

Mining licenses – Impact on mortgagors and mortgagees

Special Counsel, Jacquie Browning offers a brief insight into the impact of mining licenses upon not only landowners as mortgagors but also upon financiers as mortgagees and offers some suggestions to ensure that all parties are not disadvantaged or adversely affected by such licenses. The relevance of the Personal Property Securities Act is also considered.

Australia's ongoing mining boom has had widespread ramifications for the Australian economy. However, how often do we consider the impact of mining operations on the landowners? Each state has specific legislative procedures intended to safeguard the interests of owners of land where minerals, petroleum, gas and more recently coal seam gas are located.

More often than not, behind every landowner is a financier who has taken security over such land. Even more rarely, how often do we consider the impact on mortgagees where mining licenses have been granted over secured property?

Mineral, Petroleum and Gas Exploration and Mining.

An examination of the legal and practical processes associated with the granting and operation of mining leases on land is an enormous topic and beyond the scope of this article; suffice to say that whilst each state has similar regimes there are particular requirements in each state that need to be complied with. The Department of Primary Industries (DPI) in each state generally administers each state based legislation and their associated websites provide invaluable guidance.

In Victoria, for example, the *Mineral Resources (Sustainable Development Act) 1990 (and Regulations)* applies to mineral and coal seam gas resources and the *Petroleum Act 1998 and Regulations* applies to petroleum (and natural gas) resources. In NSW, the *Petroleum (Onshore) Act 1991* applies to petroleum.

Who owns the resources?

All minerals and coal seam gas belong to the people of the state (ie the Crown) unless subject to a minerals exemption. This includes minerals located beneath privately owned land. Similarly, the Crown owns all petroleum on or below the surface of any land. Landowners are not entitled to any income generated from the mining of resources on their land.

In the case of minerals, the grant of a mining licence transfers ownership of the minerals from the Crown to the licensee when they are eventually mined from the land. Royalties are payable to the Crown in the case of petroleum but the landowner has no legislative right to be compensated for the petroleum extracted.

Exploration and Mining Licences/ permits

State legislation permits the issue of licences for exploration, mining and development. Initially, exploration licences are granted to permit limited exploration depending upon the nature of the resource and are granted for limited tenure.

Mining licences (or, in the case of petroleum production permits) are similarly granted once strict criteria have been fulfilled. Licences are for varying periods and for stipulated and closely regulated areas.

Access to the land

Access to privately owned land to carry out exploration or mining activities requires the consent of the landowner. If a landowner does not consent to entry for confirming boundaries, for example, the Minister for Energy and Resources can grant for this purpose only.

Landowner's entitlements

- All mineral and petroleum licence applications have to be advertised and notice given to all affected landholders. (Interestingly, in Victoria at least, a landowner is not notified of areas designated as vacant areas where tender applications for petroleum exploration permits are offered. In fact, all of the Otway and Gippsland Basin areas have been subject to exploration permits for petroleum. A search of the DPI website will ascertain if a title for petroleum mining has been awarded over private land.)

- No operation can commence unless there is either a consent from the landowner or occupier or a compensation agreement with the landowner or occupier.
- A compensation agreement is negotiated between the licensee and the landowner and allows for either or both financial and non financial compensation where a landowner suffers loss or damage.
- Once compensated, new owners and occupiers cannot seek further compensation (the agreement remains with the land and not the landowner).

Land valuation – is the property affected?

Of particular concern to mortgagees (and indeed to landowners generally) is the impact of any mining operations on the value of the property. Value can be undermined as a result of many factors including the loss of agricultural land for income production and the loss of resale value as a result of the impact of mining operations on part of the land. Compensation agreements are intended to address this aspect to ensure that, for the current owner at least, there is no adverse financial consequence as a result of the mining operations.

Agricultural land

The impact of mining operations can be very significant for land used for agricultural purposes. Interestingly, under the Victorian legislation, a licensee of a mining licence that covers agricultural land must prepare a statement of the economic significance of the work including the assessment of the benefits to Victoria of the proposed work and an assessment of those benefits if it was not possible to do the work on the agricultural land.

