



Dorrigo 17 September 2011

MINING LAW BASICS

Environmental Defender's Office (NSW)



Environmental Defender's Office

- A community legal centre specialising in public interest environmental law
- Mission: promote the public interest and improve environmental outcomes through the informed use of the law
- Functions
 - ▣ Legal Advice and Representation
 - ▣ Policy and Law Reform
 - ▣ Community Education
 - ▣ Scientific and Technical Advice



In a nutshell

- Even though you own your land, you do not own the minerals or petroleum in your land.
- Most minerals belong to the Crown.
- The Government can authorise third parties to look for and extract minerals.
- The Government can take royalties for mining.
 - *Antimony & Gold listed as minerals in the schedule of the Mining Regulation 2010*



Who are the decision makers?

- Department of Primary Industries (Minerals and Petroleum)
 - The Hon. Chris Hartcher— Minister for Resources and Energy

- Department of Planning and Infrastructure
 - The Hon. Brad Hazzard – Minister for Planning and Infrastructure

- Planning Assessment Commission

- Local Council (limited role)



Types of Mining Approvals

□ Mining activities require approval from Minister for Resources and Energy:

- exploration licences;
- assessment leases;
- mining leases.



□ Planning approval (development consent) may also be needed



Changes to regulation of mining and CSG activities

- The NSW Government has announced some changes to laws regulating mining and CSG activities.
- Government will prepare strategic land use plans for NSW to identify land use priorities within a region.
- Triple bottom line assessments (environmental, social and economic values).
- **Transitional arrangements** while the plans are prepared.



Exploration activities must be licenced

- **Mining exploration titles** - granted for up to 5 years - Renewable
- **Petroleum exploration titles** - granted for up to 6 years - Renewable
- Can be granted over any land (including privately owned land)



Development consent may be required

- Development consent **is not** required for mining exploration activities.
- N.B this area is currently under review





Approval process where no development consent is required

Invitation to apply for EL (tender)

Application

Community notification (newspaper)

Environmental Assessment (REF)

Determination (granted or rejected)



Approval process where development consent is required

- The Part 3A approval process applied until recently when Part 3A was repealed.
- A new regime is about to commence – Part 4.1 - and it will apply to granting development consent for exploration licences.
 - We'll go through this process later
- NB. The planning system is under review and this area may undergo further changes



Transitional Provisions

- A precautionary approach will be implemented to consider the appropriateness of an area for future mining when releasing new exploration licence tenders for coal and coal seam gas
- Major fees in relation to the project will only be paid if the project passes through the assessment process and obtains a mining lease



Finding out about proposed exploration

- Affected landholders have no right to be personally notified of an exploration licence application.
 - All exploration licence applications must be advertised in a State-wide and district newspaper.
- If development consent is required, the project will be notified on the Department of Planning & Infrastructure website.



Transitional Provision

- The community will be consulted prior to tenders being released for **coal** or **CSG** exploration licences.
 - **Not other minerals**

- Information will be provided to the community about what exploration involves.

- The community will be the first to know about any potential exploration activity.



Environmental assessment of exploration activities where no development consent is required

- ▣ **Review of Environmental Factors** – preliminary review of environmental impacts; and (if necessary)
- ▣ **Environmental Impact Statement** – more detailed assessment of the environmental impacts. Only required where the REF indicates there will be a significant impact; and (if necessary)
- ▣ **Species Impact Statement** – assesses the impact of the development on threatened species, populations and ecological communities and their habitats. Only required where a significant impact is likely.



Conditions

- Exploration licences can be granted subject to conditions such as:
 - Conditions requiring the rehabilitation of land,
 - A requirement to give security to ensure the fulfilment of obligations

- Conditions are legally binding



Do you get a say?

- If development consent **is not** required (mining exploration and some petroleum exploration)
 - ▣ Landholders are not currently consulted
 - ▣ There is currently no formal opportunity for landholders to have a say as to whether a licence should be granted

- If development consent **is** required, you will have an opportunity to comment and lodge your objections
 - ▣ We'll go through this process later



Restrictions on exploration – exempted areas

- Exploration for minerals or petroleum must not be carried out in an "exempted area" unless the Minister for Resources and Energy has granted an exempted area consent.
- An exempted area is land which is held for public purposes, and includes areas such as State Forests and National Parks.



