

Package 3 - Explanatory Document – Miscellaneous

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1. Delegations

Delegations as amended by the Statutes Amendment (Mineral Resources) Act 2019

The *Statutes Amendment (Mineral Resources) Act 2019* creates various statutory powers that are vested in a person such as the Minister, the Director of Mines, the Treasurer, the Mining Registrar and an authorised officer. When an Act vests power in a person, that person is generally required to exercise the power personally. However, the person in which Parliament directly vests a power can designate another person to exercise that power where there is an express power to delegate or an implied power to authorise. This paper will not explore implied powers to authorise.

The *Statutes Amendment (Mineral Resources) Act 2019* provides a statutory procedure for the designation or appointment of a person who may exercise power.

- **Section 12** includes an express power of delegation for the Minister, Director of Mines and Treasurer.
- **Section 13** includes an express power to appoint a Mining Registrar and mining registrars and an express power of delegation of the Mining Registrars power to mining registrars.
- **Section 14** includes an express power to appoint a person as an authorised officer, which cannot be delegated.

There are no sections or regulations that cannot be delegated as there is no express exception to the delegation powers.

Delegations must be set out in an instrument of delegation. An instrument of delegation does not have to be exercised in favour of a nominated individual but may be exercised by reference to a person from time to time holding a specified office or position, even if the office or position does not come into existence until after the delegation is given, provided that the delegate can be identified with sufficient certainty. A delegation can be made absolutely or on conditions. The power to revoke or change a delegation is exercised in the same manner as the power to make the delegation. The person in whom a power is vested may, under an express power of delegation, subdelegate part of that power.

The person to whom a power is delegated must exercise the delegated power by applying their own discretion and the person to whom power is delegated acts in their own legal capacity, not as an agent for the delegator. As a delegate literally acts in their own name, a delegate signs documents in their own name as a delegate of the Minister (e.g. Pru Freeman, Deputy Executive Director as the delegate for the Minister for Energy and Mining).

The delegator can still exercise a power that has been delegated.

The Minister may delegate any power or function vested in or conferred on the Minister under the Mining Act or Regulations, or under any other Act prescribed by the Regulations. This includes any power or functions vested in or conferred on the Minister under other statutory instruments such as Regulations (s. 14AB of Acts Interpretations Act 1915).

Regulation 7 of the draft Mining Regulations prescribe the following other Acts to which the Minister may delegate powers or functions:

- (a) the *Aboriginal Lands Trust Act 2013*;
- (b) the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*;
- (c) the *Landscape South Australia Act 2019*;
- (d) the *Maralinga Tjarutja Land Rights Act 1984*;

- (e) the *National Parks and Wildlife Act 1972*;
- (f) the *Native Vegetation Act 1991*;
- (g) the *Offshore Minerals Act 2000*;
- (h) the *Opal Mining Act 1995*;
- (i) the *Planning, Development and Infrastructure Act 2016*;
- (j) the *Roxby Downs (Indenture Ratification) Act 1982*.

2. Special Mining Enterprise

Special Mining Enterprise as amended by the Statutes Amendment (Mineral Resources) Act 2019

The Mining Act allows for the grant of special mining enterprises, which are mining enterprises of major significance to the economy of the State. Special mining enterprises can provide greater security and flexibility of tenure for operators. The only SME that has ever been established in South Australia was for the former Penrice soda ash business: a significant industrial chemical business comprised of the Dry Creek salt fields, the Angaston limestone quarry, and the Osborne soda ash plant. There are no other special mining enterprises in the State.

Two mining operations within South Australia also operate under an indenture agreement. The two indentures that permit mining operations in South Australia: the *Roxby Downs (Indenture Ratification Act) 1982* (Olympic Dam) and the *Whyalla Steel Works Act 1958* (which authorises iron ore mining to supply the steelworks).

The object of Part 8A is to facilitate the establishment, development or expansion of mining enterprises of major significance to the economy of this State by allowing greater security and flexibility of tenure.

An applicant may qualify as a special mining enterprise if:

- a) the Governor is satisfied, after taking into account the advice of the Minister, that the enterprise is of major significance to the economy of this State; and
- b) the Minister and the applicant have entered into an agreement, ratified by the Governor, for the exercise of powers and the grant of appropriate mining tenements in relation to the enterprise.

The Act does not specify criteria for determining when an enterprise is of 'major significance' to the State's economy. In the absence of special criteria, the words have their normal dictionary meanings. Under section 56B, the onus lies with the applicant to establish to the Governor's satisfaction that the enterprise does or will have the requisite level of importance to the economy. Cabinet will make the ultimate decision.