An owner or occupier of agricultural land can apply for the Minister to excise the land from the area covered by a mining licence if either the licensee consents or if the Minister decides that there is a greater economic benefit to Victoria continuing the use of the land as agricultural land.

Notice to Mortgagees

Of significance to financiers, s69EA the *Petroleum (Onshore) Act 1991 (NSW)* provides that within 14 days after an access arrangement is agreed between a landholder and the holder of a prospecting title, (subject to 2 exceptions), the holder is to serve notice of the making of the arrangement on each person who is identified on any register or record kept by the Registrar General as having an interest as mortgagee in the land. If the person is a mortgagee in possession of the land, an access arrangement with that person is also required under section 69C before prospecting operations may be carried out on the land.



A similar provision to s69EA applies under the *Mining Act 1992 (NSW)* in respect of mineral exploration and prospecting in NSW.

No similar provision applies in Victoria – the equivalent Acts only require that prior notice of any petroleum operation must be given to the owner, occupier or person or body responsible for the management of the land.

Mining leases and mortgage terms and conditions.

Most financiers have provisions in their finance documents which deal with the obligations of landowner mortgagors. The granting of exploration licences and particularly of mining licences or petroleum production licences must be adequately dealt with.

The following areas should be addressed:

- Representations should be given by the mortgagor that they own the secured property and that no one else has an interest in or any other right over the property (ensure that this is wide enough to encompass mining licenses)
- Undertakings should be given by the mortgagor that it will not part with or grant any rights or interests in the secured property without first notifying the financier and obtaining its prior written consent (ensure that this is wide enough to encompass mining licences)
- Consider specifically referring to exploration and mining licences particularly in those areas where property is more likely to be subject to such activities (eg Hunter region in NSW, Gippsland region in Victoria and indeed for any rural property) and requiring that the prior written notice of such licences is provided to the financier

- Consider also widening lease related provisions to encompass licences such as those granted for resource mining
- The financier should endeavour to be involved in the negotiation of any compensation agreement to ensure that sufficient compensation covers the loss of value of the property or any loss of income able to be generated from such property (this is more relevant in those areas where the likelihood of mining licences being granted is high)- a reduction in the value can have consequences for the exposure of the financier to future loss
- Consider whether the financier should request that some or all of compensation payments be applied in reduction of any loan facilities where there is a clear indication that the LVR is affected by such mining activities
- As part of initial due diligence prior to approving finance, financiers should ascertain if the property is currently or proposed to be subject to exploration and mining. In addition, enquiry should be made as to whether any compensation agreements were entered into by previous owners of rural property as this may affect any future value of the property if operations have not yet commenced
- The financier should ensure that the underlying value of the property is not adversely affected. Facility agreements and special conditions should provide for a financier to be entitled to request a new valuation not only on a regular basis but also in the event that a mining licence is sought over part of the secured property. This requires, of course, that the landowner advises the financier when such an application is received by it. Appropriate provisions should be inserted.

The relevance of the Personal Property Securities Act (PPSA)

The PPSA will not apply to most onshore resources licences and authorities as they are specifically excluded as personal property for the purpose of the PPSA (s8(1)(f)(i)).

In addition, a right to payment under any compensation agreement will not be a security interest as it also falls within the exclusion in s8(1)(f)(ii) as it is in connection with an interest in land and any such agreement would specifically identify the land to which the right applies.

This was intentionally done to ensure that control of such statutory rights including the granting and enforcement of security interests over them) remains with the relevant state or territory rather than the Commonwealth.

And the lesson is.....

All financiers should review their loan terms and conditions including in particular the Memorandum of Common Provisions to ensure that they are robust enough to cover situations where mining or exploration licences are granted over secured property.

All landowner mortgagors should ensure that they are aware of their obligations under their finance documents to ensure that any mining or exploration dealings are notified to their financier so as to avoid triggering defaults under their facilities.

For further information contact:



Jacquie Browning, Special Counsel
t +61 3 8665 5558

jbrowning@piperalderman.com.au