



NORTHERN TERRITORY CATTLEMEN'S ASSOCIATION INC.

Advancing and protecting the interests of cattle producers in the Northern Territory

Member - National Farmers' Federation & Cattle Council of Australia

April 2017

NTCA Submission to the Hydraulic Fracturing Scientific Inquiry Public Hearing 10th March 2017

Supplementary Information

1. LAND ACCESS IN NT

Whilst landholders in NT are bestowed with surface rights in connection with their land tenure (perpetual leasehold) to conduct business (notably cattle grazing), tenement holders (both mining/petroleum) are entitled, in accordance with their mineral title/exploration permit or licence (collectively 'resource authority') to mine/extract valuable minerals/petroleum (resources) which are below the surface of the land, belonging to the NT.

NTCA accepts mining / extraction of resources by the tenement holder, delivers royalties and economic financial income to the NT.

Cattle grazing is not bereft of utilitarian rewards.

There are numerous benefits including amongst other things, food source, fire management, regeneration of plant life / grasslands and dams created for cattle, attracting native wildlife and plant species. The Australian agricultural sector has grown exponentially with sound prospects for further expansion. Australia is at the forefront in terms of quality of the produce, health and safety, technology and economy (to name a few).

Landholders also support the economy through investment, employment and growth.

Moving forward, landholders in the agricultural sector will advance innovative changes to meet current environmental, social and financial challenges. Higher education will equip landholders with the skill and knowledge to capitalize on increasing globalised trading environment.

Food and water = life.

Many of the areas targeted by tenement holders are rich agricultural areas with valuable water resources.

Ideally, neither right to land should supersede the other however, the current land access and resources regime in the NT empowers resource tenements to a higher prerogative and broader spectrum of entitlements, to the detriment of the landholder.

Equilibrium must be imbued, so that both landholders and tenement holders' rights and interests in the land are balanced, ensuring dichotomous entitlements and rights to economic benefits are fairly and adequately accommodated.

Native Title notwithstanding, NTCA's stance, is the opinion a landholder being entitled to quiet enjoyment of the land to the exclusion of all others.



Other Australian jurisdictions recognise, acknowledge and have legislated, the need to balance the expectations of a landholder providing valuable economic contributions to the welfare of the country (together with the right to quiet enjoyment) with that of the resource sector, which also valuably injects pecuniary contributions to the economy.

Any interference to this right of quiet enjoyment as a result of tenement holder activities, which impact on landowners must be fairly and adequately compensated. It follows that damages / losses arising must also be compensated.

Additionally, landholders must be given the right to refuse entry to carry out Authorised Activities in circumstances where agreement cannot be reached. Failing which, will rely upon the common law position.

2. ISSUE

NTCA note that there are several issues facing landholders in NT in respect of current resource tenements, including (however not limited to):

- **Water Integrity** (quality and quantity) (surface and groundwater): important for the grazing of livestock, biodiversity, food and fibre production for domestic and international purposes.
- **Land/Flora/Fauna**: soil, ecosystems and biodiversity which are vital to sustainable longevity of land use for food production.
- **Air**: integral to healthy environment and production systems.
- **Human Wellbeing**: physical and mental health of landholders.
- **Aboriginal People / Cultural Heritage**: must be respected and maintain integrity.
- **Social Impacts**: must be managed and maintained.
- **Economic Impacts**: impacts of disruption to cattle grazing businesses caused by resource tenement activities.
- **Land Access**: the right to exclusive possession of the land.
- **Flooding Impacts**: impacts to disruption to cattle grazing business must be avoided and mitigated.

Access to land by a tenement holder adversely impacts upon each of these values. These impacts must be recognised by the NT and tenement holders.

3. INFORMED CONSENT

NTCA considers that establishing good relations between parties requires the use of common sense, practical approach and mutual courtesy.

The development of good relations between landowners and tenement holds requires recognition of rights and obligations of both parties.

Any person, including a tenement holder, who requires access to a property owned by another party must consult regularly and be subject to contractual obligations.

