,
- (b) proceedings in the Land and Environment Court commenced, but not determined, before the commencement of this clause.

Application of amendment relating to the definition of “significant improvement”

The insertion of the definition of **significant improvement** into section 72, and the other amendments to that section, by the 2015 amending Act do not apply in relation to the following:

- (a) any proceedings in the Land and Environment Court under that section, or
- (b) any proceedings in that Court in relation to a dispute concerning an access arrangement for which notice had been given under section 69F before the commencement of this clause,

that were commenced, but not finally determined, before the commencement of this clause.

[41] Schedule

Insert at the end of the Act with an appropriate Schedule number:

Schedule Cancellation of titles relating to national parks

1 Cancellation of certain exploration licences

An exploration licence, or part of an exploration licence, that is comprised of land within a national park (within the meaning of the [National Parks and Wildlife Act 1974](#)) as at the commencement of this Schedule is cancelled by this Schedule, either wholly or in part, as the case requires.

2 Compensation not payable

(1) Compensation is not payable by or on behalf of the State:

- (a) because of the enactment or operation of this Schedule or any Act that amends this Schedule, or
- (b) because of any direct or indirect consequence of any such enactment or operation (including any conduct under the authority of any such enactment), or
- (c) because of any conduct relating to any such enactment or operation.

(2) This clause extends to conduct and any other matter occurring before the commencement of this clause.

(3) In this clause:

compensation includes damages or any other form of compensation.

conduct includes any statement, or any act or omission:

- (a) whether unconscionable, negligent, false, misleading, deceptive or otherwise, and
- (b) whether constituting an offence, tort, breach of contract, breach of statute or otherwise.

statement includes a representation of any kind, whether made orally or in writing.

the State means the Crown within the meaning of the [Crown Proceedings Act 1988](#) or an officer, employee or agent of the Crown.

3 State not liable for certain conduct

- (1) The State is not liable, and is taken never to have been liable, whether vicariously or otherwise, for any conduct (**relevant conduct**) before an exploration licence's cancellation under this Schedule in relation to an exploration licence or prospecting on land (whether occurring before or after the grant of the licence).
- (2) In addition, the State is not liable, and is taken never to have been liable, whether under any contract, policy or other arrangement for self-insurance or otherwise, to indemnify any person against any personal liability of the person for relevant conduct.
- (3) This clause extends to all types of civil liability, whether at law or in equity, and whether arising in tort or contract, or under an enactment or otherwise.
- (4) An employee (or former employee) of the State acting honestly and in good faith in the performance or purported performance of his or her functions as an employee of the State has the same protections and immunities as the State under this clause.
- (5) This clause applies despite the [Law Reform \(Vicarious Liability\) Act 1983](#) and the [Civil Liability Act 2002](#).
- (6) In this clause:

employee of the State means a person employed under the [Government Sector Employment Act 2013](#).

the State means the Crown in right of New South Wales and includes a statutory body representing the Crown.

4 Continuing obligation to provide reports

The obligation of the holder of an exploration licence to provide a report under this Act continues despite the cancellation of the licence under this Schedule.

5 Access arrangements

- (1) The cancellation of an exploration licence by this Schedule does not affect any liabilities of a holder or former holder of the licence under an access arrangement.
- (2) The cancellation of an exploration licence by this Schedule operates, for the purposes of any access arrangement relating to the licence:
 - (a) as an occasion of the holder of the licence ceasing to hold an authority over the exploration area, and

- (b) as a cancellation of the licence for the purpose of any provision of the access arrangement that deals with the cancellation of an authority.
- (3) The regulations may make provision for or with respect to the termination of any access arrangements relating to an exploration licence cancelled under this Schedule.