Tenure Matters

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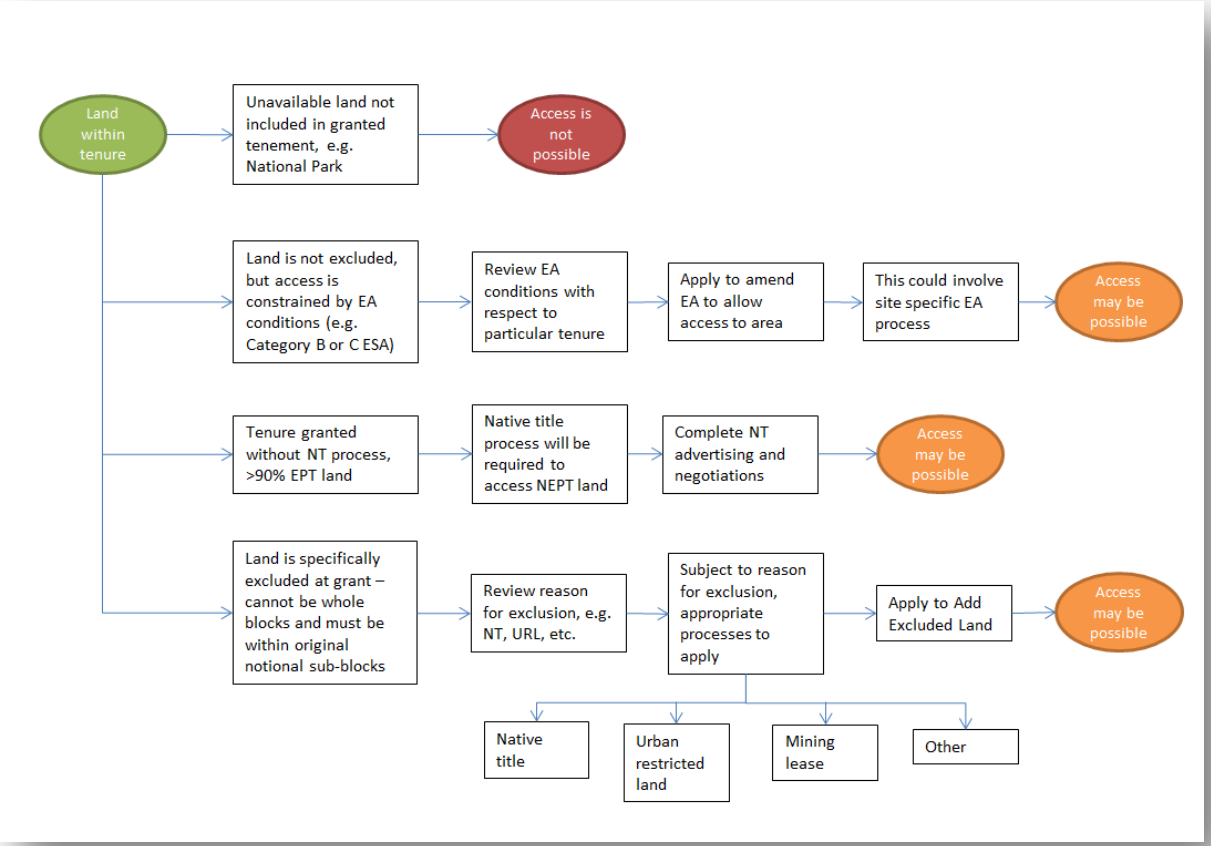
Welcome back. This month I want to explore some thoughts on land. It is important to understand that resources belong to the State; this includes petroleum, gas, coal, minerals, geothermal energy, and water; and somewhat less obviously, storage within geological formations. How these resources are able to be accessed and used, and by whom, is dealt with in legislation – through the *Petroleum & Gas (Production & Safety) Act 2004*, *Petroleum Act 1923*, *Mineral Resources Act 1989*, *Geothermal Energy Act 2010*, *Greenhouse Gas Storage Act 2009* or the *Water Act 2000*.

The various resource Acts (we will discount water for the rest of this discussion) are all subject to the Land Access Code, which was initially introduced in 2010 with the *Geothermal Energy Act 2010*. It was intended to bring all the resource legislation into a common framework for dealing with the access required to land, and how negotiations with landowners were undertaken, in order to undertake the activities authorised by the relevant resource tenure. Without the ability to access land, whether freehold or leasehold, tenure holders are unable to complete their required work programs or development plans.

