


***CR 2021/59 - New South Wales Minerals Council Limited - access arrangements under the Mining Act 1992 (NSW) between holders of exploration licences and assessment leases and landholders on whose land prospecting operations are undertaken***

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## Class Ruling

New South Wales Minerals Council Limited – access arrangements under the *Mining Act 1992 (NSW)* between holders of exploration licences and assessment leases and landholders on whose land prospecting operations are undertaken

### **📌 Relying on this Ruling**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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### **What this Ruling is about**

1. This Ruling sets out the Commissioner's opinion of whether, for the purposes of paragraph 9-5(a) of the *A New Tax System (Goods and Services Tax) Act 1999*<sup>1</sup>, payment of compensable losses made by an entity that holds an exploration licence or an assessment lease over the land (holder) is consideration for a supply made by an owner of land (landholder) under an access arrangement made pursuant to section 141 of the *Mining Act 1992 (NSW)* (NSW Mining Act).
2. Full details of this scheme are set out in paragraphs 9 to 35 of this Ruling.

<sup>1</sup> All legislative references in this Ruling are to the *A New Tax System (Goods and Services Tax) Act 1999* unless otherwise indicated.

**Who this Ruling applies to**

3. This Ruling applies to you if you are:

- A landholder who
  - enters into an access arrangement under the NSW Mining Act with a holder
  - receives payment for compensable losses (cash or non-monetary consideration) as defined in section 262 of the NSW Mining Act under the access arrangement from the holder, and
  - is either registered or required to be registered for GST at the time of entry into the access arrangement and during the term of the access arrangement.
- A holder who
  - enters into an access arrangement with a landholder, and
  - is a member of New South Wales Minerals Council Limited (applicant).

**Access arrangements covered by this Ruling**

4. This Ruling covers access arrangements that:

- (a) are under Division 2 of Part 8 of the NSW Mining Act between a landholder and holder
- (b) may cover matters specified in section 141 of the NSW Mining Act and/or other matters, and
- (c) are in respect of land on which there is no dwelling, garden or significant improvement or which is within a prescribed distance of such items and
  - (i) such that the holder is not precluded by section 31 of the NSW Mining Act (in regard to exploration licences) or section 49 of the NSW Mining Act (in regard to assessment leases) from exercising their prospecting rights on such land, or
  - (ii) written consent is provided by the landholder to the holder under an access arrangement to exercise its rights conferred by the prospecting title such that the holder is not precluded from doing so by either sections 31 or 49 of the NSW Mining Act.

5. To the extent the *Mining Regulation 2016* prescribes an access code and designates provisions of the access code as mandatory in accordance with sections 141A and 141B of the NSW Mining Act, and the mandatory provisions of the access code are not contrary to the matters specified in section 141 of the NSW Mining Act nor impose any obligations on the parties which are inconsistent with the matters described in section 141 of the NSW Mining Act, this Ruling will continue to apply to access agreements with mandatory provisions included.

**When this Ruling applies**

6. This Ruling applies to entities that enter into the scheme during 8 September 2021 to 8 September 2025.

## Ruling

7. The regulatory requirement arising under the NSW Mining Act to pay compensation for compensable losses is directly linked to the prospecting title held by a holder. The compensation for compensable losses is for repatriation of any damages caused/potentially caused by the works undertaken by the holder as allowed under either an exploration licence or assessment lease (prospecting titles).

8. For the purposes of paragraph 9-5(a), the payment for compensable losses made by a holder to a landholder does not have a nexus with any supplies made by a landholder under an access arrangement. Accordingly, for the purposes of paragraph 9-5(a), the payment for compensable losses made by a holder to a landholder is not consideration for a supply made by a landholder under an access arrangement made pursuant to section 141 of the NSW Mining Act.

## Scheme

9. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

10. Exploration licences and assessment leases are granted under Parts 3 and 4 of the NSW Mining Act to holders. Pursuant to section 138(1) of the NSW Mining Act, exploration licences and assessment leases are referred to as 'prospecting titles'.

11. Under the NSW Mining Act, a holder who holds a prospecting title has a right to carry out prospecting activities on land (subject to the licence or lease) that belongs to landholders.

12. Part 8 of the NSW Mining Act regulates how a holder exercises their prospecting title rights (including access to the land).

13. Section 140 of the NSW Mining Act provides that a holder must not carry out prospecting operations unless they are in accordance with an access arrangement entered into with each landholder of the area or, where no agreement can be reached with a landholder, determined by an arbitrator in accordance with Division 2 of Part 8 of the NSW Mining Act. Accordingly, an access arrangement must be entered into prior to the holder accessing and carrying out prospecting operations on the landholder's land.