A tenement holder should not be entitled access to private leasehold land without first:

- Delivering a copy of resource project details, tenement holder searches and environmental authorities regarding the same.
- Obtaining written consent of the landholder by way of a conduct and compensation agreement (valid for no more than one (1) year), including provision for compensation payable by the tenement holder to the landholder as a result of the disruption / disturbance / granting of the right to enter the land for the purpose of undertaking necessary investigative or more intrusive activities.



NTCA considers it appropriate to incorporate provisions to also include mandatory provisions regarding dispute resolution, standard acceptable land access conduct requirements and notification requirements.

A tenement holder may not access the land until there is a valid and binding signed conduct and compensation agreement.

Following conduct and compensation agreement, providing an Entry Notice to the landholder when the tenement holder requires access, delivering details of the activities to be undertaken, including:

- Where the activities will be undertaken (shown on a map)
 - o including location of the activities
 - o access points to / from the land
 - o roads / tracks to be used
- When the activities will be undertaken
 - o period of time required (not exceeding three (3) months)
 - o dates of entry
 - o approximate arrival and departure times each day
 - o There must be a limit on the period of time the Entry Notice is applicable. For example, after three (3) months, a new Entry Notice must be issued. The Entry Notice must not extend beyond a defined period. For each new entry, a new Entry Notice must be delivered.
- What activities will be undertaken
 - o details of the project and tenement holder
 - o level of activity (i.e. minor in nature or more intrusive)
 - o type of activities in detail
 - o confirmation that any disturbance will be immediately rehabilitated
- Who will undertake the activities
 - o details of whether the tenement holder will be entering the land or a contractor (including details of the contractor(s))
 - o number of employees / contractors
- How will the activities be undertaken
 - o what machinery will be used (types and number of machines)
 - o conditions to be observed by the tenement holder in accessing the land

Without the foregoing information, a landowner, in NTCA's experience, will likely have (amongst other things):

- its grazing operations disrupted;
- staff/livestock/property injured or damaged;
- spread of dust/weed;
- damage to wetland and plant communities – often relied heavily by landowner for the success of its grazing operations on the Land.

All of which would divert human and financial resources away from a landowner's significant business interest; which in the current economic and low rainfall environment should not be undervalued or underestimated in importance.

NTCA considers it fundamental for any objection by the landholder, to be reasonably considered and acted upon appropriately.



Where the issues cannot be resolved in a reasonable time (for example, 20 business days), an independent third party (such as a mining department or independent qualified mediator) must be engaged to consider the issues (to be paid for by the resource holder). These might include reasonable refusal by a landholder to the tenement holder due to calving season/weather and is thereby unable to muster cattle in sufficient time to allow entry for the proposed activities.

In negotiating access to land, the tenement holder must recognise and respect the landholders' right to quiet enjoyment of the land which is first in time and paramount to that of the tenement holder. Any disruption caused by the tenement holder to the landholder must pragmatically, be compensated.

As noted in the Australian Government *Agricultural Competitiveness White Paper: Stronger Farmers Stronger Economy (2015)*, page 108, the Government's three principles for coexistence of farming and the development of unconventional gas resources are:

- Access to agricultural land should only be done with the farmer's agreement and farmers should be fairly compensated;
- There must be no long-term damage to water resources used for agriculture and local communities; and
- Prime agricultural land and quality water resources must not be compromised for future generations.

Where agreement cannot be reached between landholder and tenement holder after a statutory minimum negotiation period, the matter may be referred by either party to Tribunal/Court for compensation determination, which will take into account the detrimental impact the mining tenement will have on the land/landholders' business.

NTCA is of the view, that a tenement holder may only access the land once agreement in the form of a conduct and compensation agreement is reached to ensure the landholder is adequately protected. Access and Authorised Activities must be undertaken in a manner that avoids unreasonable interference with the landholders' right to exclusive possession and use of the land.

It is incumbent upon the tenement holders to adhere to a mandatory framework of access conditions (such as a Land Access Code) to form part of the conduct and compensation agreement.

NTCA considers that landholders and tenement holders must be respectful of one another, negotiate in good faith and once agreement is reached, the parties must adhere to the agreed terms. Failure by the mining tenement holder to comply with the Land Access Code must result in the payment of compensation to the landholder for the breach.

