

Package 1 - Explanatory Document – Land Access and public participation

Mining Act
Exempt land – s. 9 and 9AA
Public consultation and engagement – s. 36(1)(c)(iv), 44(1)(c)(iv), 49(1)(c)(iv), 56H, 56R(1)(b)(ii), 56S, 70B(2)(e) & 70D
Entry onto land – s. 57, 58, and 58A
Compensation – s. 61 and 75A
Agreement making and consent – s. 75 and 82

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1. Exempt land

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

'Exempt land' is areas of the State awarded special protections against exploration and mining operations. The first reference to exempt land in South Australia legislation was in the *Gold Mining Act 1885* (SA).

In the late 1800's all land in South Australia vested in Her Majesty, unless the land was granted or lawfully contracted to be granted in fee simple, or leased with the right of purchase. A small portion of the state at this time was privately owned. The first Mining Acts were the *Gold Mining Act 1885* which regulated gold mining on Crown Land, and the *Mining on Private Property Act 1888* which regulated gold mining on privately owned land (albeit there was a minimal number of privately owned property at the time).

The *Gold Mining Act 1885* allowed the Governor to grant gold mining leases over Crown land. Section 16 provided:

'[n]otwithstanding any provisions to the contrary, all Crown lands which shall be lawfully and bona fide used as a yard, garden, cultivated field, or orchard, or upon which any house, outhouse, shed or other building shall have been erected, provided the same be in actual use or occupation, or any artificial dam or reservoir which shall have been made, shall be, and the same are hereby exempted from occupation for mining purposes, and for residence, or business, under any miner's right or business licence: Provided that such exemption shall cease upon payment to the lessee of compensation, such compensation to be determined by arbitration, in manner prescribed by regulations.'

The *Gold Mining Act 1885* included the first right to object to mining on exempt land. The Act required the person who was planning to apply for a mining lease to serve a notice on any person occupying, or having any rights on or under the land or any part thereof. The person had 21 days from the date of the notice to object to the Warden. The Warden had to 'report thereon and forward them to the Minister of Goldfields for his approval'. The Minister had to consider the application and the objections (if any) and could refuse or grant the application.

The *Mining on Private Property Act, 1888, Act No. 448 of 1888* allowed mining of privately owned gold, and minerals mixed with gold, on privately owned land and for the mining of reserved minerals on privately owned land. The Act provided that exempt land was:

'any garden, orchard or vineyard, church, chapel, school house, hospital asylum, college, or grounds enclosing the same, or any park lands or recreation grounds vested in any municipal corporation or district council, or other public body or trustees, or to any land of less area than half an acre within any city or township, or to any land within three hundred yards of any well, artificial reservoir, dam, dwelling-house, manufactory, or building, of not less than Fifty Pounds value.'

The Act created a moratorium for mining and exploration on exempt land that was privately owned. This moratorium existed between 1888 to 1893 and related only to a small portion of the state held by individuals who were bequeathed land by Her Majesty.

In 1893, the *Mining Act 1893, Act No. 587 of 1893* was introduced to regulate mining for gold, copper and silver on privately owned land and Crown land. Subsection 9(1) provided that '*mineral lands lawfully and bona fide used as a yard, garden, cultivated field, or orchard, or as the site of a*

house, outhouse, shed or other building, actually used and occupied, or of any artificial dam or reservoir, are exempted from the operation of this Act'. Subsection 9(2) provided that the exemption would cease on the payment of compensation which would be determined by arbitration in the prescribed manner.

As you can see from this brief history, the definition of exempt land has been modernised over the last 100+ years but the foundations remain the same.

The Mining Act, as amended by the *Statutes Amendment (Mineral Resources) Act 2019*, defines exempt land as areas of land in South Australia in which authorised operations cannot occur without the owner of that exempt land waiving their right to the exemption and allowing authorised operations to occur.

Section 9(1) of the Mining Act defines exempt land as:

- (a) *land that is lawfully and genuinely used—*
 - i. *as a yard or garden;*
 - ii. *as a cultivated field, plantation, orchard or vineyard for commercial purposes;*
 - iii. *as an airfield, railway or tramway;*
 - iv. *as the grounds of a church, chapel, school, hospital or institution; or*
 - (b) *land that constitutes any parklands or recreation grounds under the control of a council; or*
 - (c) *land—*
 - i. *that is dedicated or reserved, pursuant to statute, for the purpose of waterworks; or*
 - ii. *that is vested in the Minister of Public Works for the purpose of waterworks; or*
 - iii. *that is comprised within an easement in favour of the Minister of Public Works; or*
 - (d) *land that constitutes a forest reserve under the Forestry Act 1950; or*
 - (e) *any separate parcel of land of less than 2 000 square metres within any city, town or township; or*
 - (f) *land that is situated—*
 - i. *within the prescribed distance of a building or structure used as a place of residence (except a building or structure of a class excluded by regulation from the ambit of this paragraph); or*
 - ii. *within 150 metres of—*
 - A. *a building or structure, with a value equal to or exceeding the prescribed amount, used for an industrial or commercial purpose; or*
 - B. *a spring, well, reservoir or dam that has some commercial value or use,*
- (but not if it is an improvement made for the purposes of authorised operations).*

The prescribed distance for the buffer around a residence is:

- (a) 200m for low impact exploration operations;
- (b) 400m for advance exploration operations or any operations for the recovery of extractive minerals; and
- (c) 600m for all other authorised operations, unless another distance is prescribed by the regulations (which may make a different provision according to the circumstances or thing to which it is expressed to apply) (s. 9(5)).

While subsection 9(5) includes a regulation-making power to prescribe a distance from a building or structure that is used as a residence which is exempted from authorised operations, this power has not been used. Therefore, there all buildings and structures used as a residence create a benefit of exempt land.