The minimum requirements for special mining enterprises have been modernised to increase transparency. The assessment of a Special Mining Enterprise application will be assessed with the similar rigour as a mining lease application and must include public consultation, relevant referrals to the Minister for Sustainability, Environment and Conservation and the Minister for Water and the River Murray and consideration of Aboriginal heritage and the environment.

An application of a mining enterprise can be made in relation to an existing mineral tenement(s) or for the purpose of obtaining mineral tenement(s).

An application for a mining enterprise includes a scoping/concept phase and an application phase. In the concept phase, the applicant must notify the Director of Mines of its intention to apply for a Special Mining Enterprise. The intention of this section is to allow the Director of Mines to obtain information on the proposed Special Mining Enterprise and begin preparing a project-specific determination that sets out the fit-for-purpose application process, which the applicant is expected to meet, that considers all of the relevant environmental, social and economic matters.

The engagement with the Director must be made in a manner and form determined by the Director, and an application must incorporate or be accompanied by such information prescribed by regulations, and a prescribed fee must also be lodged. The Director may require the applicant to provide additional information and undertake consultation with the public as required by the guidelines issued by the Minister or specified by the Director. At the close of the consultation, the Director may allow the applicant to proceed to the formal Special Mining Enterprise application process or advise that the matter is not suitable for further consideration.

Regulation 66 of the draft Mining Regulations prescribe that for the purposes of section concept phases, the following information must accompany an application:

- (a) information demonstrating that the enterprise is of major significance to the economy of the State;
- (b) a statement outlining the principal mineral or minerals that the proponent is seeking to recover by undertaking the special mining enterprise and a general description of the operations that would be carried out for the purposes of mining enterprise;
- (c) maps and plans relating to the place where the mining enterprise is proposed to be undertaken;
- (d) an outline of the environmental and social impacts of the enterprise and of steps proposed to be undertaken to address or manage those impacts;
- (e) a statement identifying any exemptions or modifications with respect to the provisions of the Act that the proponent has under consideration in connection with the operation of section 56C of the Act;
- (f) such other information as may be determined by the Minister for the purposes of this regulation.

If the applicant satisfies the Director during the concept phase, the applicant can proceed to the application phase, which is assessed by the Minister.

An application must be made in the form approved by the Minister and must be accompanied by a written proposal containing full particulars of the mining enterprise, including—

- a) a sufficient delineation of the land in accordance with section 56E; and
- b) a statement of nature, extent and proposed scheduling of the mining operations and related or ancillary operations or works that the applicant carries out or proposes to carry out under the enterprise; and
- c) an economic analysis of the enterprise, including financial projections and details of the financial resources available to the applicant for the purposes of the enterprise; and
- d) an assessment of the benefits to the State derived or expected to be derived from the enterprise; and
- e) an assessment of the expected social and environmental effects of the enterprise; and
- f) a statement of the measures that the applicant considers appropriate to protect the environment, and to remedy the environmental damage that may result on account of operations or activities carried out for the purposes of the enterprise; and
- g) a statement of the measures that the applicant considers appropriate for the protection of any Aboriginal sites or objects within the meaning of the Aboriginal Heritage Act 1988 that may be affected by the enterprise; and
- h) any other information required by the regulations; and
- i) must be accompanied by the prescribed fee.

Regulation 67 of the draft Mining Regulations prescribes that an application must be accompanied by:

- (1) a statement providing, addressing or outlining any additional information, requirement or action specified by the Director as part of the concept phase;

- (2) a statement outlining the results of any consultation undertaken in connection with the application, including information about—
 - a. the persons consulted; and
 - b. the issues of concern raised by the persons consulted; and
 - c. the steps (if any) taken or proposed to be taken by the proponent to address those concerns;
- (3) a draft program that—
 - a. sets out the environmental outcomes that are expected to occur as a result of the mining operations and related or ancillary operations or works that are proposed to be carried out under the enterprise (including after taking into account any rehabilitation proposed by the proponent and other steps to manage, limit or remedy any adverse environmental impacts); and
 - b. sets out a statement of the criteria to be adopted to measure those environmental outcomes, in a form determined by the Minister; and
 - c. incorporates information about the ability of the proponent to achieve the environmental and social outcomes set out in the program; and
 - d. addresses any other matter determined by the Minister;
 - e. such other information as may be determined by the Minister for the purposes of this regulation.

Where an application relates to tenement(s) that may be subsequently granted under part 8A, an application for a mining enterprise will be taken to be an application for the relevant tenement.