4. LAND ACCESS CODE

NTCA submits that a Land Access Code must be established and implemented by the NT as a mandatory access guideline, setting out conditions upon which the parties agree to allow access to the land. Terms which must be considered and agreed between the parties includes (however is not limited to):

- Weeds and pests
- Access points, roads and tracks
- Grids, gates and fences
- Camps
- Restrictions on access in close proximity to buildings (including houses, business and the like), wells, dams, water storage facilities, cemetery, stockyard, feedlot etc.

Where an incident arises (i.e. cattle death due to conduct of the tenement holder or damage to access tracks due to wet weather), additional compensation must be paid to the landholder for the damage or loss caused. NTCA considers this to be a fundamental and non-negotiable term going forward. Landholders should not have to wait for compensation, nor have to argue about the actual.



5. COMPENSATABLE IMPACTS

It would be a different narrative where resource tenement holders were given the right to access land and carry out improvements for the benefit of the landholder, however that is not the case.

Tenement holders are entitled secondary rights to access the land and carry out authorised tenement activities (Authorised Activities).

The agricultural sector has a genuine concern (based on precedent) that toxic spills could occur, drinking and irrigation water could be contaminated and productive agricultural land could be irreparably destroyed.

NTCA notes that advantages which flow from the access and use of the land to obtain resources (minerals/petroleum) beneath the surface of the soil are for the benefit of the resource tenement (profit) and the NT (licence fees and royalties), however is to the detriment of the landholder, who under the current NT regime, is only entitled to compensation where damage or loss arises after the Authorised Activities.

Mineral Titles Act (2016) NT (MTA), permits a tenement holder to:

- Enter and occupy land in the title area with persons, vehicles and equipment to conduct Authorised Activities in accordance with the tenement holders' mineral title^[1];
- Take or divert water in the title area (except artificially conserved), sink a well or bore and take water from the well or bore^[2];
- Use water in connection with the Authorised Activity in the title area, whilst conducting Authorised Activities^[3];
- Access the title area, including^[4]:
 - enter the land to construct or maintain a road and do other work to enable to the tenement holder to have access to the title area
 - use any person, vehicle and equipment necessary to complete the work for access
- Enter and use land outside the title area to construct, maintain and use infrastructure associated with conducting Authorised Activities under the title, where access authority is also held^[5].

The only right to compensation by a landholder to compensation from the tenement holder is for^[6]:

- Damage to the land and any improvements on the land caused by the activities conducted under title; and
- Any loss suffered as a result of that damage (for example, loss suffered as a result of being deprived of the use of the land).

However, this general entitlement to compensation is limited where the damage caused by the tenement holder, is to pastoral land. MTA provides that a landholder in these circumstances, is only entitled to damage in excess of *what is reasonably necessary* for conducting the Authorised Activities.

Petroleum Act 2016 (NT) contains similar provisions regarding access and compensation payable^[7] as enunciated in this communication and as it relates to the MTA. However rather than an automatic right to compensation under reasonably foreseeable disruption and damages caused by the Authorised Activities, the landholder in accordance with NT resource tenement legislation, is obligated to lodge a claim within three (3) years for agreement with the tenement holder, otherwise where agreement cannot be reached, determination by the Tribunal.

NTCA notes that exacerbating this oversight is the noticeable absence of any legislative right for the landholder to be recompensed for consultants' fees and management time. Such costs are directly relevant and relatable to time taken away from landholders conducting their own businesses' to deal with the loss, damage and disturbance caused by the tenement



holder, for the tenement holders' profit and benefit. Landholders are invariably out of pocket for substantial sums of money to contest payment of compensation, for what is rightfully theirs in the first instance.

Not only does this place additional strain on the NT Tribunal resources in considering and determining the outcome of the damage and losses, additional time and funds are thrown away on resolving a dispute where the funds are essentially owing to the landholder.

It is of mutual benefit and in the best interests of all parties involved, to have agreed terms, conditions and covenants set in place, prior to any land access to ensure the time and resources of regulatory bodies are not wasted.

NTCA considers it to be erroneous to deny a landholder entitlement to compensation for an obvious disruption to the land and the business, for the overwhelming benefit of another (tenement holder).

This universal objective approach in the legislation disregards the subjective impacts on respective landholders operating cattle grazing businesses.

