

Attention affected landowners, are you informed enough?

- [Fingerboards Mineral Sands Project](#)

Victoria's MINERAL RESOURCES (SUSTAINABLE DEVELOPMENT) [ACT](#) 1990 does not protect the landowner because the real facts and risks to you, your land and business is up to YOU to KNOW, not up to the mining licence proponent to MAKE KNOWN to YOU.

Explorers do have the right to enter and explore your property under licence granted by the Victorian Government and you will eventually have to allow an explorer onto your property.

However, what YOU DO have control over is the access arrangement and compensation agreement, specifically, what YOU NEED to KNOW and what YOU NEED to CONSIDER.

YOU also have the right to ensure the mining regulator and Victorian Resource Minister acts with integrity, prevents bullying of landowners by mining agents, and ensures the [objectives](#) and [principles](#) of the MR(SD) Act are delivered. Regulatory reform is occurring¹ and FUTURE community engagement is improving² but, ultimately, the landowner is the loser.

What other private commercial entity can enter your land without your permission for the sole purpose of making a profit and, adding insult to injury, eventually leave your property worthless? - John Nader QC (The Land article, 'Mining Acts Need Severe Surgery')

LANDOWNERS NOT PROTECTED UNDER THE MRSDA.

- [SECT 45](#)

- (3) A consent given by any owner of land under subsection (2)—
- (b) cannot be withdrawn by that owner or by any subsequent owner of the land; and
 - (c) binds all subsequent owners and occupiers of the land.

Beware, for once all works cease either from exploration or mining production it is only in the *Codes of Practice*³ that you can fully appreciate the magnitude of what rehabilitation really entails with the destabilisation & contamination of the land and/or waters. The following matter, normally unknown in the land access agreement stage, states -

*Where mining-related infrastructure is to remain, obtain the written consent of the private landowner/occupier and/or Crown land manager that they will assume responsibility for the infrastructure.*⁴

YOU, as the landowner, MUST eventually signoff on the rehabilitation works. This is binding on every subsequent landowner into perpetuity for any maintenance issues that may arise.

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¹ <https://earthresources.vic.gov.au/licensing-approvals/licensing-disputes-and-objections>

² <https://earthresources.vic.gov.au/community-and-land-use/consultation-engagement>

³ <https://earthresources.vic.gov.au/search?query=rehabilitation+code+of+practice>

⁴ https://earthresources.vic.gov.au/data/assets/pdf_file/0011/456275/Code-of-practice-for-low-risk-mines.pdf 6.7 Final Rehabilitation

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Landowners should seek a Conduct and Compensation agreement between themselves and the licensee to be guaranteed complete indemnity for all adverse impacts, both immediate and consequential, upon their business, land, water and assets. Landowners need the assurance that redress is not just available for the life of the resource project which is only production plus 3 years.

WHY MINING IS UNTOUCHABLE IN VICTORIA

Under the Kennett government, mining as a land use, was made exempt from the State Planning Policy Framework⁵ (SPPF) of the Planning and Environment Act 1987⁶ (P&E Act) and its corresponding protective objectives and policies in the late '90s to facilitate investment.

Consequently, mining has been removed from one part of a legislative framework and declared superior to all other land uses.⁷ As such, the State Minister[s] for Water and Environment are subservient to the State Resources Minister who, in turn, acquiesces to the Mining Industry. There has never been any attempt by consecutive governments to return the status quo or reduce mining's dominance. There continues to be no strategic planning and cross-departmental assessment of water intensive projects,

- on their cumulative effects and impacts to regional surface and ground waters and other consumptive water users.
- from increasing variable and unreliable rainfall.
- on the federal water trigger⁸ under the EPBC Act.

The 2013 Mineral and Energy Resource Exploration Productivity Commission Inquiry Report States the rationale for government intervention⁹

There are three key reasons why governments regulate mineral and energy resource exploration in Australia:

- ***the mineral and energy resources are owned by the Crown***
 - *given the Crown's ownership of resources, governments have established legal frameworks which outline how competing exploration proposals are assessed (for example, tendered programs of works and cash bidding), when, where and how long exploration can occur, and with what caveats.*
- ***exploration could directly impact on existing and future agricultural and other land uses or damage sites of environmental and heritage significance***
 - *much of the area covered by, or potentially available for, exploration licences has alternative economic uses*
 - *more intensive exploration activities can impinge on other land uses*
 - *an important role for government is to establish property rights and legal systems to allow parties to negotiate outcomes and/or to enforce their rights in such circumstances.*
- ***exploration may have effects beyond the area being explored***
 - *exploration may have effects on the regional environment and nearby communities.*

