



The Hon Anthony Roberts  
Minister for Resources and Energy  
**via electronic mail:** [office@roberts.minister.nsw.gov.au](mailto:office@roberts.minister.nsw.gov.au)

cc:

Jock Laurie  
NSW Land and Water Commissioner  
**via electronic mail:** [jock.laurie@landandwater.nsw.gov.au](mailto:jock.laurie@landandwater.nsw.gov.au)

**3 June 2016**

Dear Minister,

**Re: Landholder Compensation for Land Access Negotiations**

In light of the recent decision to discontinue the land access working group meetings between industry stakeholders and the Land and Water Commissioner on 19th May 2016, the participating landholder groups would like to reaffirm their agreed position on matters relating to landholder compensation for land access negotiations with coal, mineral and onshore petroleum explorers. We trust that as Minister for Resources and Energy your leadership on this issue will result in a fair and equitable decision for landholder compensation caps that will ensure landholders have the capacity to fund the resources necessary to fairly negotiate land access agreements.

The NSW Farmers Association, Cotton Australia, NSW Irrigators' Council and the Country Women's Association of NSW have spent considerable time and resources to review, evaluate and prepare our position on reasonable caps for landholder compensation relating to the participation in land access negotiations around exploration activities. Whilst our position is that 'costs reasonably incurred' would more accurately cater for the varying needs of the parties in this negotiation context, nevertheless, in good faith, we presented a balanced position that is based on evidence and advice we received from experts. As further discussions around compensation caps have reached an apparent impasse, landholder groups wish to reiterate our position that:

- **Landholders may wish to access expert advice at both the exempt and assessable activities stage of coal and mineral exploration and;**
- **At the exempt activity stage a cap of \$10,000 should apply, and**
- **Where exploration activities move to assessable activities we support a 'reasonable cost' approach.**

Given the huge diversity of landholders' properties and their farming operations, we believe that these cost caps are reasonable, and in fact often at the lower end of cost estimates for legal advice, landholder time and expert advice. We also reiterate that the above mentioned positions are caps and we acknowledge and support the stipulation that landholders would need to provide evidence of their costs for seeking expert advice in the land access negotiation in order to satisfy an assessment of "reasonableness". Sufficient



provisions have been put in place within the legislation to ensure that only those costs that are reasonable and duly incurred by the landholder are recovered from explorers.

Furthermore, as the recent Land and Environment Court decision (*Martin v Hume Coal Pty Ltd*) has highlighted, every property requires an individualised assessment on matters relating to land access negotiations, thereby lending further support to our position on compensation caps.

We submit that the status quo around mining and petroleum exploration activities no longer applies. This has been presented to the NSW Government, industry and the wider public by a number of respected experts and professional agencies. We wish to highlight the following:

1. The NSW Government commissioned Mr Bret Walker SC to undertake an independent review of the process for arbitrating land access arrangements for exploration under the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*. Mr Walker's report contained recommendations in relation to compensation for landholders who are required to negotiate with mining or petroleum companies who seek access to their land. Mr Walker recommended that compensation rates be developed taking into account legal fees, time spent by the landholder in negotiation proceedings and the cost of any necessary expert reports. The Government agreed to the recommendation that landholders should have the ability to access expert advice if required, although stated that it would place a cap on the amounts to be paid.
2. The NSW Government commissioned consultants Henry Davis York to review the appropriate caps for landholder compensation. The report did not advocate for the setting of caps due to the difficulty in determining what might represent suitable cost caps and instead recommended a "reasonable costs" approach until greater evidence on an appropriate limit on "reasonable costs" is uncovered.
3. The Independent Pricing and Regulatory Tribunal (IPART) undertook the most comprehensive study on compensation caps to date and determined that a 'one size fits all' approach does not and cannot be applied. IPART instead recommended a framework based approach to development what might represent suitable costs. While this study encompassed costs beyond negotiation of land access in the exploration phase, it should be noted that this was one of the key elements of the final report delivered to the NSW Government.

We wish to emphasise that landholders are not in the business of commissioning expert reports for the sake of it, but they are very interested in protecting their greatest assets; their property and water licences. A land access negotiation takes away from core farm business which means reasonable compensation for time taken to prepare for and participate in land access negotiations is central to reimbursement of reasonable costs accrued by the property owner. Similarly the ability and the right of a landholder to seek legal advice or expert advice on these matters when needed should also not be undermined. Landholders should not be placed at an ongoing cost disadvantage in these negotiations because mining companies wish to obtain access to the farmer's land. The legal rights of our landholders should be upheld with legislation and regulation put in place that supports an even playing field.



As stated by Bret Walker SC<sup>1</sup>:

*For an explorer, the negotiation and arbitration of a land access arrangement is a cost of the business of exploration. For a landholder, this is a forced arrangement. It is not a commercial arbitration where there are willing participants and mutual benefits to be achieved from arbitration. In this context, the argument that a landholder should be compensated for these costs is attractive as part of the trade-off for their private property rights being overridden and is similar to comparable legislative schemes where private rights are being overridden and those affected are compensated (i.e. the Land Acquisition (Just Terms Compensation) Act 1991).*

In recognition of the disparity between the 'forced' arrangements undertaken by the landholders, if caps are required, realistic caps are needed that accurately reflect the time and costs for landholder participation in the negotiation of land access agreements. This will ensure a greater balance in the negotiation outcome - a position that has not occurred for landholders to date.

If exploration is to proceed in NSW, much needs to be done to restore landholder's faith in the process - compensation caps represents just one aspect of the reform agenda. If landholders feel their needs have been considered they will be more willing participants in the exploration process, however, if the lack of respect for landholder property rights apparent in the current regulatory arrangements continues, our members and NSW landholders will be highly critical of the Government's approach.

If, after your further consideration of the cost of land access negotiations you believe caps are still required, we submit that you should establish realistic caps around the costs for landholder participation in negotiating land access agreements to achieve a fair and balanced negotiation outcome.

Please find enclosed the joint presentation of the landholder groups as presented to the NSW Land and Water Commissioner Jock Laurie and the participants of the Land Access Working Group.

Should you require any clarification on the information presented in this letter, our organisations can be contacted through the following staff members:

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Yours sincerely,

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CEO NSWIC

Danica Leys  
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CEO, NSW Farmer

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<sup>1</sup> Water Review Page 28