But is all land equal? The answer is no, of course. Some land is off-limits for particular reasons. Land can be "unavailable" to the tenure holder, or "excluded" from the area of grant. Land can also be "constrained", or "restricted", or under a moratorium. We will have a look at each of these definitions. Complicating the understanding of different land type descriptions is that each resource Act has not had a consistent approach to the usage and definition of terms. Additionally, under the *Environmental Protection Act 1994*, there are concepts of environmentally sensitive areas (ESA), which overlap with both unavailable and constrained land definitions; and sensitive or commercial places, which overlap with the restricted area definition under some of the resource legislation.

In order to determine whether land is ultimately entirely off-limits, or accessible only once certain processes have been completed, the holder needs to understand the type of land (e.g. unavailable, constrained, restricted) and what process may be required to gain the ability to access that part of the tenure, relative to the particular resource Act. See Figure 1 for a summary in relation to the petroleum legislation.

Figure 1 Accessing types of land in a tenure



Excluded land

Land subject to native title (i.e. any non-exclusive possession tenure land (NEPT)) is excluded land for the tenure, unless a native title process (Right to Negotiate or Indigenous Land Use Agreement) has been undertaken. Excluded land can be added back into a tenure if the appropriate process has taken place; so long as the land has been properly excluded at grant.

Granted mining leases were routinely excluded from Authorities to Prospect for Petroleum prior to the introduction of the overlapping tenure regime; and some Mining Leases are still excluded from the "overlapping" petroleum leases or exploration permits for historical reasons; or because some mining leases are designated as a mineral hydrocarbon mining lease under the *Mineral Resources Act 1989* and have the gas rights from the coal, as well as the coal rights.

Excluded land can be added back to tenure if an application is made to Add Excluded Land (AEL). Excluded land cannot be whole graticular blocks, only parts of blocks, and must be within the original notional sub-blocks for the tenure. An application is made to add the land back to the tenure, if the appropriate process has been undertaken – for example, a native title process, or perhaps a co-ordination agreement with an excluded lease. The land must be specifically excluded from the grant in order to apply to add the excluded land. Excluded land is generally determined by the Minister at grant.

Unavailable land

Whilst excluded land can be potentially added back to the tenure under certain circumstances, unavailable land is almost always unavailable. An example would be National Parks, which are also Category A Environmentally Sensitive Areas (ESA) under the *Environmental Protection Act 1994*.

In all cases, land already held under a tenure for the same resource is unavailable for application. So in the *Petroleum & Gas (Production & Safety) Act 2004*, for example, section 98(4) states that unavailable land for an application for an ATP includes:

- land in the area of another petroleum tenure;
- excluded land for another petroleum tenure;
- land in the area of a 1923 Act petroleum tenure;
- excluded land for a 1923 Act petroleum tenure;
- land that a regulation prescribes as land over which an authority to prospect cannot be granted.

Similarly, section 168 describes unavailable land for a petroleum lease area.

Constrained land

Constrained land is typically land which remains part of the tenure, but access is constrained by conditions attached to either the tenure, the environmental authority, or under other legislation. The most common example of this is Category B or Category C ESA, which are subject to restrictions under the environmental authority (EA). In certain cases, amendments to the EA, which provide additional information on the potential impacts that may occur and how these would be managed, can result in changes to the restrictions to access and the type of activity can occur.

Other land that can be considered to be constrained includes land which may be subject to a "Regional interests development approval" under the *Regional Planning Interests Act 2014*. This Act protects certain high-value living, agricultural or environmental areas.

Restricted land and restricted areas

Restricted areas, under the *Mineral Resources Act 1989* and the *Geothermal Energy Act 2010* (section 33) may be declared by the Minister, and may subsequently be amended or cancelled. Restricted areas are published in the Government Gazette. Restricted areas cannot be included in an application area or the subsequent tenure.