The main concerns raised in this inquiry have been -

- ***the lack of transparent and consultative processes when adding or changing regulation***
- ***the poor communication of some regulators and***
- ***the limited use of evidence-based decision making and proportionate risk management in some regimes***

⁵ <https://planning-schemes.delwp.vic.gov.au/schemes/vpps>

⁶ http://www5.austlii.edu.au/au/legis/vic/consol_act/paea1987254/

⁷ https://planning-schemes.delwp.vic.gov.au/schemes/vpps/52_08.pdf

⁸ <https://www.environment.gov.au/epbc/about>

⁹ <http://www.pc.gov.au/inquiries/completed/resource-exploration/report/resource-exploration.pdf> pg8

MINING, WATER RIGHTS & WASTE STREAMS

A licence is the right to exploit a resource, in this case for mineral sands, on private property. To extract the resource the company requires water for the extraction process so needs to obtain a water licence from appropriate authorities to access groundwater or surface water flows. As there is currently a cap on allocations of further water entitlements in Gippsland, the proponent of the licence needs to trade for water rights.¹⁰ Southern Rural Water is the agency responsible for water licences in Gippsland. On Kalbar's FAQs webpage under subheading *Environmental Issues*, it notes -

How will water be obtained for the mine? The project is anticipated to require an estimated 3 gegalitres of water per...

The project is anticipated to require an estimated 3 gegalitres of water per annum. Water is proposed to be obtained from a combination of winter flow in the Mitchell River and groundwater from the Latrobe aquifer. Water from the Mitchell River will not be taken during summer. The final decision on water allocation will be made by Southern Rural Water.

Uncertainty exists on the full water account balance needed but the 3-4 GL appears to be 'make-up' water required if the Licensee could capture and recycle much of their process water. The Latrobe Aquifer is fully allocated with the current rehabilitation of the Latrobe Valley open cut coal mines¹¹ taking priority for any available water in trading so where will the water come from? The success of this project is solely dependent on where it will access its significant water use from.

MINING WASTE STREAM

All mining extraction or production has a waste stream. For this mineral sands project¹², treated wastewater would be discharged into surface waters upstream of Bairnsdale drinking water supply, vegetable farms, Gippsland Lakes and breeding waters for recreational fishing.

All waste waters are deemed a contaminant to surface waters for any changes in PH causes changes to existing ecosystems. Then there are the sediment load discharges noted as solid pollutants that smothers bottom feeders and the deposition of heavy metals that enter waterways from poor initial testing of wastewaters due to self-regulation.

All discharges of wastewater are dependent on an increased velocity of water flow to reduce concentrations of contaminants and to flush the pollutants downstream otherwise they become more concentrated in the localised area with siltation and only the finer sediments flow further. Either way pollution of soils, drinking waters and recreational waters are problematic in times of both increased and decreased flows.

Who in Government questions what these sorts of projects are doing to our environment because, for mining, there is no monetary value put on water use, soil degradation, let alone the quality of water flow and to its negative impacts on vegetable farming, irrigation and the Gippsland Lakes.

¹⁰ <https://earthresources.vic.gov.au/legislation-and-regulations/guidelines-and-codes-of-practice>

¹¹ <https://earthresources.vic.gov.au/projects/lvrrs/project-information-and-factsheets/reports>

¹² http://epbcnotices.environment.gov.au/_entity/annotation/40e654e4-3e2e-e711-891f-005056ba00a7/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1587686400333

THE INTERESTS OF LANDOWNERS, THE COMMUNITY, THE LOCAL ECONOMY AND THE ENVIRONMENT ARE NOT ADEQUATELY REPRESENTED OR PROTECTED

Can it be verified that the Department Head / The Minister is Qualified in:

- The range and complexity of insurance policies
- The legal interpretations of the Policy clauses
- The types of Policies required
- Levels of coverage required

Can it be verified that Legislation is in place should these policies be subsequently changed through:

- Endorsements
- Exceptions
- Special wording and drafting
- Farm in agreements
- Changes to Authority Holder or Licensee Legal structure
- Null and void due to non-payment of premiums.

Can it be verified that Legislation is in place to ensure:

- Those insurance requirements are not limited to the holder of an Authority or Licensee but extend to all entities engaged in or acting on behalf of the Authority Holder or Licensee

This is relevant given that Kalbar entered a joint venture and is now operated by Kalbar Operations Pty Ltd as of 1st May 2020.¹³

As defined by law, the crown claims ownership of the land and under land tenure, the people are subject to laws that are *ENACTED* by the *CROWN'S REPRESENTATIVES* within our State and Federal Parliament.