14. Section 140 of the NSW Mining Act states:

- (1) The holder of a prospecting title must not carry out prospecting operations on any particular area of land except in accordance with an access arrangement or arrangements applying to that area of land—
  - (a) agreed (in writing) between the holder of the prospecting title and each landholder of that area of land, or
  - (b) determined by an arbitrator in accordance with this Division.
- (2) Separate access arrangements may (but need not) be agreed or determined with different landholders of the same area of land, for different areas of the same landholding or with respect to the different matters to which access arrangements relate.
- (3) Separate access arrangements may be made to preserve the confidentiality of provisions of the arrangements, to deal with persons becoming landholders at different times or for any other reason.

15. Pursuant to section 142 of the NSW Mining Act, a holder may, by written notice served on each landholder concerned, give notice of the holder's intention to obtain an access arrangement in respect of the land.

16. The holder and a landholder concerned may agree in writing (either before or after the prospecting title is granted) on an access arrangement.

17. Subsection 141(1) of the NSW Mining Act states:

An access arrangement may make provision for or with respect to the following matters—

- (a) the periods during which the holder of the prospecting title is to be permitted access to the land,
- (b) the parts of the land in or on which the holder of the prospecting title may prospect and the means by which the holder may gain access to those parts of the land,
- (c) the kinds of prospecting operations that may be carried out in or on the land,
- (d) the conditions to be observed by the holder of the prospecting title when prospecting in or on the land,
- (e) (Repealed)
- (f) the compensation to be paid to any landholder of the land as a consequence of the holder of the prospecting title carrying out prospecting operations in or on the land,
- (g) the manner of resolving any dispute arising in connection with the arrangement,
- (h) the manner of varying the arrangement,
- (i) the notification to the holder of the prospecting title of particulars of any person who becomes an additional landholder.

18. Prospecting titles can cover land on which, or within the prescribed distance of which, there is a dwelling-house, a garden or other significant improvement.

19. However, holders of prospecting titles cannot exercise any of their prospecting rights in relation to land on which, or within the prescribed distance of which, there is a dwelling-house, a garden or other significant improvement.

20. Section 31 of the NSW Mining Act (in regard to exploration licences) states:

- (1) The holder of an exploration licence may not exercise any of the rights conferred by the licence over the surface of land—
  - (a) on which, or within the prescribed distance of which, is situated a dwelling-house that is the principal place of residence of the person occupying it, or
  - (b) on which, or within the prescribed distance of which, is situated any garden, or
  - (c) on which is situated any significant improvement other than an improvement constructed or used for ancillary mining purposes only,

except with the written consent of the owner of the dwelling-house, garden or improvement (and, in the case of the dwelling-house, the written consent of its occupant).

- (2) The prescribed distance is—
  - (a) 200 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1) (a), and
  - (b) 50 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1) (b).
- (3) A written consent given under this section is irrevocable.

- (4) This section does not apply with respect to a dwelling-house, garden or significant improvement owned by the holder of the exploration licence or, if the holder is a corporation, by a related corporation.

21. Similarly, section 49 of the NSW Mining Act (in regard to assessment leases) states:

- (1) The holder of an assessment lease may not exercise any of the rights conferred by the lease over the surface of land—
  - (a) on which, or within the prescribed distance of which, is situated a dwelling-house that is the principal place of residence of the person occupying it, or
  - (b) on which, or within the prescribed distance of which, is situated any garden, or
  - (c) on which is situated any significant improvement other than an improvement constructed or used for ancillary mining purposes only,

except with the written consent of the owner of the dwelling-house, garden or improvement (and, in the case of the dwelling-house, the written consent of its occupant).

- (2) The prescribed distance is—
  - (a) 200 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1) (a), and
  - (b) 50 metres (or, if a greater distance is prescribed by the regulations, the greater distance) for the purposes of subsection (1) (b).

- (3) A written consent given under this section is irrevocable.
- (4) This section does not apply with respect to a dwelling-house, garden or significant improvement owned by the holder of the assessment lease or, if the holder is a corporation, by a related corporation.
- (5) If a dispute arises as to whether or not subsection (1) applies in a particular case, any party to the dispute may apply to the Land and Environment Court for a determination of the matter.

22. Accordingly, a holder can only access land on which a dwelling-house, garden or significant improvement is situated (or within a prescribed distance of these items) where a landholder has granted permission to access this land to a holder under an access arrangement.

23. For the avoidance of doubt, these conditions on which access occurs do not change the prospecting title already granted to the holder.

