

Package 3 – Explanatory Document – Operating Approvals

Mining Act	
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1. Operating Approval - Programs for Environment Protection and Rehabilitation

Programs for environment protection and rehabilitation as amended by the Statutes Amendment (Mineral Resources) Act 2019

An explorer or miner cannot commence exploration for, or production of, a mineral or extractive mineral in South Australia unless they have complied with the Act and have secured:

- a) A right over the minerals under a claim, lease or licence granted under the Act ('mining tenement');
- b) An operational approval, such as a Program for Environment Protection and Rehabilitation (**PEPR**), or a Mining Operations Plan (**MOP**) which authorises the specific exploration or production activities; and
- c) All land access rights required under the Mining Act.

Part 10A of the Act sets out the framework for PEPRs with its primary objective to must ensure that authorised operations that have (or potentially have) adverse environmental impacts are properly

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managed to reduce those impacts as far as reasonably practicable and eliminate, as far as reasonably practicable, risk of significant long term environmental harm. In achieving this objective, the Regulator must ensure that the holders of mineral tenements have an operating approval in the form of a PEPR. A PEPR must provide adequate information about the authorised operations that will be conducted under the tenements, and a PEPRs must ensure that land adversely affected by authorised operations is properly rehabilitated (s. 70A).

A person must not carry out any operations unless, or until, those operations comply with an approved PEPR. The offence for undertaking operations without an approved PEPR is a maximum penalty of \$250,000 (s. 70DC(1)).

A PEPR must be in a manner and form determined by the Minister and must:

1. specify the operations the tenement holder proposes to undertake (s. 70B(2)(a)),
2. set out the environmental outcomes (s. 70B(2)(b)(i)),
3. set out a statement of the criteria to be adopted to measure environmental outcomes (s. 70B(2)(ii) and r. 61(1)(c)) and to the extent that there is a high level of reliance on control strategies to reduce risk to the environment, a PEPR must set out criteria (leading indicator criteria) that will be used to give an early warning that a control strategy may be failing (r. 61(1)(d));
4. set out the strategies that the tenement holder propose to adopt to achieve the environmental outcomes (r. 61(1)(b)); and
5. include information about the ability of the tenement holder to achieve the environmental outcomes (s. 70B(2)(c)).

If a PEPR relates to operations to be carried out under an exploration licence or a mineral claim, a PEPR must:

1. include a description of the features of the natural environment that are expected to be affected by the proposed authorised operations (r. 61(1)(a)(i)); and
2. include a description of the environmental impacts that may reasonably be expected to occur (r. 61(1)(a)(ii)).

Any information or material provided in a PEPR must (r. 61(3))—

1. be balanced, objective and concise; and
2. state any limitations that apply, or should apply, to the use of information; and
3. identify any matter in relation to which there is a significant lack of information or a significant degree of uncertainty; and
4. so far as is relevant, identify the sensitivity to change of any assumption that has been made and any significant risks that may arise if an assumption is later found to be incorrect; and
5. be in a form determined by the Minister, be supported by such evidence as the Minister may determine, and comply with any requirement of the Minister relating to the amount or detail of information that must be provided.

Additional requirements to be set out in a PEPR may be required by a condition of the tenement or by the Regulations, and a PEPR must comply with any other requirements prescribed by the Regulations (s 70B(2) and (4a)). Regulation 61 of the draft Mining Regulations, as summarised above, proposes additional requirements to be set out in a PEPR. The terms and conditions of a lease or licence may set out additional requirements, and in the case of recent grants, the holders of mining leases may notice that their lease conditions require a PEPR to be consistent with the information set out in their environmental impact assessment. The applicant must furnish any additional information required by the Minister, within the period specified by the Minister (s. 70B(4b)).

Prior to submitting a PEPR to the Minister for assessment, the applicant must engage on the draft and demonstrate in the final version submitted to the Minister the people the applicant consulted, any

issues of concern raised by the persons and the steps (if any) taken or proposed to be taken to address those concerns (r. 62).

Submission of a PEPR must be accompanied by the prescribed fee.