Under the *TORRENS TITLE* of land *TENURE*, the Crown forces the people to *VOLUNTARILY* claim *OWNERSHIP* of *LAND* whereby they *AGREE* to abide by the Transfer of Land Act 1958 in order they may *ENJOY* each parcel of land according to the designated purpose assigned to it by the Crown. This simple fact binds the people to the land on the Crown's Terms and Conditions meaning that the Crown can specify the *TERMS AND CONDITIONS* of *all LAND LEASES* including under the Torrens title.

By the transfer of land without regard to the purchase price, the State transfers land from one entity to another by the 'appropriate form' allowing the State to treat the land as its own which is reflected by the Terms and Conditions within the Transfer of Land Act 1958 that binds *ALL OCCUPANTS ON ALL LANDS* to all other State and Commonwealth laws! As such, the people have no rights on the land that they *ENJOY*.

However, in regard to *BANKRUPTCY*, the High Court of Australia (HC) has determined that entities must control their *RISK* as not to lead to bankruptcy.

¹³<https://www.fingerboardsproject.com.au/news/project-bulletins>

Thus, Australians have a *DUTY* to control their risk in order that entities must make provision for sufficient funds and or assets to meet any liabilities as a result of any claim made with respect to *RISK!*

Consequently, if the regulation standards are inadequate or their application lax, is the government in breach of their respective legislative objectives putting the landowners at risk of liability? The answer is YES.

We know the environment is devoid of a monetary value worth when negatively impacted by mining but, worst, the current law is incapable of protecting the person and the land because the law only acknowledges (through exemption from the P&E Act) that mining holds authority according all others a lower order of ranking.

MINING UNDER VICTORIAN LAW

TRANSFER OF RIGHTS TO MINERALS FROM THE CROWN TO THE MINING LICENCEE

- [SECT 9](#)

Ownership of minerals

(1) The Crown owns all minerals except— ...

- [SECT 11](#)

Transfer of property in minerals

(1) The property in minerals passes from the Crown to the holder of a licence or a person searching under a miner's right or tourist fossicking authority when the minerals are separated from the land in accordance with the licence, miner's right or tourist fossicking authority.

A government granted exploration licence accords a **legal economic privilege to a speculative industry that subordinates existing economic enterprises**, through occupation of private property, rendering landholders and communities subservient to the proponent in the absence of the right of veto.

SECURITY

- [SECT 26AU](#)

*(1) Before granting an authority to enter land under section 26AS, the Department Head must require the person to provide a security, of **an amount and kind specified by the Department Head**, against the risk of damage to the property of the owner or occupier of the land as a result of the person's entry on to, or activities on, the land.*

(2) The Department Head—

(a) may use the security, or part of it, to compensate the owner or occupier for any damage resulting from that entry or those activities; and

(b) must return the balance of the security to the applicant no later than 30 days after the day on which the authority expires or is withdrawn

INSURANCE

- [SECT 26AV](#)

*A person must not enter any land or carry out any surveying for the purposes of section 26AR unless the person is insured for an amount **determined by the Department Head** against any risk that might arise if the owner or occupier of the land were to sustain a personal injury as a result of the person's entry on to, or activities on, the land.*

COMPENSATION

- [SECT 85](#)

(1) Compensation is payable by the licensee to the owner or occupier of private land that is land affected for any loss or damage that has been or will be sustained as a direct, natural and reasonable consequence of the **approval of the work plan or the doing of work under the licence** including—

- a) deprivation of possession of the whole or any part of the surface of the land; and
- b) damage to the surface of the land; and
- c) damage to any improvements on the land; and
- d) severance of the land from other land of the owner or occupier; and
- e) loss of amenity, including recreation and conservation values; and
- f) loss of opportunity to make any planned improvement on the land; and
- g) any decrease in the market value of the owner or occupier's interest in the land; *(only if you sell)*
- h) loss of opportunity to use tailings disposed of with the consent of the Minister under section 14(2).

However, there is no landowner compensation when a retention licence is granted for a further 10 years on top of the exploration renewal periods. Adding another 10 years under licence with the potential for an extra renewal period under Minister's Discretion significantly disadvantages the landowner impacting land value and capacity to improve land and infrastructure. Complications can also arise with project interruptions which can leave the landowner with no recourse for compensation.

If a mortgage is held over the property compensation advice should be guided by YOUR BANK.

- How can an accurate compensation amount be determined pre-mining if production under a retention licence may not occur for another 20 years?
- What if the company becomes bankrupt, pulls out, is dissolved, in what capacity can the landowner seek further compensation/redress?

OFF-SITE COMPENSATION

- [SECT 85](#)

(1A) Compensation is payable by the licensee to the owner or occupier of private land that is not land affected for any loss or damage that has been or will be sustained as a direct, natural and reasonable consequence of the approval of the work plan or the doing of work under the licence...