Landholder Rights

- You can ensure that mining exploration does not occur on the **surface** of land within:
 - 200m of your house
 - 50m of your garden or
 - On any significant improvement

- Just DON'T give consent!





Landholder Rights

- You may not be able to prevent a licence being granted as you won't usually have an opportunity to comment.
- You CAN influence how exploration is carried out on your property.
- You do this through an Access Arrangement



Landholder Rights

- You can ensure the licence holder only engages in activities that are authorised by the licence
 - ▣ You may also have an action in trespass for an injunction to prevent the unauthorised activities from continuing





Landholder Rights

- If the mining company causes environmental damage without an approval you can:
 - ▣ Report the incident to the Office of Environment and Heritage who can take enforcement action
 - ▣ If the OEH does nothing, you may be able to commence enforcement action





Landholder Obligations

- Landholders must not unlawfully obstruct or hinder the holder of an exploration licence from undertaking authorised activities (maximum penalty: \$11,000)
- You can take a stand but there may be legal and financial consequences





Mining/CSG activities require a lease

- The Minister for Resources and Energy grants mining/production leases.
- Usually granted for a period of up to 21 years.





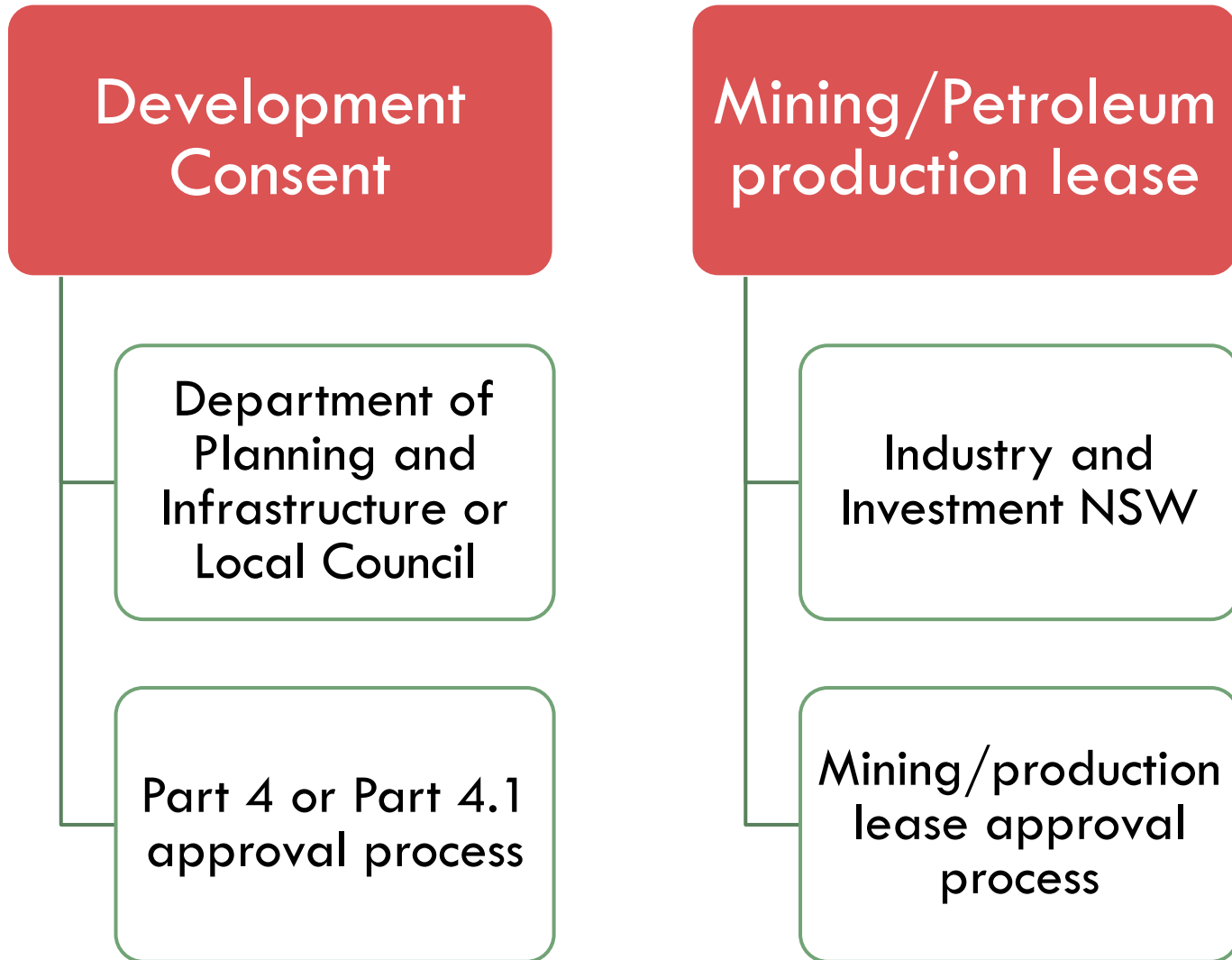
Mining/CSG activities also require development consent