A PEPR may apply to a single tenement or to a group of tenements within a particular area (s. 70B(3)).

Following the assessment of a PEPR, the Minister may approve, reject or require alteration to the PEPR after consultation with the tenement holder to ensure the PEPR complies with the requirements of section 70B(2). The Minister may also require additional information to be furnished to the Minister after the applicant has submitted a PEPR for assessment (s. 70B(4b)).

A tenement holder may seek review of a decision to require alterations or reject a PEPR in the ERD Court (s. 70B(6)).

While a person other than the tenement holder may submit a PEPR and be held to compliance, where the Minister requires alterations, the Minister must consult the tenement holder and the tenement holder has merit review rights to review a decision to reject or require alterations, not the applicant (where that person is different to the tenement holder). This distinction is important, as the tenement holder holds the ultimate responsibility under the Mining Act and is deemed to be liable for any non-compliance unless there is evidence to the contrary.

A PEPR approved by the Minister is subject to any conditions prescribed by the Regulations, or any such additional condition as the Minister thinks fit and specifies by notice to the tenement holder. The offence for failing to comply with a condition of a PEPR is a maximum penalty of \$250,000 (s. 70DC(2)).

The regulations may set out generic PEPRs that may be adopted for operations of a prescribed class. If a PEPR is adopted by virtue of section 70B(8), the tenement holder (or person acting on behalf of the tenement holder) may, subject to comply with any requirements prescribed by the Regulations, may rely on that PEPR rather than preparing a program. The Minister has the discretion to determine by notice that a PEPR may not be adopted in the circumstances (s. 70B(10)).

The Mining Regulations 2011 prescribes that a generic PEPR can be prepared for exploration operations and mining operations for extractive minerals. After the grant of an exploration licence (EL) or an extractive mineral lease (EML), a 'Generic PEPR' is intended to apply. A Ministerial Determination has been prepared for 'Low Impact Mineral Exploration in South Australia' which identifies the potential impacts, outcomes and measurement criteria that must be adopted by explorers when undertaking low impact exploration activities in South Australia. A Generic PEPR has not been prepared pursuant to regulation 66(2) for EMLs.

The holder of the EL can choose to adopt a Generic PEPR for the life of the tenement or for a 12-month term as set out in MD001. This Generic PEPR will apply to all exploration activities not requiring separate approval under the Act or conditions of the EL. A separate PEPR must be developed in accordance with MD013 and submitted for approval prior to conducting any exploration activities (including low impact) on Retention Leases (RLs), and Mineral Claims (MCs) or for exploration activities that do not fall within the scope of the Generic PEPR. Certain locations and sensitive environments where low impact exploration is taking place may also require separate approval above and beyond the Generic PEPR (such as parks and reserves). The Generic PEPR provides a list of activities that are covered as low impact mineral exploration and also a list of activities which are not covered. An approved PEPR or a Generic PEPR will continue for the term of the tenement (including renewals).

Regulation 63 of the draft Mining Regulations proposes that the Minister may prepare a generic PEPR in respect of operations carried out on an exploration licence, mineral claim, retention lease, mining lease and miscellaneous purpose licence and that PEPR must be published in the gazette. Where the Minister proposes that a generic PEPR is to apply, the Minister must prepare a ministerial determination setting out the PEPR requirements and publish this in the Gazette.

A PEPR may be developed and approved even though it relates to exempt land on the basis that the tenement holder will seek to gain access to land under a waiver and will not undertake operations in accordance with the approved PEPR over than land until access is obtained (s. 70B(11)).

The Minister may publish a program or part of a program in such a manner as the Minister thinks fit (s. 70DB).

A person who contravenes for fails to comply with a PEPR or a condition of a PEPR is guilty of an offence with a maximum penalty of \$250,000 (s. 70DC(5)).

2. PEPR Review

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

When a change to existing operations is required, the tenement holder will need to review the proposed change and determine if the change is:

- a) within or outside the scope of the PEPR approved under the Mining Act; and
- b) consistent or inconsistent with the terms and conditions of the tenement.