- Such a claim would not involve a prior compensation agreement **but must be made within three years of the loss, or damage or licence expiry, whichever is earlier.** - [SECT 86](#)

LIMIT ON TOTAL AMOUNT OF COMPENSATION

- [SECT 89](#)

(1) The total amount of compensation payable under section 85(1) or (1A) in respect of any land must be no greater if the land is not owned and occupied by the same person than if it is.

(2) Nothing in subsection (1) limits the amount of solatium¹⁴ payable to the owner or occupier under section 85(2).

¹⁴ Solatium definition, something given in compensation for inconvenience, loss, injury, or the like; recompense

(3) *The maximum amount of compensation that a court or the Tribunal may order to be paid under section 85(1)(e) or (1A)(d) (loss of amenity) is \$10 000.*

- [SECT 89AB](#)

Compensation payable under section 89AA is compensation for—

(a) *deprivation of the possession of the surface of the land or any part of the surface; and*

(b) *damage to the surface of any land and to any improvements on the land which has been caused by or may arise from the carrying on of any operation under the search authority on the land in respect of which the search authority was granted; and*

(c) *all consequential damage to the land.* **Production plus 3 years** - [SECT 86](#)

DETERMINATION OF COMPENSATION ON LAND AFFECTED

If agreement on land access can't be reached, the matter can be referred to the Victorian Civil and Administrative Tribunal (VCAT) for a determination regarding compensation (but not the right of access – which is bestowed upon licence holders under the Mineral Resources (Sustainable Development) Act 1990.

Where parties have failed to negotiate a satisfactory settlement, the disputed compensation claim may be referred to the Victorian Civil and Administrative Tribunal (VCAT), in accordance with Part 10 of the Land Acquisition and Compensation Act 1986. If the amount of compensation in dispute exceeds \$50,000, either party can seek to have the matter resolved by the Supreme Court.¹⁵

- [SECT 88](#)

(1) *The owner or occupier or the licensee may—*

(a) *apply to the Tribunal for determination of a disputed claim for compensation; or*

(b) *refer a disputed claim for compensation to the Supreme Court for determination— in accordance with Part 10 of the **Land Acquisition and Compensation Act 1986** as if it were a claim for compensation under that Act and the licensee were the Authority referred to in that Part.*

(3) *In its application to a claim referred under subsection (1) Part 10 of the **Land Acquisition and Compensation Act 1986** has effect as if—*

(b) *section 91(1) provided that the **licensee must pay the licensee's own costs and the costs of the other party unless—***

(ii) *the other party has **been frivolous or vexatious** or has otherwise acted unreasonably— in which case the Tribunal or the Court (as the case requires) may, subject to that section, award such costs as it thinks proper.*

In determining costs, the *Land Acquisition and Compensation Act 1986* (- [SECT 91](#)) is relevant. This is important that the landowner has a right to make risks to their business known. On this point **a landowner cannot be declared vexatious** as some mining agents like to play against the landowner so long as their reasoning and evidence are thorough. While VCAT and the Supreme Court can only determine the amount of compensation payable by the licensee to the landholder this, **however, confers a right for the licensee to enter the land when, in fact, the landholder did not give authorisation.** This issue is relevant for future complications with accessing insurance coverage and being in default of mortgage conditions.

You either willingly signed a land access agreement or you did not.

¹⁵ <https://earthresources.vic.gov.au/community-and-land-use/landholder-information/faqs> if agreement cannot be reached

Throughout the MR(SD) Act, and many other documents, is the lack of key references to the landowner, the impact, their right to security of tenure and their future.

WHAT COMPENSATION & INSURANCE FOR LAND ACCESS MEANS TO YOU?

If compensation is paid for the loss of value or damage to the land, this will generally be a capital payment, which reduces the cost base of the land and means no Tax is payable on the compensation payment. However, if the compensation is for loss of income, it will be fully taxable. As the whole question regarding resource extraction is about RISK ASSESSMENT, science is only a cursory attempt at defining a predictive model that can go some way, in part, to allay fears of what might happen.

- Will dust contamination on my property or reduced access to groundwater impact my business?
- How will the reforming of the mine site ensure surrounding properties are not impacted by floods or erosion impacting homes or business operations?
 - o Am I liable to other property owners if I sign off on rehabilitation?

Therefore, it is essential that the information contained within that written land access authorisation is appropriate to inform the landowner of the risks economically, legally, and environmentally. Similarly, the discussion on insurance is limited to the Proponent as a singular entity and does not address the complexity of the legal arrangements the proponent enters into in the development of the tenement (e.g. Joint ventures) and the insurance liabilities of each party, the content of those individual policies, and the interpretation of the clauses. The MR(SD) 1990 Act is silent on who holds the insurance as it is at the Minister's Discretion.¹⁶

JOINT VENTURE AND IMPLICATIONS

Kalbar Operations Pty Ltd

The joint venture company, Kalbar Operations Pty Ltd, became operational on 1 May 2020. The formation of this new company marks the start of a new phase for the Fingerboards Project as we progress the EES and focus on our project implementation plans.¹⁷

Again, the landowner is severely disadvantaged if a company restructures which could potentially lead to legal and economic implications throughout the mining, decommissioning and rehabilitation stage.