The Minister has absolute discretion to advise the applicant by a notice that the application has been refused, without needing to consult or undertake any other step.

A special mining enterprise allows the Minister to exempt or modify the Act. Section 56C sets out the provisions of the Act that can't be exempted or modified. These include provisions relating to exempt land, waiver of exemption (to exempt land), compensation, native title land, programs for environment protection and rehabilitation (PEPR), or any other provision outlined in the regulations.

3. Amalgamation of area

Amalgamation of area as amended by the Statutes Amendment (Mineral Resources) Act 2019

The *Statutes Amendment (Mineral Resources) Act 2019* introduces a new power to amalgamate two or more mineral tenements (on application from the tenement holder or initiated by the Minister with the agreement of the tenement holder). The amalgamation of tenements is not a new grant of a lease or licence under the Mining Act; however, the terms and conditions and duration of the lease or licence may change to facilitate the amalgamation.

The Minister's power to amalgamate tenements applies to all mineral tenements, including private mines.

The powers to amalgamate is enlivened by an application from the tenement holder, or by the Minister, with the agreement of the tenement holder. While there is no head power to prescribe the content of an application in the Regulations or to create a Ministerial Determination, policy can dictate what factors are relevant when assessing an application for amalgamation.

Where the Minister approves an application to amalgamate or initiates an amalgamation, the tenements will be amalgamated into one tenement, and the ownership of that tenement will be set according to any agreement between those parties (if multiple ownership is relevant). The overall

interpretation of the section demonstrates that the amalgamated tenement will not be a grant of a new tenement under the Mining Act. However, this may not be the case for other legislation such as the *Native Title 1993 (Cth)*.

The terms and condition of the amalgamated tenement will be set by the Minister after consulting with the tenement holder.

The term of the amalgamated tenement will be set by the Minister after taking into account such other interests that may be relevant in the circumstances. It is anticipated that the term will not be longer than the youngest tenement or shorter than the older tenement; however, it will depend on the circumstances. The subsection has been left broad and open to agreement between the Minister and the tenement holder, as the term of the amalgamated tenement may trigger a tax event or native title issues.

The Minister may make other such determinations as the Minister think appropriate. For example, what should happen with the dealings registered on the Mining Register, whether a new PEPR may be required, etc.

Regulation 51 of the draft Mining Regulations requires the Minister to provide to the tenement holder (or tenement holders) a copy of the proposed terms and conditions of the tenement for the purposes of consultation.

4. Surrender

Surrender as amended by the Statutes Amendment (Mineral Resources) Act 2019

A tenement holder may apply to the Minister to surrender all or part of a mineral tenement (including a private mine). An application must be made in a manner and form determined by the Minister and must be accompanied by such information as may be prescribed in the regulations. The manner and form of a surrender application will be published in the Gazette in the form of a Ministerial Determination. The Minister may publish multiple ministerial determinations, and these may apply to all tenements or a class of tenements, or the Minister may publish a project-specific determination necessary for the surrender of a particular tenement.

A tenement will be surrendered when an instrument is registered on the Mining Register.

Regulation 52 of the draft Mining Regulations prescribes that an application for a surrender must be accompanied by:

- (a) a statement, accompanied by supporting evidence—
 - (i) that mine completion outcomes required under a program under Part 10A of the Act, or all mine completion objectives required under a mine operations plan under Part 11B of the Act, have been achieved (or if an outcome or objective has not be achieved, the reason for this situation and information about what the tenement holder has done, or proposes to do, in the circumstances); and
 - (ii) that all rehabilitation required to be undertaken has been completed or is in place;
- (b) in the case of a surrender of a part of the area of the mineral tenement—a map and description of the relevant areas, showing the area to be surrendered and the area to remain, that comply with the requirements of section 56E of the Act;
- (c) the final compliance report, final royalty report and, if relevant, a final technical exploration report, required under these regulations;
- (d) the following declarations, in the form of a statutory declaration:

- (i) a declaration that authorised operations have ceased;
 - (ii) a declaration that there are no outstanding liabilities under the Act or these regulations;
 - (iii) a declaration that all fees, royalties, rents or penalties under the Act or these regulations have been paid;
 - (iv) a declaration that outlines any legal proceedings in respect of the tenement that involve the tenement holder as a party to those proceedings;
 - (v) if relevant, a declaration that the tenement holder has a management plan in place for the management or transfer of any outstanding matters or liabilities;
 - (vi) in the case of a private mine where the person carrying out mining operations is not the proprietor of the private mine—a declaration that the person who has been carrying out the operations has consulted with the proprietor of the mine;
- (e) an outline of the consultation undertaken by the tenement holder with the owner of the land about surrendering the mineral tenement and any rehabilitation or other work or activities to be carried out in connection with the surrender, including the issues raised by the owner and how those issues have been, or will be, addressed.