24. If a landholder disagrees to a holder entering their land (other than land on which a dwelling-house, garden or significant improvement is situated (or within a prescribed distance of these items)), an arbitrator or the Land Environment Court may rule that a holder is nonetheless entitled entry into the respective land on which they hold an exploration licence or assessment lease to carry out prospecting activities.

25. Under sections 263 and 264 of the NSW Mining Act, a landholder has a statutory entitlement to compensation for any 'compensable loss' suffered as a result of the holder exercising the prospecting rights conferred by the prospecting title or access agreement.

26. Section 263 of the NSW Mining Act states:

- (1) On the granting of an exploration licence, a landholder of any land (whether or not subject to the licence) becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the licence or by an access arrangement in respect of the licence.

- (2) The holder of an exploration licence may agree with a landholder as to the amount of compensation payable, but an agreement reached is not valid unless it is in writing, signed by or on behalf of the parties to the agreement.
- (3) Such of the provisions of an access arrangement (whether or not in writing) as relate to compensation have effect as an agreement for the purposes of this section.
- (4) Payment of compensation under this section (other than compensation payable under an access arrangement agreed on as referred to in section 140 (1) (a)) is taken, for the purposes of any security given by the licensee, to be an obligation under the licence.

27. Similarly, in relation to compensation arising under an assessment lease, section 264 of the NSW Mining Act states:

- (1) On the granting of an assessment lease, a landholder of any land (whether or not subject to the lease) becomes entitled to compensation for any compensable loss suffered, or likely to be suffered, by the landholder as a result of the exercise of the rights conferred by the lease or by an access arrangement in respect of the lease.
- (2) The holder of an assessment lease may agree with a landholder as to the amount of compensation payable, but an agreement reached is not valid unless it is in writing, signed by or on behalf of the parties to the agreement.
- (3) Such of the provisions of an access arrangement (whether or not in writing) as relate to compensation have effect as an agreement for the purposes of this section.
- (4) Payment of compensation under this section (other than compensation payable under an access arrangement agreed on as referred to in section 140 (1) (a)) is taken, for the purposes of any security given by the lessee, to be an obligation under the lease.
- (5) If, immediately before the grant of an assessment lease any part of the assessment area was, or was in, an authorisation area and the subject of a valid agreement under this Division (an **existing agreement**), a valid agreement is taken to have been entered into in relation to that part for the purpose of this section, if the holder of the assessment lease—
  - (a) was the holder of the authorisation immediately before the grant of the assessment lease, or
  - (b) is the assignee of the rights under the existing agreement.
- (6) Subsection (5) ceases to apply to a part of an assessment area if a subsequent valid agreement is entered into, or the Land and Environment Court makes an assessment of compensation payable, in relation to that part.

28. Section 262 of the NSW Mining Act defines 'compensable loss' as:

... **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 paragraph (a)–(e),

but does not include loss that is compensable under the *Coal Mine Subsidence Compensation Act 2017*.

29. An access arrangement will typically include a clause that provides that the compensation provided to the landholder under the access arrangement represents a full and final settlement of the landholder's compensation rights in relation to the matters covered by the access arrangement.

30. The full and final amount payable to landholders under an access arrangement is only for a 'compensable loss' as defined in section 262 of the NSW Mining Act and does not include payments for anything other than a compensable loss (for example, no payments for minerals, incentive payments to secure an access arrangement or to obtain consent to operate within the prescribed distance of a house, garden or significant improvement or other supplies that will not constitute a payment for damage will be agreed to under an access arrangement).

31. Compensation provided by a holder under an access arrangement includes:

- cash compensation, and
- non-monetary compensation, which may include building fences, fixing a farm gate or upgrading a farm road for the landholder in lieu of a cash payment (which will be for compensable losses).

32. The access agreement is entered into prior to the prospecting activities taking place and the amount agreed to be paid for compensable loss is an estimate. In some circumstances, the amount of compensation paid to a landholder under an access arrangement may be more or less than the actual loss suffered.

33. Where a holder breaches an access arrangement, section 141(4) of the NSW Mining Act enables the landholder to deny access until the breach is rectified or a resolution is arbitrated.

34. A compensation amount agreed under an access agreement between a holder and a landholder is no more than what is reasonably necessary for the holder to exercise its rights under its prospecting title.

35. The landholders are either registered or required to be registered for GST and enter into access arrangements with holders in the course of an enterprise carried out by them.