Currently in the *Mineral Resources Act 1989*, restricted land (category A – not to be confused with Category A environmentally sensitive areas) is defined as land that is within 100m laterally of a permanent building used mainly for accommodation or for business purposes; or for community, sporting or recreational purposes or as a place of worship. Category B restricted land is land within 50m laterally of features including a principal stockyard, a bore or artesian well, a dam, artificial water storage connected to a water supply, a cemetary or a burial place. The concept of restricted land is not presented in either the *Petroleum & Gas (Production & Safety) Act 2004* or the *Greenhouse Gas Storage Act 2009*. The term restricted land or area is not defined specifically in the *Geothermal Energy Act 2010*, although the concept is addressed.

The *Minerals & Energy Resources (Common Provisions) Act 2014* (MERCP) defines restricted land in section 68 (not yet commenced) for a resource authority as land within a prescribed distance of any of the following:

- a permanent building used for residence, place of worship, childcare centre, hospital or library
- an area used for a school, a cemetery or burial place
- aquaculture, intensive animal feed-lotting, pig keeping or poultry farming
- a building used for a business or other purpose if it cannot be easily relocated and cannot co-exist with the authorised activities under the resource authority
- an area, building or structure prescribed by regulation.

Table 1 What land is that?

Resource legislation	Unavailable land	Excluded land	Constrained land	Restricted land
Petroleum & Gas (Production & Safety) Act 2004	Section 98 Section 168	Section 98, 99 Section 169	Not specifically mentioned	Not specifically mentioned
Petroleum Act 1923	Not specifically mentioned	Section 18A, 40B Section 154	Not specifically mentioned	Not specifically mentioned
Mineral Resources Act 1989	Not specifically mentioned	Section 132 and only in respect of Cherwell Creek, Chapter 12, Part 4	Not specifically mentioned	Schedule 2 Section 51,129, 238
Geothermal Energy Act 2010	Not specifically mentioned	Section 184	Not specifically mentioned	Section 33
Greenhouse Gas Storage Act 2009	Section 44 Section 135	Section 44 Section 135, 137	Not specifically mentioned	Not specifically mentioned
Minerals & Energy Resources (Common Provisions) Act 2014	Not specifically mentioned	Not specifically mentioned	Not specifically mentioned	Section 68 *not yet commenced*

Sensitive or commercial places

Under the Environmental Protection Act 1994, a sensitive place is a dwelling (including residential allotment, mobile home or caravan park, residential marina or other residential premises), motel, hotel or hostel; a library, childcare centre, kindergarten, school, university or other educational institution; a medical centre, surgery or hospital; a protected area; a public park or garden that is open to the public for use other than sport or organised entertainment.

A commercial place means a work place used as an office or for business or commercial purposes which is not part of the petroleum activities and does not include employee accommodation or public roads.

These definitions obviously have some overlap with the MERCP definition, and restricted land under the MRA.

Moratoriums

In general, land within a moratorium area is unavailable for application for a stated period. Under the MRA land that was previously in an exploration permit and is relinquished, surrendered or expired is under a moratorium and considered 'excluded' land for a minimum of 2 calendar months from the surrender date.

Specific moratoriums may also be declared. For example, there is currently a moratorium declared under the MRA for the McFarlane oil shale deposit, which is in place until the 17 August 2028. During this period, no oil shale mining tenements can be granted on the subject land and during this period, all oil shale activity is not an authorised activity for the particular mining tenements to which the moratorium applies.

In summary, the terminology regarding land is confused across the various resource Acts, with some Acts having specific definitions for terms that are in common usage elsewhere in a slightly different context. Constrained land, for instance, is not defined in any of the Acts, however the term is in widespread use: on MinesOnlineMaps1 for example the 'layer' includes restricted areas, regional planning interests areas (such as Strategic Environmental Areas, strategic cropping), State Forests and others.

The designation given to land may impact the ability to apply for the area, and/or it may impact the type of activities that can be undertaken if the area is granted. In some cases, additional approval processes will be required; some prior to a grant, and some prior to an activity. When determining an appropriate work program or development plan for a particular area it is important to understand thoroughly any limitations on activities that might result from certain 'land type' designations.

I am happy to hear suggestions about topics you would like covered. Feel free to email me at sue.slater@rlms.com.au with the subject heading Tenure Matters.

In the meantime, remember "Tenures make the Project; the Project doesn't make the Tenures".

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[1] https://www.business.qld.gov.au/industry/mining/mining-online-services/minesonlinemaps