5. Assessment Reports

Assessment report as amended by the Statutes Amendment (Mineral Resources) Act 2019

The Minister must prepare assessment reports on various matters, which demonstrates accountability for relevant decisions, promotes transparency and aligns with requirements under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* bilateral.

The Minister must prepare a report (an assessment report) that sets out or includes the Minister's assessment in respect of the following:

- (a) an application for a mineral tenement under this Act;
- (b) the ranking of applications for exploration licences in relation to an exploration release area;
- (c) an application for retention status under section 33B;
- (d) an application to amalgamate the areas of 2 or more mineral tenements under Division 6;
- (e) an application for a change in operations under Division 7;
- (f) a decision to cancel, suspend or surrender a mineral tenement under Division 8;
- (g) a decision to exempt a tenement holder from an obligation to comply with a term or condition of a mineral tenement, or from a requirement of this Act;
- (h) any other matter prescribed by the regulations.

The Minister must, in preparing a report:

- a) set out or include information about any submission that was made to the Minister in connection with the relevant decision; and
- b) set out or include information or material provided by an applicant or tenement holder in connection with the decision (including any response provided to the Minister in relation to any submission made to the Minister); and
- c) include any other information or material that the Minister thinks fit.

The Minister may publish an assessment report in such manner, and to such extent, as the Minister thinks fit. No liability attaches to the Minister in connection with a decision by the Minister to include any particular matter, information or material in an assessment report or a decision by the Minister to publish an assessment report.

6. Personal use

Personal use as amended by the Statutes Amendment (Mineral Resources) Act 2019

Section 75 of the *Statutes Amendment (Mineral Resources) Act 2019* sets out specific rights connected with the use of extractive minerals. In particular, certain owners of land have veto rights over extractive minerals, and all owners of land have rights to use extractive minerals for their own personal use.

Firstly, no claim may be established or lease granted in respect of extractive minerals on land granted in fee simple or land in respect of which native title confers a right to exclusive possession of land, except with the written consent of that owner of the land. The right is effectively a veto over mining operations for extractive minerals under the Mining Act. Written consent provided by an owner of land to consent to establish a mineral claim or grant a lease is binding on successive owners of land if the owner sells their property.

The veto right does not apply if the Director of Mines authorises the recovery and use of extractive minerals produced as a result of operations or where extractive minerals are required for the pursuance of the mining operations. The veto right also does not apply where the extractive minerals are recovered under an Act other than the Mining Act.

Extractive minerals are used under 3 authorisations:

1. Authorised under section 75 and without a lease as personal use by an owner of land;
2. Authorised under a mineral lease (for extractive minerals only, or both minerals or extractive minerals); and
3. Authorised by some other Act such as the Local Government Act.

As per section 75(2), no tenement is required if a landowner or a related body corporate uses the extractive minerals for their own personal use. This is often farmers and plantation owners, to build dams, tracks and access roads within their property. Personal use requires the owner to use those extractive minerals on their land and does not include the disposal of those extractive minerals to anyone other than to a related body corporate (for their use and not for disposal). 'Disposal' means transferring to the care or possession of another or parting with, alienating, or giving up of the extractive minerals. This would include gifting, bartering, transferring, exchanging, or affixing to another person's property. The intent of this is that a landowner can use extractive minerals from their land but as soon as they dispose of those extractive minerals to another person, that activity will be illegal mining and a tenement will be required, and a royalty will be payable. The reason disposal includes a related body corporate is to ensure that farmers who have various holdings under different entities can use extractives on their properties.

If the owner of land and the holder of the mineral tenement are the same person or are a related body corporate, personal use cannot apply. The holder of the mineral tenement would need an extractive mineral lease or be authorised to use extractive minerals under the conditions of their mining lease. Therefore, a tenement holder cannot claim to be using the extractive minerals for personal use on their land to avoid the payment of royalty.

Personal use does not apply to local councils. By virtue of section 208 of the *Local Government Act 1999*, all public roads in the area of a council are vested in the council in fee simple under the *Real*

Property Act 1886. Public roads are also owned by the Minister of Local Government or the Crown under the *Highways Act 1926*. Because of section 208, a local council maintaining roads in their local area could fall within the scope of personal use; therefore, they have been expressly excluded. If a local council wants to extract extractive minerals from council-owned land and use those minerals to maintain roads, they must undertake that activity under section 294 of the *Local Government Act 1999*. Local councils no longer pay royalty for extractive mineral recovered under the Local Government Act as a result of budget measures in the 2018/2019 Budget.