If the proposed change to approved operations is consistent with the terms and conditions of the tenement but requires a change to the PEPR, a 'PEPR review' must be undertaken. A PEPR review is a process under the Mining Act whereby the proponent reviews the PEPR to determine whether a change is required and if so, submits a revised PEPR to the Minister for approval.

Section 70C contains provisions under which a PEPR may or must be reviewed. A review can be initiated by the tenement holder, or a review *must* be conducted if:

- an application for a change of operation is made, and that change gives rise to an inconsistency with the PEPR;
- the Minister directs that a PEPR be review; or
- a review if required by the Regulations.

Failure to review a PEPR as required may result in a maximum penalty of \$250,000 (s.70DC(3)).

A review must be conducted in accordance with any requirements prescribed by the regulations within a period prescribed by the regulations and must comply with the requirements of section 70B(2).

Regulation 64(1) of the draft Mining Regulations proposes that a PEPR review must be completed and furnished to the Minister within 3 months after a direction of the Minister to review the program, or within such longer period approved by the Minister.

A revised PEPR for assessment by the Minister must be furnished in the manner prescribed by the Regulations and must be accompanied by the prescribed fee.

Prior to submitting a revised PEPR to the Minister for assessment, the applicant must engage on the revised draft PEPR and demonstrate in the final version submitted to the Minister the people the applicant consulted, any issues of concern raised by the persons and the steps (if any) taken or proposed to be taken to address those concerns (r. 62).

Following the assessment of a revised PEPR, the Minister may approve or require alteration to the PEPR after consultation with the tenement holder to ensure the PEPR complies with the requirements of section 70B(2). A tenement holder may seek review of a decision to require alterations of a PEPR in the ERD Court (s. 70C(6)).

On approving a revised PEPR, the Minister may add, vary or revoke a condition of a PEPR.

3. Public Consultation on a PEPR

Public consultation on a PEPR as amended by the Statutes Amendment (Mineral Resources) Act 2019

A tenement holder must consult on the preparation of their PEPR, however, there is no requirement under the current Mining Act to undertake public consultation. Section 70D of the Statutes Amendment (Mineral Resources) Act 2019 has been introduced to allow public consultation on PEPRs to take place if the proposed activity triggers the *Environment Protection and Biodiversity Conservation (EPBC) Act 1999* (the **EPBC Act**) and any assessment or approval bilateral agreement with the Commonwealth.

The bilateral agreement declared PEPRs for exploration activities on an exploration licence under Part 10A of the Act, and regulation 65(1) as a class of actions accredited under the EPBC Act and is an assessment approach corresponding to assessment by preliminary documentation. The process for assessing a PEPR under the Mining Act does not include any public consultation, and therefore, this assessment process does not meet the minimum requirements to corresponding to preliminary documentation under schedule 1 of the EPBC Regulations.

To ensure an exploration PEPR could correspond to preliminary documentation, the bilateral agreement included a requirement to release the draft exploration PEPR for public consultation for at least 14 days and an obligation on the explorer to prepare a response document, and a clause requiring the publication of an assessment report when assessing an action under the agreement.

No referral so far has triggered this class of action under the EPBC Act or the bilateral agreement.

Under section 77D of the unamended Mining Act and regulation 88 of the Mining Regulations, the Minister can only release an approved PEPR if the tenement holder consents to its release; the Minister releases it after consulting with the tenement holder, or the Minister makes a determination that it is in the public interest to release the PEPR. In an attempt to ensure consistency between the bilateral agreement and the Minister's power to release PEPRs, Ministerial Determination MD013 was updated on 17 June 2015. It was updated to include a declaration requiring a PEPR to specify whether the explorer consents to the public release of the approved PEPR, and where consent is not provided, the explorer is required to indicate, with reasons, which sections of the PEPR should not be released in the public interest. This, however, only related to approved PEPR's, not draft PEPR's. The foundation of the public consultation process on preliminary documentation under the EPBC Act is to provide the public with the opportunity to comment on the draft documentation and allows the explorer to address those comments, where applicable, by amending their draft documentation prior to final assessment.