**Appendix – Explanation**

**❶** *This Explanation is provided as information to help you understand how the Commissioner’s view has been reached. It does not form part of the binding public ruling.*

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**Goods and services tax liability**

36. GST is payable on taxable supplies an entity makes.

**Taxable supply – section 9-5**

37. Section 9-5 states that you make a taxable supply if:

- (a) you make the supply for consideration; and
- (b) the supply is made in the course or furtherance of an enterprise that you carry on; and
- (c) the supply is connected with the indirect tax zone; and
- (d) you are registered, or required to be registered.

38. Section 9-5 further provides that the supply is not a taxable supply to the extent that it is GST-free or input taxed.

39. The first requirement of section 9-5 is that a supply is made for consideration. This requires the consideration of establishing whether there exists a nexus between a supply made by the supplier and consideration paid by the recipient to the supplier. In other words, it needs to be established whether the consideration was for that particular supply made by the supplier or something else.

40. The importance of establishing the nexus between a supply and consideration was discussed in *AP Group Limited v Commissioner of Taxation* [2013] FCAFC 105.

41. Paragraph 21 of Goods and Services Tax Ruling GSTR 2001/4 *Goods and Services Tax: GST consequences of court orders and out-of-court settlements* states:

... for there to be a supply for consideration, three fundamental criteria must be met:

- (i) there must be a supply ...
- (ii) there must be a payment ... and
- (iii) there must be a sufficient nexus between the supply and the payment for it to be a supply for consideration ...

**Supply**

42. The term 'supply' is broadly defined in subsection 9-10(1) as 'any form of supply whatsoever' and includes the following:

- a grant, assignment or surrender of real property (paragraph 9-10(2)(d))
- a creation, grant, transfer, assignment or surrender of any right (paragraph 9-10(2)(e)), and
- an entry into, or release from, an obligation
  - to do anything, or
  - to refrain from an act, or
  - to tolerate an act or situation (paragraph 9-10(2)(g)).

43. The Commissioner's views on supplies are outlined in several goods and services tax rulings.

44. Paragraph 71 of Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies* states:

An entity will make a supply whenever that entity (the supplier) provides something of value to another entity (the recipient). This is consistent with the ordinary meaning of 'supply', being to furnish or provide.

45. Further, paragraph 25 of GSTR 2001/4 states:

Subsection 9-10(2) refers to two aspects of a supply; the thing which passes, such as goods, services, a right or obligation; and the means by which it passes, such as its provision, creation, grant, assignment, surrender or release.

46. While generally there is an inherent requirement for a supplier to take some action to cause a supply to be made, the High Court said in *Commissioner of Taxation v MBI Properties Pty Ltd* [2014] HCA 49 that it is not necessary '... that the making of a supply must always involve the taking of some action on the part of the supplier'. An entity may be said to be making a supply by refraining from doing something or tolerating some act or situation if the entity was subject to an obligation to do so and then performed accordingly.

47. Accordingly, in certain circumstances, not taking any action may also still constitute a supply. However, there will be no supply where something occurs by operation of law. Paragraph 76 from GSTR 2006/9 distinguishes between situations where an act may amount to a supply from situations where something that occurs by operation of law that does not amount to a supply:

While an entity may make a supply by observing an obligation, even if that involves no more than refraining from doing something or tolerating some act or situation, there will be no supply where something occurs by operation of law without an entity providing something or without any obligation being placed on the entity to provide something. Examples of such situations are:

- *Shaw v. Director of Housing and State of Tasmania (No 2)* [2001] TASSC 2 in which Underwood J held that a judgment creditor makes no supply on extinguishment of the obligation to pay the judgment sum; and
- *Reglon Pty Limited v. Commissioner of Taxation* [2011] FCA 805 in which Emmett J analysed an action in conversion and found no supply was made when vesting of title in goods occurred by operation of law on satisfaction of the judgment in full.

48. The prospecting title which grants prospecting rights over the landowner's land is issued to the holder by the State of NSW in accordance with the NSW Mining Act. The landowner does not do anything or agree to tolerate anything in respect of this licence. Therefore, in respect of the prospecting title, the landowner does not make a supply.

49. However, the prospecting title does not, in itself, grant access to the holder to the landowner's land. Prior to being able to access the landowner's land to exercise the rights under the prospecting title, there must be an access agreement.

50. Where the landowner and the holder enter the access agreement (as opposed to an agreement set by an arbitrator or court), the landowner grants certain rights of access over their land. Landholders take positive action in the form of providing access and deciding the conditions upon which the holders can access the land, including locations, times, how the holder will access the land and any consent to prospecting activities within prescribed distances of dwelling-houses, gardens and significant improvements.