Mining and energy projects throughout Australia are frequently conducted through joint ventures as Kalbar has done.

Despite the prevalence of joint ventures, there is no single body of regulation that applies to this type of legal relationship, nor are there settled legal rules that determine the rights and obligations of parties to a joint venture relationship. Most mining industry joint ventures in Australia are unincorporated joint ventures and all references in this guide to joint ventures are to unincorporated joint ventures, except where otherwise indicated.

¹⁶ [26AV](#). Insurance

¹⁷ <https://www.fingerboardsproject.com.au/news/project-bulletins> May 2020

*Joint ventures are distinguished from partnerships for several reasons. Some of the key distinguishing characteristics of a typical mining joint venture are:*¹⁸

1. (a) participants hold the property of the joint venture as tenants-in-common;
2. (b) participants contribute money, property or skill to the joint venture, but their contributions are not necessarily equal;
3. (c) the liability of the participants to third parties for debts of the joint venture is several rather than joint and the extent of liability is usually determined by reference to their respective ownership shares of joint venture property;

Benefits of a Joint Venture

*There are some key advantages to establishing a joint venture, including sharing of resources and risk (including financial, market and product liability). Joint venture formation also allows foreign investment. There is a legislative and regulatory requirement that participation in a venture is prohibited unless the venture is joint for foreign investment. The Foreign Acquisitions and Takeovers Act 1975 (Cth), administered by the Foreign Investment Review Board ("FIRB"), is the principal source of such a requirement.*¹⁹

INSURING THE PARTNERS

Whether or not the JV entity itself is protected through its own insurance program, the partners need to be certain that their insurance policies provide coverage for losses arising from the JV. Even if the JV entity is separately insured, there are circumstances under which the JV's coverage may be inadequate or not apply at all.

Considerations of Joint Ventures from most insurance policies provide some protection for mergers, acquisitions or other consolidation. However, JVs are usually treated differently. For example, the 'Who is an Insured' section of a commercial general liability (CGL) policy specifically excludes joint ventures.²⁰

AUTHORITY TO ENTER LAND

Now that you know the above, how will you use that information to either refuse access to your land based on risks and implications to your business or give authority to access your land and negotiate considerable conditions. If an existing land access agreement between Kalbar and the landowner has been drafted in such a way as to deny the landowner full disclosure of risks and potential liabilities, the *Doctrine of Contra Proferentem*²¹ would be a landowner's lifeline and should be used against this company and its shareholders.

The following is Kalbar's 2017 *Access to Land*²² arrangement - **If the following has been breached you should contact the mining regulator.**

¹⁸ <http://www2.lexisnexis.com.au/pdf/Joint%20ventures.pdf> and [https://uk.practicallaw.thomsonreuters.com/0-616-8149?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/0-616-8149?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1)

¹⁹ <https://legalvision.com.au/legal-considerations-for-a-joint-venture/>

²⁰ <https://www.mynewmarkets.com/articles/103309/how-to-insure-joint-ventures>

²¹ Contra proferentem puts a greater onus on the person who drafts a contract when the parties have unequal bargaining power and access to knowledge. The doctrine rightfully places the cost of losses on the party who was in the best position to avoid the harm. This is generally the person who drafted the contract.

²² <https://www.fingerboardsproject.com.au/assets/files/2019/governance/access-to-land-procedure.pdf>

Procedure for Access to Land

This procedure has been prepared to ensure that Kalbar Resources takes a consistent, transparent and respectful approach to landowners in seeking to gain access to private land for exploration, field work or data collection purposes.

Kalbar recognises that landowners require reasonable notice and sufficient information about any request to access land, and are given the opportunity to seek further information and notify Kalbar of any requirements that must be met.

Procedure

1. Kalbar will provide 14 days' (10 working days') notice in writing of any request to gain access to private land.
2. Notice will be given by mail and, where possible, e-mail. Kalbar will also notify the landowner by telephone or e-mail to advise prior to the written request is being sent.
3. The notice will include:
 - The proposed date and time that access is requested
 - The purpose of accessing the land
 - The personnel who will be entering the land
 - The type of vehicles and equipment to be used
 - What the expected outcome of the site visit will be and when/how the information will be provided
4. An agreement form (attached) will be provided for signature by the landowner.
5. Landowners will be invited to respond with any requirements they may have as conditions of access. Kalbar will confirm its agreement to any conditions, either in writing or by e-mail.
6. If the landowner agrees to allow access, a reminder will be provided by e-mail or telephone 24-48 hours prior to the time of proposed access.
7. Kalbar, its staff and contractors will adhere to any agreed conditions of access.