- The applicant must also obtain a development consent under the planning system
- Usually from the Minister for Planning and Infrastructure





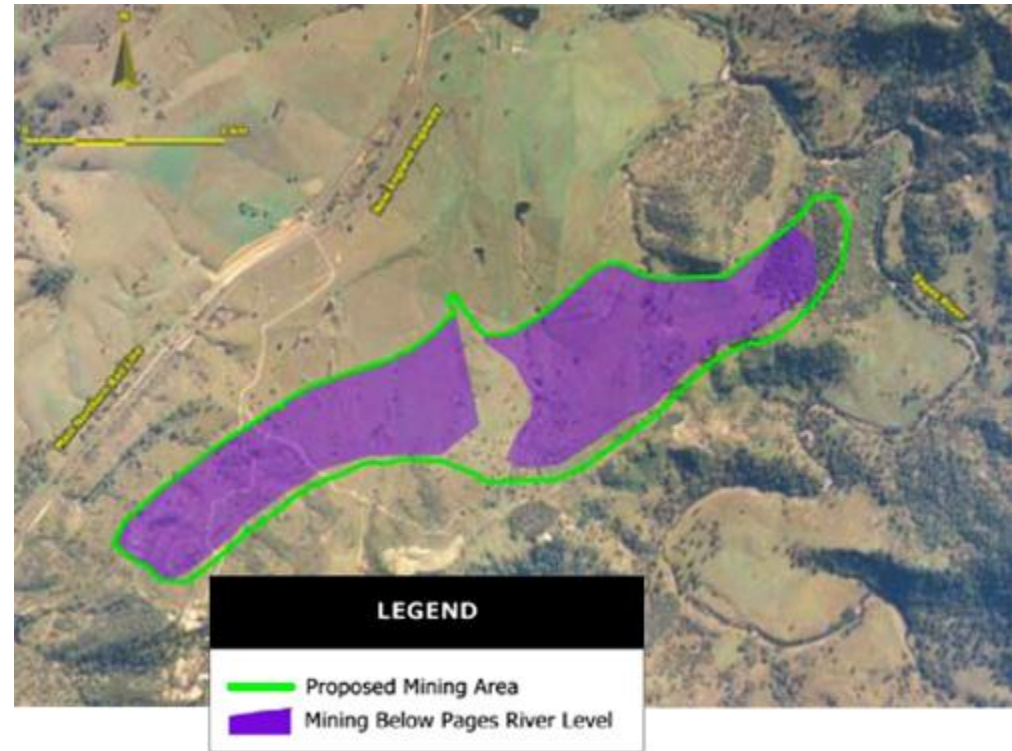
Two- stage approval process





Development Consent

- First we'll look at the provisions that apply to the granting of development consent.





Status of Part 3A

- Until recently, most mines were assessed and approved under Part 3A. This system is now being repealed and replaced with a new regime.
- HOWEVER:
- Part 3A provisions will continue in force for all existing mining/petroleum applications already in the system



Planning Assessment Commission

- Will replace the Planning Minister as the decision making authority for all Part 3A projects from now on
- PAC consists of a Chair and between 3 and 8 members appointed by the Minister for Planning
- The PAC may call a public hearing
- <http://www.pac.nsw.gov.au/>



The new process- Part 4

- Applies to State Significant Development (SSD) and State Significant Infrastructure (SSI)
- Mining and CSG to be classified as SSD
- Development of SEPP (State and Regional Development) 2011 - yet to be released