In NTCA's experience, there are direct and natural consequences of a tenement holder conducting Authorised Activities on the land. Essentially, a tenement holder places an absolute restriction on the landholder as to how, when and where the landholder is entitled to operate the cattle grazing business.

In turn, the landholder (as a pastoral holding) may only seek recompense in circumstances where it can be proven that actual damage has resulted. NTCA does not consider this to be a justifiable position for landholders.

Legislation must be amended to a position of equilibrium. NTCA submits that it is not acceptable in the current form to entitle tenement holders greater rights and prerogatives over and above that of the landholder.

Landholders' right to exclusive possession/quiet enjoyment are vital must be considered paramount in the equation for land access and impacts caused by tenement holders undertaking Authorised Activities.

NTCA is of the view that compensation must be paid to a landholder, who is required to accept a disruption to the right of exclusive possession and quiet enjoyment to the land and the business (generally grazing) operated on the land.

Impacts must be properly considered and where such impact is not able to be avoided, must be compensated. For example, as a result of the proposed mining operations on the Land, the landowner may be required to modify its cattle (and cropping) operations on the Land.

This might extend to disruptions to management plans to clear vegetation, develop the land (i.e. fencing, pasture rotation, dam construction) or conduct cattle grazing, breeding, backgrounding, which must be undertaken in a manner that ensure maximum weight gain. Any loss or disruption to the process of the activities causes a strain to cattle management and has far-reaching financial impacts on the landholder (for example, market price for the cattle and reputation in the industry).

In NTCA's experience, such impacts detailed are not exhaustive, however disruptions to landholders extend to *inter alia* dust, noise, machinery, presence of operators, movement of vehicles, interruptions to cycles and movement of cattle, severance to access in various areas and changes to management plans.

Landholders have genuine concerns and are exposed to real risks associated with weed/pest infestation, rubbish, fires, unlocked gates/open gates, accidental cattle deaths. Not all of these issues are immediately apparent however cause a real, ongoing and substantial interference with the quiet enjoyment of the land.

Plainly, a restriction on the ability to use the land to the full extent or develop in a particular way will have significant financial impacts on the landholder.



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As a direct and natural consequence of the tenement holder requiring access to the land for Authorised Activities, compensation must be paid to the landholder for all impacts arising.

Compensatable impacts the tenement holder as a result of the activities upon the land, must pay to the landholder for impact (including roads, tracks and access to water) on the land.

NTCA is of the view that the quantum of compensation must be negotiated and agreed, between the landholder and tenement holder and must include the following heads of compensation:

- Deprivation of possession of its surface
- Diminution of its value
- Diminution of the use made or that may be made of the land or any improvement upon it
- Severance of any part of the land from other parts of the land or from other land that the landholder owns
- Any cost, damage or loss arising from the carrying out of activities under the resource authority on the land
- Legal, valuation, agronomy, accounting costs (together with any other reasonably necessary consultant or experts' opinion required) and management (landholders') time incurred by the landholder in the preparation, negotiation and settlement of the conduct and compensation agreement.

Negotiating conduct and compensation agreements is not simply an incident of ownership. Time taken away from the landholders' business for the benefit of the tenement holder, must be fairly and adequately compensated.

NTCA suggests that all agreements should be registered on title to ensure transparency in all future land dealings.

Any / all direct loss and damage arising from the tenement holder accessing the land to conduct Authorised Activities must be fairly and reasonably compensated by the tenement holder to the landholder in a conduct and compensation agreement, to be registered on title.

Any / all consequential or indirect loss and damage caused by the tenement holder as a direct result of accessing the land to conduct Authorised Activities, such as:

- A material change in circumstance to the Authorised Activities before commencement, such as where/when/what the same are to be carried out, must be negotiated and further compensated by the tenement holder to the landholder
- Future disturbance as a result of the Authorised Activities following commencement, such as damage caused by a resource tenement holder creating new or different access tracks, taking more than an agreement amount of water, introduction of weeds, open gate leading to cattle deaths and the like.

Such additional heads of compensation must be considered and paid separately to access arrangements.

Any change to the resource method, timing, activities or impact must result in an amended compensation agreement, including additional compensation to the landholder for the additional / changed impact(s).