Complaints

Kalbar will:

- (a) Follow up all landholder complaints within 24 hours and ensure resolution in accordance with the complaints procedure.
- (b) Ensure all relevant communication with landholders is recorded in the stakeholder database.

ATTENTION #4 & 5 Do not sign an agreement until you first set the conditions based on following guidelines and after consultation with your bank manager, lawyer, insurance operators, etc. If your lawyer states that there is nothing you can do, get a BETTER lawyer. Report bullying and deceitful behaviour by mining agents in writing to the licence proponent and mining regulator.

WHAT YOU SHOULD KNOW BEFORE YOU SIGN A LAND ACCESS CONTRACT

Banks should be involved as stakeholders if a mortgage is held over the 'affected land' so as not to breach binding contractual agreements. Similarly, the landholder should source relevant information from their personal insurance operators in consideration of obligations and potential new coverage complications.

MORTGAGE - TERMS & CONDITIONS

Under a person's mortgage contract agreement, it is incumbent upon the mortgagee to contact the bank when they may be in default of their mortgage terms & conditions,²³

The following are individual cost burdens that can impact a landowner.

Wealth Sacrifice	Direct Costs	Cumulative Cost	Exposure
Real Estate	Human Health	Property Insurance	Litigation
Debt to Equity	Medical Costs	Health Insurance	Product Liability
Compound Capital Gains Loss	Animal Health	Life Insurance	Service Liability
Environmental Stigma	Veterinarian Costs	Income Protection Insurance	Employer / Employee
Commercial Standing	Impaired Income	Livestock Insurance	Legal Responsibilities
	Reputation	Vehicle Insurance	Contamination Liability
	Contravention Existing License	Business Insurance	
	Contravention Mortgage/ Business		
Exploitation	Discrimination	Priced for Risk	Healthy Lifestyle Choice?

Is there a risk that:

- loan paperwork could be recalled if property owners allow mining on their land essentially creating a covenant, though not visible on the title, contractually binding all subsequent heirs and successors in Title?
- the marketability of the property is compromised and unable to attract appropriate insurance coverage?
- the storage of hazardous materials on a residential property could technically be in default of mortgage contracts?

Disclosures should state plainly that property covered by a License might violate the terms of a current mortgage or make it impossible to secure a mortgage, refinance or secure insurance on the property in the future.

- It is important that the landowner press for a contract which allocates responsibility for managing the risk and any adverse outcome onto the licensee operator.
- Landowners should know upfront if discharge of wastewater to land would impact their business requirements.
- Buffer and separation distances should be clearly outlined to ensure exposure risks from chemicals, toxic gas, radioactive material, accidents, and spills are reduced.

²³ <https://www.ubank.com.au/content/dam/ubank/documents/uhomeloan-terms-conditions.pdf> p49

For these reasons, it is important that any contractual agreement allocates responsibility for managing the risk and any adverse outcome onto the licensee and/or operator as a single entity.

COMPANY RISK & CODE OF CONDUCT DISCLOSURES

Landowners are going in blind for contractual agreements in exploration stages without any real understanding of the risks and liabilities from operations and to any protections from company liability. If companies must prepare hazards and risks declaration to shareholders to protect their investments, then the same rights should be afforded to the landowner prior to the signing of a land access agreement to ensure transparency. The landowner is not made aware of the full risk disclosures, the work plan, and the potential timeframe that mining could take or that the landowner is to assume responsibility for all leftover infrastructures after signing off on rehabilitation. But at their own cost they may access advice or the work plan for a prescribed fee. If the workplan is to inform compliance and enforcement functions, it should be incumbent on the Minister to ensure that the landowner are aware of full risk disclosures to enable a landowner to sign access agreements knowing legal and liability implications for the future and that the workplan be automatically supplied to all affected landholders?

RISKS TO LANDOWNERS NOT KNOWN AND OFTEN NOT FORESEEABLE

The main disadvantage to landowners is in the creation of new risks of environmental harm created by any mining operations. It is clear that disturbance of soil and pasture will occur and that varying impacts related to contamination will also occur as can happen with any mining operations, which is why the term 'minimising the impacts' is found throughout all government documentation in extracting a resource.