Section 70D was introduced to address the inconsistency with the bilateral agreement and aligns with the public consultation process under section 56N.

Regulation 64(2) of the draft Mining Regulations clarifies that in determining whether or not to approve a revised program under section 70C of the Act and, if so, any change to the terms and conditions applying in relation to a program, the Minister must have regard to any submissions or response received under section 70D(2) or (3) of the Act.

4. Operating Approvals - MOPs

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

Under Part 11B of the Mining Act, a person must not carry out mining operations on a private mine without a 'mine operations plan' (**MOP**). Any ADPs on a private mine in place at the time under the *Mines and Works Inspection Act 1920* is deemed to be MOPs for the purposes of Part 11B. A MOP must be in a manner and form determined by the Director (r. 70(5)) and include objectives and criteria for measuring those objectives, the requirements prescribed in the Regulations and must be consistent with any relevant environment improvement programme or environment protection policy under the *Environment Protection Act 1993*.

Regulation 70 of the draft Mining Regulations provides for specific requirements for the content of the MOP. The MOP must:

- (a) include a statement outlining the operations to be carried out at the mine; and
- (b) include a description of the features of the natural environment that are expected to be affected by operations at the mine; and
- (c) include a description of the environmental impacts that may reasonably be expected to occur; and
- (d) set out the measures that are used, or to be used, to manage, limit or remedy those impacts; and
- (e) set out the environmental objectives that are expected to be achieved; and
- (f) set out a set of criteria proposed to be adopted to measure the environmental objectives to be achieved in relation to the mining operations to be carried out at the mine and when operations at the mine will no longer be undertaken, including details about—
 - i. what is to be measured and the form of the measurements that are to be used; and
 - ii. the locations where relevant measurements are to be taken, or how such locations are to be determined; and
 - iii. what is proposed to be taken to constitute the achievement of the relevant objectives (with consideration being given to any inherent errors of measurement); and
 - iv. the frequency of any measurement or monitoring; and
 - v. any background or control data that is to be used, or how any such data is to be acquired; and
- (g) without limiting paragraph (f), to the extent (if any) that there is a high level of reliance on control strategies to reduce risk to the environment—set out criteria (leading indicator criteria) that will be used to give an early warning that a control strategy may be failing; and
- (h) include a statement of the capabilities of the person's ability to achieve the environmental objectives that are expected to occur; and
- (i) if so determined by the Director in a particular case, include a description of the social impacts that may reasonably be expected to occur and the measures that are to be used to manage, limit or remedy those impacts (in the case of negative impacts), or to facilitate or ensure those impacts (in the case of positive impacts); and
- (j) include such other information as may be determined by the Director for the purposes of this regulation.

Any information or material provided for the purposes of a mine operations plan must—

- (a) be balanced, objective and concise; and
- (b) state any limitations that apply, or should apply, to the use of information; and

- (c) identify any matter in relation to which there is a significant lack of information or a significant degree of uncertainty; and
- (d) so far as is relevant, identify the sensitivity to change of any assumption that has been made and any significant risks that may arise if an assumption is later found to be incorrect; and
- (e) be in a form determined by the Director, be supported by such evidence as the Director may determine, and comply with any requirement of the Director relating to the amount or detail of information that must be provided.

A description of the environment for the purpose of MOP includes:

- (a) land, air, water (including both surface and underground water and sea water), organisms, ecosystems, native fauna and other features or elements of the natural environment; and
- (b) buildings, structures and other forms of infrastructure, and cultural artefacts; and
- (c) public health, safety or amenity.

MOP objectives are statements of the expected impact on the environment caused by the proposed mining operations after the implementation of mitigation and control measures. The objectives must be consistent with any relevant environment improvement program or environment protection policy under the *Environment Protection Act*. Clear and measurable criteria are required to measure the achievement of all objectives.

Prior to submitting a MOP to the Minister for assessment, the applicant must engage on the draft and demonstrate in the final version submitted to the Minister the people the applicant consulted, any issues of concern raised by the persons and the steps (if any) taken or proposed to be taken to address those concerns (r. 71).