Part 4 process

Project qualifies as SSD or SSI

Proponent lodges an application

Project must be accompanied by an Environmental Impact Statement



Part 4 process

Application and EIS placed on public exhibition for 30 days

Public submissions

Minister evaluates the project



Part 4 process

Minister decides whether to approve the project

Proponent notified of Minister's decision

People who made submissions notified of Minister's decision



Matters to be considered (where relevant)

- Any environmental planning instrument (such as a LEP)
- Any development control plan
- Any coastal zone management
- The likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- The suitability of the site for the development
- Public submissions
- The public interest



Application of local zones

- SSD cannot be approved where such development is wholly prohibited in the zone.
- Consent can be granted where the development is only partially prohibited.
- Spot rezonings to facilitate wholly prohibited development will have to go before a PAC.



Do you get a say?

- Members of the public can write a submission outlining objections to the proposal
- Be sure to include objection based on the fact that the land is agricultural land (more on this later)
- It is important to write a submission and encourage others to do so



Possible Strategic Action

- Think about what conditions would minimise the adverse impacts of the development on you and the environment and ask for them to be attached to the consent:
 - Restrictions on noise, dust, light and operating hours
 - Buffer zones to preserve visual amenity
 - Restoration works
 - Avoidance of certain sites
 - Water monitoring and limitations on extraction



Other approvals

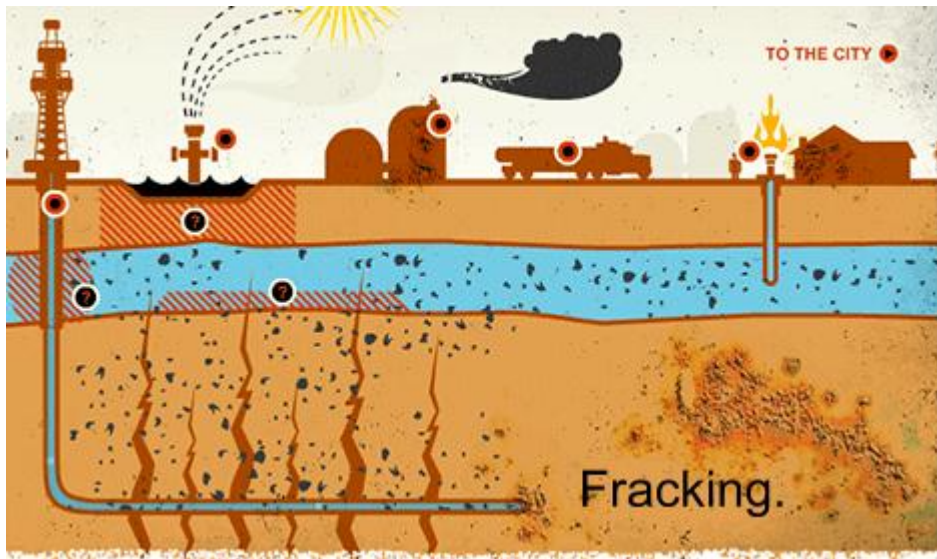
- Usually, a development will need certain approvals from other Government departments:
 - Environment Protection Licence from EPA
 - Clearing permit under the Native Vegetation Act
 - Bush Fire Safety Authority under Rural Fires Act

- Part 4.1 developments either do not require these extra approvals or, where they do, there is a requirement that the approval must be granted.



Transitional Provision

- All new mining or CSG applications that will interfere with an aquifer will need an aquifer interference approval from the Office of Water





Transitional Provision

- All new mining and petroleum project applications will be required to undertake explicit agricultural productivity impact assessments as part of their environmental impact statement.
- During the transitional period, approvals will not be granted on **strategic agricultural lands** where there will be a detrimental effect on the agricultural productivity of the land and associated water resources.



Strategic Land Use Plans

- Will play an important part in the new planning assessment process
- Future development within a region (including SSD) will be assessed within the context of any relevant strategic land use plan
- All developments will need to demonstrate that they are consistent with the outcomes and objectives of the strategic land use plan



Finding out about mining/petroleum lease applications

- Affected landholders have a right to be notified of an application for a mining/petroleum lease that extends to the **surface** of land.
- The notice should inform you of your rights to object.
- Notice of an application will also appear in a State-wide and regional newspaper.



Landholder Rights

- Your land can be developed without your consent.
- You may have a right to object – esp if the land is agricultural land or under cultivation.