CURRENTLY, NO PRESUMPTIVE LIABILITY EXISTS

If, in the event, an incident occurs related to or the result of works, under the current legislation the licensee is only liable when an event is obvious or reported; that is, a reportable incident.²⁴

If an incident goes under the radar there is no point of entry, date or incident record that can prove that the licensee is liable and therefore no proof of incident event, assessment, or detailing type of contamination.

*(2) A party who applies to the Tribunal in respect of a claim or refers a claim to the Court under subsection (1) is only entitled to have that claim determined by the Tribunal or the Court (as the case requires) if the Tribunal or the Court is satisfied, after **considering evidence produced to it**, that the party has attempted to settle the claim by conciliation but has not been able to do so because the other party has refused to negotiate a settlement or because both parties are unable to agree.²⁵*

²⁴ http://classic.austlii.edu.au/au/legis/vic/consol_act/mrda1990432/s41ac.html

²⁵ http://classic.austlii.edu.au/au/legis/vic/consol_act/mrda1990432/s88.html

Additionally, potential for contamination relates to what are real or perceived impacts. In Victoria the issue has always been that the landowner has to prove that an incident and impact has occurred; however, it should be that the licensee has to prove that they did not cause the incident and to remunerate as instructed. Or the onus is on the landholder to prove that the proponent was deliberately negligent and caused the incident – very costly and high probability of failure.

If contamination is obvious, state acts are applicable. If contamination or other incidents cannot be proved, no insurance company will compensate.

There is no **Industry Fund** that has been established to cover the costs of the remediation of a triggered event in the event the Holder of an Authority or Licensee or entities engaged by them become insolvent, underinsured or engaged in legal proceedings with their respective insurer due to an insurance claim.

RETENTION LICENCE

On the granting of the first retention licence the landowner would have no idea when mining might occur, how much land they would need, how long they would be there and what the impacts would be. Try saying that to a bank manager when seeking refinancing because on Government granting a retention licence they have instantly devalued your land. A RL becomes a barrier to agricultural development, small business confidence, transfer of land and community renewal.

What would this mean to your local council, their forward planning and budget forecasts?

Have you got the right to seek reduced rates on reduced devaluations?

A retention licence should be part of a Section 32.

SECTION 32

In regard to Retention Licences, the area of vendor disclosure now comes onto play. It is now incumbent on the government to ensure that potential purchasers are not unduly impacted from the correct description [access authority/caveat] on the title of land that is the subject of a sale.

- **Risk** – Purchase of land that may, in the future, prevent purchaser from using the land from original intention.
- **For many farmers, the land is their superannuation.** If they cannot sell their land for what it should be worth prior to mining, how will the Government reconcile that with socio-economic support in rural communities?
- How will the government address this anomaly of vendor disclosure to ensure the description of the land use is an appropriate level to warn prospective purchasers that they should make land use inquiries that may affect how the purchaser can use the land in total for the future and the consequent value of that land?
- **How will Government address the problems where legal responsibility of a company is forfeited when they choose or become bankrupt?**

POTENTIAL FOR ACID SULPHATE SOILS

As most mineral sands deposits are found in unconsolidated fossil shorelines several hundreds of metres to tens of kilometres and occasionally hundreds of kilometres inland from the present coastline, *the potential for acid sulphates soils*²⁶ to exist undisturbed in the subsurface is probable.

The priority for Kalbar is to determine and accurately identify the soil chemistry in its current undisturbed state for the Fingerboards Mineral Sands project.²⁷ The mine site is located on the floodplains of the heritage listed Mitchell River²⁸, fed by many tributaries upstream and flowing downstream into the Gippsland Lakes. Nearby to the mine site is a significant vegetable growing industry and productive farmland.

LOCAL VEGETABLE GROWERS NOT PROTECTED

Coffey Services Australia²⁹ (engaged by Kalbar for specialist technical studies³⁰) stated at a community meeting,

*“if vegetable crops are contaminated, it will be up to the vegetable growers to ‘sue’ the miner.”*³¹

See [SECT 85 Off-Site Compensation](#).

With 24/7 operations and known dispersal of dust from mineral sands mines to at least 7km from the source concerned vegie growers³² note it is probable that local growers will suffer from rejected crops due to dust contamination which could also contain radioactive particles.

NATIONAL VENDOR DECLARATION (NVD) & INSURANCE LIABILITY ON EXPORT OF LIVESTOCK

Lawyer Bill Loughnan, partner at Thynne and Macartney has been quoted,³³

“One of the most important issues we say as lawyers acting for rural landholders is if you are going to have a Conduct and Compensation Agreement, you need to have indemnity.

“If someone is coming on your land to do something and something goes wrong, it’s effectively their problem.”