Objectives and criteria set out in a MOP must be submitted and approved by the Director of Mines. The *Statutes Amendment (Budget Measures) Act 2019* introduced an assessment fee to accompany a MOP submission which commenced on 1 January 2020.

After assessing a draft set of the objectives and criteria, the Director of Mines may (s. 73G(5)):

- a) accept the draft of the objectives and criteria without alterations; or
- b) after consultation with the applicant, require alterations to the draft of the objectives and criteria.

If the applicant does not agree with the Director of Mines' determination, they have the right to appeal to the Warden's Court (s. 73G(6)). The Warden's Court may either confirm the requirement of the Director of Mines or vary the requirement. In hearing a merits review, the Warden's Court may:

- a) confirm the decision of the Director of Mines
- b) vary or revoke the decision of the Director of Mines
- c) make any consequential order that it considers necessary or expedient.

Once the objectives and criteria are approved, the MOP may be registered on the Mining Register and the Minister can publish the MOP in such manner and to such extent as the Minister thinks fit (s. 73G(12a)).

If a draft MOP relates to new operations to be carried out at a private mine, the objectives and criteria sections must be released for public consultation in accordance with the section 73G(9) of the Mining Act. Subsequently, the applicant must prepare and submit a report to the Director of Mines addressing relevant issues raised or draft alterations recommended during the public consultation process.

Regulation 72 of the draft Mining Regulations prescribes the process for undertaking public consultation of a MOP. In accordance with regulation 72, the Director must publish a notice in a manner the Director thinks fit. In practice, the Director publishes the notice in the Gazette, a state-wide newspaper, any relevant regional newspapers and online.

The notice seeking public consultation must:

- a) identifying the location of the mine; and
- b) stating that a mine operations plan has been prepared for the mine and that the relevant objectives and criteria may be inspected at a place specified in the notice; and
- c) inviting written submissions in relation to the draft objectives and criteria within a period specified in the invitation.

The Director must also invite written submissions on the draft objectives and criteria from the owners of land and the local council (r. 72(3)).

The Director has the discretion to determine the length of time by which the draft MOP is publically exhibited. In practice, the Director routinely exhibits applications for a number of weeks.

The Minister must give all submissions received during the consultation period to the person who submitted the draft MOP (r. 72(4)), and the submitter must prepare a report setting out responding to any relevant matter raised in the submissions (r. 72(4)-(5) and s. 73G(10)).

A submission received during the public consultation period cannot be made on the basis that the submission or part of the submission be kept confidential (r. 72(6)) and a response by the applicant cannot be made on the basis that the response or part of the response be kept confidential. This aligns with the rules of natural justice as the Director must have regard to both the submission and the response document. For example, if the Director had regard to a confidential submission but did not provide the applicant with the opportunity to respond and therefore, for the Director to have regard to the response, this would not align with natural justice.

Where mining operations comprises private mine(s) and a number of different mining tenements (extractive mineral leases, mineral leases, miscellaneous purpose leases etc.), the Director of Mines recommends that applicants develop a single document that encompasses the entire mining operation. This single program may be approved by Director of Mines and the Minister for Energy and Mining as a MOP and PEPR for the various private mines and tenements that comprise the operation.

A MOP may be reviewed by a person carrying out, or intending to carry out, mining operations at the private mine at any time, and must be reviewed if required by the director, or at least every seven years. A MOP review is conducted in accordance with the Regulations and at the conclusion of the review a report must be furnished to the Director. Unlike a PEPR review, which is undertaken to revise the PEPR, a MOP review is the preparation of a report that considers the compliance with the MOP and analysis of the MOP. The report may include details about any proposals for alterations to the objectives or criteria, which will require the approval of the director to alter the MOP.

Regulation 73 of the draft Mining Regulations proposes that a MOP review must be conducted taking into account the minimum requirements of a MOP and must include the preparation of a report that contains the information determined by the Director and if required by the Director, a revised mine operations plan for approval.