In the absence of agreement and/or payment of compensation, landholders will reserve and/or assert their common law right to prevent access in accordance with *Plenty v Dillon (1991) 171 CLR 635*.



6. CONCLUSION

NTCA is of the view, that empowering landholders and tenement holders the ability to agree on fair and equitable terms for access to the land and compensation for the Authorised Activities (given the impacts that will occur as a result of the resource tenement holders' activities) preserves dual rights granted by the NT, enabling contented coexistence.

Fundamentally, it is the manner in which rights are exercised and rights are preserved which will ultimately improve landholder/resource tenement holder relations.

Landholders must be satisfied that resource tenement holders will be required to adhere to a strict code of ethics and behaviour upon entering the land.

In paying fair and reasonable compensation to the landholders for impacts on the land, recognises and values landholders' entitlement paramount to all others, to use and enjoy the land.

What the resource tenement holder takes/uses/accesses for their own benefit to the detriment of others, the resource tenement holder must fairly compensate.

Signed,

Tracey Hayes
Chief Executive Officer
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^[1] Section 80: Rights relating to occupation of title area

(1) The right of the holder of a mineral title to occupy the land in the title area includes the right to enter and occupy the land with the persons, vehicles and equipment required for conducting authorised activities under the title

^[2] Section: 81: Right to use water in title area

The holder of a mineral title has the right to:

(a) take or divert water in the title area (except water artificially conserved by or for a landowner in the title area), or sink a well or bore in the title area and take water from the well or bore; and

^[3] Section: 81: Right to use water in title area

(b) use that water in connection with the authorised activities being conducted in the title area and for domestic use while conducting those activities.

^[4] Section: 83 Right to construct road for access to title area

(2) For subsection (1), the title holder has the right to:

(a) enter land to construct or maintain a road, and do other work, to enable the title holder to have access to the title area; and

(b) use the assistance of any persons, and the vehicles and equipment necessary, to do the work mentioned in paragraph (a).

^[5] Section 84: Right to enter and use land outside title area



(1) The holder of a mineral title has the right to enter land outside the title area (the relevant land) to construct, maintain and use infrastructure associated with conducting authorised activities under the mineral title if the title holder also holds an access authority for the relevant land.

[6] Section 107: General entitlement to compensation

(1) A person who has an interest in land is entitled to compensation from the holder of a mineral title for:

(a) damage to the land, and any improvements on the land, caused by activities conducted under the title; and
(b) any loss suffered as a result of that damage (for example, loss suffered as a result of being deprived of the use of the land).

(2) However, if the damage is caused to land in a park or reserve or pastoral land by exploration activities, a person who has an interest in the land is entitled to compensation only in relation to damage in excess of what is reasonably necessary for conducting those activities.

[7] Section 81: Compensation to owners

(1) The holder of a petroleum interest must pay to:

(aa) the owner of land comprised in the petroleum interest; and
(ab) any occupier of land comprised in the petroleum interest who has a registered interest in the land, in respect of the owner's and occupier's respective interests in the land, compensation for:

(a) deprivation of use or enjoyment of the land, including improvements on the land; and
(b) damage, caused by the permittee or licensee, to the land or improvements on the land.

(2) A permittee shall not commence his exploration operations unless he has given notice to:

(a) the owner of land comprised in the exploration permit and any occupier of the land who has a registered interest in that land of the proposed date of commencement, nature and duration of the permittee's exploration operations and served those persons with a copy of this section; and
(b) the Minister that he has complied with paragraph (a).

Maximum penalty: If the offender is a natural person – 400 penalty units or imprisonment for 2 years.

If the offender is a body corporate – 2 000 penalty units.

(3) Where a permittee or licensee and a person entitled under subsection (1) to compensation are unable to agree upon an amount or other benefit, by way of compensation, to which the person is entitled, either party may refer the dispute to the Tribunal.

(6) No person is entitled under this section to compensation based on the known or potential occurrence of petroleum in or on the land.

(7) An agreement in relation to compensation may include compensation for work undertaken under an exploration permit, retention licence or production licence or under all exploration permits and licences held by the permittee or licensee in relation to that land.

(8) In this section and section 82, "registered interest", in relation to land, means an interest registered on the Register kept by the Registrar-General under Part 3 of the Land Title Act .