The NVD is underpinned by Livestock Production Assurance (LPA). The NVD is used to identify the origins of stock and obtain declarations from producers about a range of issues relating

²⁶ http://vro.agriculture.vic.gov.au/dpi/vro/vrosite.nsf/pages/soil_acid_sulfate_soils

²⁷ <https://www.fingerboardsproject.com.au/>

²⁸ [https://en.wikipedia.org/wiki/Mitchell_River_\(Victoria\)](https://en.wikipedia.org/wiki/Mitchell_River_(Victoria))

²⁹ https://www.isca.org.au/coffey_services_australia_pty_ltd

³⁰ <https://www.fingerboardsproject.com.au/assets/files/2019/presentations/SEIA-Presentation-for-Website.pdf>

³¹ At the same meeting the Coffey representative stated that if environmental damage was thought to have resulted from mining activities, it would be up to the EPA to prove the link between mining operations and damage.

³² <https://www.abc.net.au/news/rural/2014-12-17/gippsland-farmers-dubious-about-co-existence-with-mining-project/5972546>

³³ <https://www.queenslandcountrylife.com.au/story/3578060/mla-hits-back-on-csg/>

to animal treatments, feedstuffs and the environment which are designed to ensure consumer interests are protected.³⁴

Any chemical exposure is relevant – livestock producers are responsible for undertaking a risk assessment to ensure they are aware of any potential areas of contamination and take appropriate management steps to avoid the risks. If a contamination incident occurs the mining regulator should be made aware and asked to take a water or soil sample. If there is an issue of residue concern, the mining regulator should then pass it on to State agriculture department for decision on any steps needed to manage it. This may include advice on what to disclose on the NVD. It is a Livestock Production Assurance³⁵ (LPA) requirement to have a property risk assessment and, if circumstances change, it is the producer's responsibility to update the property risk assessment and exclude stock from risk areas if necessary. Producers should seek independent legal advice if they wish to pursue damages for any contamination.

UNDERSTANDING THE MORTGAGE CONDITIONS

- Has the Land been devalued via “works” which includes excavation and earth works, demolition and construction works?
- Is your ability to use, have interest in the property and your capacity and financial positions as originally intended under your Secured Agreement been affected?

The following mortgage conditions³⁶ are consistent for all Australian Loan Contract Terms and Conditions.

3.2 Land not subject to any other rights

You promise Us that:

- the Property is not subject to any right under any:
 - lease, licence or tenancy,
 - adverse possession claim,
 - public or private right of way or easement, or
 - mortgage, charge or other security,
 - no part of the Property is reserved for the purpose of a roadway or road-widening or for the purpose of existing or proposed public open space or public purposes,

3.5 Contamination of the Property

You promise Us that, to the best of Your knowledge and belief, at the time You enter the Mortgage the Property is free from pollutants and is not contaminated.

You must inform Us as soon as reasonably practicable if You have reason to believe that the Property is polluted or contaminated.

5 Obligations Regarding The Land

5.1 Sell or deal with the Property

You must not, without our prior written consent:

- sell or transfer the Property,
- lease or allow a surrender or variation of any lease of the Property,
- give any mortgage, charge or other security over the Property,

³⁴ <http://agriculture.vic.gov.au/agriculture/livestock/national-livestock-identification-system/national-vendor-declarations>

³⁵ <https://www.integritysystems.com.au/on-farm-assurance/livestock-product-assurance/>

³⁶ <https://www.ubank.com.au/content/dam/ubank/documents/uhomeloan-terms-conditions.pdf>

- create, vary or terminate any easement, covenant, licence or other right affecting the Property.

5.2 Permit charges on the Property

You must not, without our prior written consent, allow any charge or liability to be imposed on the Property.

5.5 Structural changes

You must not demolish or make structural alterations to the Improvements without our prior written consent.

You must not do or permit any thing that reduces the value of the Property.

5.10 Protect the Property

You must:

- keep the Property in good condition and maintain its value and Your and our respective interests in the Property, and
- if the Property is or becomes contaminated remove any pollutant and clean up the contamination promptly.

5.11 Information

You must promptly:

- give Us any information about the Property or anything happening on or to it that We reasonably request,
- notify Us in writing if the Property becomes contaminated or if the Improvements become defective or seriously damaged, and
- give Us any notice or order (other than usual rate notices or land tax notices) affecting the Property on becoming aware thereof.

5.14 Caveats

You must do everything necessary to remove any caveat placed on the title to the Property without our consent.

6 Insurance

6.1 Maintain insurance

You must maintain insurance over the Property, including the Improvements, against loss or damage by fire, storm and other usual risks. The insurance must be for the full reinstatement value of the Property, including Improvements. You must also maintain insurance against public liability risk and any other risk We reasonably require.

6.3 Keep insurance valid



Simpsons Gully

In Year 3 the road will be diverted, and a sediment capture dam is to be built in this gully system.