Practically speaking, the scale of personal use operation is not significant enough to attract the regulation and control of the Mining Act. However, where the operations are of a nature or scale that ought to be regulated by the Mining Act, the Minister may determine that the operations ought to be the subject of a mineral tenement and require the owner of land to establish a mineral claim within the period required by the Minister.

The Minister may also require the owner of land to establish a mineral claim if the Minister believes the owner of land is undertaking actions to attempt to avoid the requirements of the Mining Act. For example, where the freehold owner enters into a contractual arrangement with another person to bring that person within the definition of an 'owner of land' to allow that person to use extractive minerals which would otherwise be required to purchase the minerals in an open market.

The Minister may also require the owner of land to establish a mineral claim on any other grounds determined by the Minister to be a reasonable basis.

While the Minister's discretion to bring personal use operations within the regulation of the Mining Act is broad, this discretion will only be exercised where the nature and scale of the operations are undermining the intent of the Mining Act or are affecting the equity of purchasing extractive minerals on the open market.

7. Exemptions

Exemptions as amended by the Statutes Amendment (Mineral Resources) Act 2019

Section 79 of the Mining Act allows the Minister to exempt the holder of a mineral tenement from an obligation to comply with either a condition of their lease or licence or compliance with an obligation under the Act of Regulations. Section 79 cannot be exercised in relation to any obligation under Part 9B of the Act or to discriminate against the holders of native title. This section does not operate to exempt the Minister, Director of Mines, or the Mining Registrar of any obligation exercisable under this Act, only the tenement holder.

Where an exemption is granted, the beneficiary of the exemption will not be exposed to the consequences that would follow, in accordance with the terms of the Act, from a failure to comply with an obligation embraced by the exemption.

The Minister may grant an exemption with retrospective effect where there would be no conceivable harm that would be caused either to the administration or the policy objectives of the Act or to any third party.

Note that decisions to grant an exemption will require the Minister to publish an assessment report.

8. Overlapping tenements

Overlapping tenements as amended by the Statutes Amendment (Mineral Resources) Act 2019

Section 80 prohibits land from being the subject of simultaneous tenements unless certain conditions are met. Where land is already the subject of a mining tenement, a further tenement may be granted subject to this section and/or with the approval of the holder of that tenement, or the approval of the Warden's Court, be granted in respect of any portion of the land comprised in the prior tenement, and the rights conferred by the respective tenements shall then be modified according to the agreement of the parties or the order of the Warden's Court as the case may require. Therefore, simultaneous tenements may occur but only in a way that ensures that they can both co-exist with some modification of the respective rights of each tenement holder. This is required because tenements such as mineral claims (s. 25(1)), mining leases (s.35(1)(a), and retention leases (s. 43(2)(a) grant the holder *exclusive rights*. The holder of the prior tenement must consent to this modification of their rights necessary to allow the co-existence of the two tenements. Therefore, the consent must indicate the way in which the respective rights of each tenement will be modified.

Where the consent of the prior tenement holder cannot be obtained, it is necessary to obtain the approval of the Warden's Court. However, the Warden's Court cannot approve the grant of a subsequent tenement unless it is satisfied that the rights of the holder of the prior tenement will not be materially diminished by the grant of such approval.

This section has been updated by the *Statutes Amendment (Mineral Resources) Act 2019* to ensure the holder of a mineral claim does not establish another mineral claim prior to the expiry or lapse of that mineral claim to circumvent the prohibition on establishing another mineral claim under section 27 (s. 80(2a)).

Due to the repeal of Part 9A of the current Mining Act, this section has also been updated to require agreements that relate to an overlapping tenement with subsurface and surface strata must include rights relating to access to the subsurface stratum.

9. Deemed consent and agreements

Deemed consent and agreements as amended by the Statutes Amendment (Mineral Resources) Act 2019

Section 82 of the *Statutes Amendment (Mineral Resources) Act 2019* introduces a new section that states that in the event the tenement holder and the landowner are the same person or entity, any agreements or consent required under the Act are deemed to be complied with, and will bind subsequent owners of the land. This will remove the confusing practice of having to enter into agreements or obtaining consent from yourself.

Deemed consent and agreement is binding on successive owners of land.

Deemed consent does not apply where consent is required to establish a subsequent mineral claim under section 80(2a). Deemed consent and agreement does not apply in any circumstances prescribed by the Regulations.

Deemed consent or agreement will be reflected on the Mining Register.