51. The Commissioner considers that the granting of permission to access land and the conditions agreed under an access arrangement constitute supplies that come under either paragraphs 9-10(2)(d) or (e), or subparagraph (g)(iii). This is because, while having an access arrangement may be a statutory obligation, the terms and conditions agreed under these access arrangements are not governed by a statute. The statute does not stipulate the nature of the terms and conditions to be agreed under access arrangements.

### Consideration

52. Consideration is defined in section 9-15 as follows:

(1) **Consideration** includes:

- (a) any payment, or any act or forbearance, in connection with a supply of anything; and
- (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.

(2) It does not matter whether the payment, act or forbearance was voluntary, or whether it was by the recipient of the supply.

(2A) It does not matter:

- (a) whether the payment, act or forbearance was in compliance with an order of a court, or of a tribunal or other body that has the power to make orders; or
- (b) whether the payment, act or forbearance was in compliance with a settlement relating to proceedings before a court, or before a tribunal or other body that has the power to make orders.

53. The compensation paid for the compensable loss is a payment that has some relationship with the prospecting arrangement. However, to meet the requirements of paragraph 9-5(a), that payment must be 'for' the supply by the landowner. That is, it must have a sufficient nexus with a supply made by the landowner.

54. The mere fact that a supply has been made under an access arrangement by a landholder and a payment has been made by a holder is not enough for paragraph 9-5(a) to have been satisfied. There must be a sufficient nexus between the payment and making of the supply.

**Nexus between supply and consideration**

55. All payments of compensation (both monetary and non-monetary) by a holder to a landholder under access arrangements that are subject to this Ruling are classified as being paid for a 'compensable loss'. A 'compensable loss' is defined in section 262 of the NSW Mining Act as:

... **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 paragraph (a)–(e),

but does not include loss that is compensable under the *Coal Mine Subsidence Compensation Act 2017*.

56. Regarding payments for damage claims, paragraph 71 of GSTR 2001/4 states:

Disputes often arise over incidents that do not relate to a supply. Examples of such cases are claims for damages arising out of property damage, negligence causing loss of profits, wrongful use of trade name, breach of copyright, termination or breach of contract or personal injury.

57. Further, paragraph 73 of GSTR 2001/4 states:

The most common form of remedy is a claim for damages arising out of the termination or breach of a contract or for some wrong or injury suffered. This damage, loss or injury, being the substance of the dispute, cannot in itself be characterised as a supply made by the aggrieved party. This is because the damage, loss or injury in itself does not constitute a supply under section 9-10 of the GST Act.

58. Accordingly, given the view that a landholder may make supplies of access to a holder under an access arrangement, it is necessary to determine whether the substance of the requirement to pay compensable losses are for:

- these supplies of access, or
- the damages caused or likely to be caused by the holder to land as a result of their prospecting activities.

59. The requirement to pay compensation for compensable losses by a holder for damages caused or potentially caused to all types of land described under paragraph 4(c) of this Ruling is a statutory obligation arising under the NSW Mining Act and has a nexus to the holders exercising of their prospecting rights sourced from the prospecting title.

60. It is acknowledged that the amount of the compensation paid for compensable losses and the means by which this amount should be calculated may be outlined in an access arrangement. However, under sections 263 and 264 of the NSW Mining Act, the requirement to pay compensation payments by a holder to a landholder is a direct consequence of the prospecting title issued by the NSW Government rather than a requirement under the access arrangement.

61. Considering the overall nature of the scheme under which compensation for compensable losses is required to be paid, the Commissioner considers that the substance of the payment is for the damages caused, or likely to be caused, to the land by a holder rather than because of any supplies made by a landholder under an access arrangement. Therefore, the payment of the compensable losses is akin to a payment of a damages claim contemplated under paragraph 73 of GSTR 2001/4.

62. Accordingly, it is the Commissioner's view that the requisite nexus that must be present between a supply and consideration under paragraph 9-5(a) does not exist between the compensable losses received by a landholder and any supply made by them to a holder under an access arrangement.

**References***Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

GSTR 2001/4; GSTR 2006/9; TR 2006/10

*Legislative references:*

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- Mining Act 1992 (NSW) 138(1)

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- Mining Act 1992 (NSW) 262
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- Mining Act 1992 (NSW) 264
- Mining Regulation 2016

*Case references:*

- AP Group Limited v Commissioner of Taxation [2013] FCAFC 105; 214 FCR 301; ATC 20-417
- Commissioner of Taxation v MBI Properties Pty Ltd [2014] HCA 49; 254 CLR 376; 2014 ATC 20-474; 92 ATR 241

## ATO references

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