Landholder Rights

- You can ensure that mining/petroleum activities don't occur on the **surface** of land within:
 - ▣ 200m of your house
 - ▣ 50m of your garden or
 - ▣ On any significant improvement

 - ▣ Just DON'T give consent!





Landholder Rights - Mines

- You can object to the granting of a **mining lease** on the grounds that the land is agricultural land.
- You have 28 days to object from the day you are notified that a mining lease application has been lodged.



COMMONWEALTH APPROVALS



Commonwealth approvals

- A development may also require approval under the Commonwealth law
- Commonwealth approvals are issued by the Federal Minister for Environment





Controlled Actions

- Approval is required for actions that:
 - Are on Commonwealth land and likely to have a significant impact on the environment
 - Are taken by the Commonwealth and are likely to have a significant impact on the environment
 - **Are likely to have a significant impact on ‘matters of national environmental significance’**



Matters of National Environmental Significance

- ▣ world heritage values of declared World Heritage Area
- ▣ ecological character of a Ramsar wetland
- ▣ listed threatened species
- ▣ listed migratory species
- ▣ nuclear actions
- ▣ Commonwealth marine areas
- ▣ listed heritage items and places



Referrals

- Referral by person taking the action
- Referral by State Government or local council
- Environment Minister can call in a controlled action
- Referral by a Commonwealth agency

- Members of the public CANNOT refer controlled actions but they can alert referring bodies to the proposal and ask them to refer it or ask the Federal Environment Minister to call it in



Landholder Rights

- Seek to have a proposed mine referred for assessment by the Commonwealth Government.
- Members of the public have the right to comment on proposals being assessed by the Commonwealth Government.
- You only have 10 days to lodge your submission!



TAKING LEGAL ACTION



Early Engagement

- Important to get involved early – raise awareness and campaign
- Encourage decision maker to prioritise other industry in the area over mining
- Think about what conditions would make mining acceptable



Case study: Effective engagement

- Maules Creek Community Council obtained \$10,000 from Boggabri Coal to respond to the EIA for a proposed expansion of mining operations





Merits Appeals

- Challenge to a decision based on arguments that the decision was a bad decision
- Court stands in shoes of original decision maker
- Court can uphold or overturn the original decision
- Court can attach new conditions



Hunter Environment Lobby Inc v Minister for Planning and Ulan Coal Mines Ltd

- Challenge to approval of existing longwall mining operations and a new open cut mine at Ulan Coal Mine near Mudgee
- Group concerned about the impact of the mine on:
 - Groundwater
 - Native vegetation, including EEC and habitat for threatened species
 - Greenhouse gas emissions





Judicial Review

- Court considers the legality of the decision

- Grounds of judicial review include:
 - Failure to follow proper legal procedure
 - Failure to take into account relevant considerations
 - Decision was affected by fraud

- Remedy: Court can void the decision but may not grant remedy if the breach is not serious or the impact on the community is not serious



Caroona Coal Action Group Inc v Coal Mines Australia and Minister for Mineral Resources

- Challenge to the exploration licence granted to Coal Mines Australia
- Argued that the licence was void as:
 - The licence was not validly renewed in the past so there was no valid licence to transfer
 - The procedure set out in the Mining Act for transferring a licence was not followed
 - The Minister exceeded his power by granting the licence for more than 5 years





Third Party Enforcement

- Most environmental laws allow ‘any person’ to bring an action to remedy or restrain a breach of the Act
- The EPBC Act is slightly more restrictive
- If the responsible government department will not take enforcement action, a member of the public can.



Blue Mountains Conservation Society v Delta Electricity

- NSW pollution laws
- Water quality testing indicates that the power station is introducing salts and metals into the Cocks River which feeds Sydney's drinking water supply
- DECCW failed to act





Monitoring and Enforcing Mining Conditions

- Conditions of consent are legally binding
- Management plans such as vegetation management plans often form part of the consent and are legally binding
- Breaches should be reported to the Department of Planning and Infrastructure
- If Minister fails to act, you can bring third party enforcement action
- Pollution licences and water licences are also enforceable



Costs

- Land and Environment Court
 - Merits appeals – Each party bears their own costs
 - Judicial review – Loser pays the winner's costs
 - Court can exercise discretion not to award costs in public interest matters
 - Other orders include security for costs and protective costs orders.