Regulation 5 of the draft regulations prescribe that the prescribed distance for the recovery of industrial minerals under a mining lease, retention lease or miscellaneous purpose licence is 400 metres.

Whether the land is exempt is determined at the time a claim is established, or at the time an application for a lease or licence is submitted for assessment (s. 9(2)). If the land ceases to be exempt by agreement or court order, the exemption revives upon completion of the authorised operations contemplated by the agreement or order (s. 9AA(11)).

The person who has the benefit of the exempt land and the person who the waiver must be sought from is the *owner of the land*. This distinction is important as the owner of the building, structure or infrastructure does not hold the benefit of the exemption, the owner of the land, as defined, holds the benefit. For example, if Electricity Co owns the power infrastructure but the land is owned by the farmer, the farmer can waive the benefit which arises due to the power infrastructure. Owner in this context includes (s. 6):

- a. a person who holds a registered estate or interest in the land conferring a right to immediate possession of the land; or
- b. a person who holds the native title in the land; or
- c. a person who has, by statute, the care, control or management of the land; or
- d. a person who is lawfully in occupation of the land.

Identifying owners within the scope of (c) and (d) can be difficult, or may not be accessible from publically available resources, therefore, the obligation to obtain an agreement or consent from an owner within (c) and (d) has been limited (s. 6(9)). The tenement holder's obligation to obtain an agreement to waive the exemption from the owner within the scope of (c) or (d) only applies to the extent that the tenement holder is aware of such an owner, or it is reasonable to expect the tenement holder to be aware of such an owner.

The Minister may grant a lease or licence (s. 9(1)) and approve a PEPR over exempt land (s. 70B(11)), however, the tenement holder cannot undertake any authorised operations on the exempt land until the tenement holder has obtained a waiver or court order under section 9AA.

An owner of land and tenement holder can enter into an agreement the benefit of the exemption which allows the tenement holder to undertake operations as agreed. The Mining Registrar must be made aware of any agreement to waive exempt land so the agreement can be noted on the Mining Register (s. 9AA(14b) and r. 6).

Each owner of land is entitled to \$2,500 paid by the tenement holder to contribute to the owner of lands legal fees related to their exempt land. This amount can be increased in the regulations, however the draft regulations do not propose to prescribe a greater value (s. 9AA(5)).

Where the parties cannot come to an agreement, the tenement holder or the land owner can apply to the Court for a determinations. Subsection 9AA(8)(b) states that a prerequisite of applying to the Court, the tenement holder must provide the owner of land with the information provided by the regulations. Regulation 6 requires the tenement holder to serve on the owner of land:

- (a) a copy of the approved program (if any) under Part 10A of the Act;
- (b) a copy of the relevant proposal;
- (c) a copy of any response of the tenement holder as required by the Minister under section 56H(4)(b) of the Act; and
- (d) information as to the rights of the owner of land under section 9AA(9)(b) and (14) of the Act in a manner and form determined by the Minister that is made publicly available on a website determined by the Minister.

The information sheets relating to the owner of land's rights are proposed to convey clear information in plain English.

Where an agreement cannot be reached between the owner of land and the tenement holder, either party can apply to the Court for a determination. If the tenement holder applies to the Court, they may need to satisfy the Court that they have:

1. served a notice on the owner of land asking them to waive the benefit of exempt land; and
2. that the items in Regulation 6 have been provided to the owner of land; and
3. that they have made reasonable attempts to negotiate an agreement with the owner.

An owner of land can apply to the Court for an exempt land determination after an application has been made for a mining lease, retention lease or miscellaneous purpose licence (s. 9AA(8a)). This is a reasonable time as the tenement holder would have prepared an environmental impact assessment defining the potential adverse effects of the proposed operations.

The Court can make confirm that an owner of land is entitled to the benefit of an exemption and can determine whether exempt land should be waived or not. In determining whether to waive exempt land, the Court will consider the adverse impacts of the proposed operations, and whether those impacts can be remedied by conditions and compensation (s. 9AA(9)). If conditions and compensation cannot remedy the impacts, the Court will not waive the benefit of exempt land and therefore the proposed operations cannot occur on that land.

The Mining Registrar will register orders of the Court waiving an exemption on the Mining Register (s. 15AA(1)(i) and (l)).

2. Public consultation and engagement

Public consultation and engagement as amended by Statutes Amendment (Mineral Resources) Act 2019

Exploration and mining projects impact communities and the environment. As a result, providing the public with an opportunity to participate in the decisions about exploration and mining operations in South Australia is of great importance. This includes the public being aware of what the government must do in terms of ensuring adequate public consultation on an application; when and how the public can participate and provide input into an application; and, what a miner or explorer must do to engage with the public.

The Mining Act, as amended by the *Statutes Amendment (Mineral Resources) Act 2019*, develops the requirements to engage with the community, landowners and the public. The legislative requirements to engage with the relevant owners of land are set out in section 58A (notice of entry), section 9AA (waiver of exempt land) and part 9B (native title).

The *Statutes Amendment (Mineral Resources) Act 2019* and the draft *Mining Regulations 2020* facilitates public participation in exploration and mining projects through three distinct stages. These are:

1. Engagement by the applicant on the preparation of a draft application for a Mining Licence (ML), Miscellaneous Purpose Licence (MPL), Retention Lease (RL), Special Mining Lease (SME), or a Change in Operations;
2. Public consultation on applications that are run by the government;

3. 3. Engagement by the applicant of the preparation of a draft Program for Environment Protection and Rehabilitation (PEPR) / mine operating plan (MOP) or a revised PEPR or MOP.

In granting the right to recover minerals, the applicant must have a fulsome understanding of the local environment, the potential impacts their proposed operations may have on the environment and the best measures to ensure that those impacts are managed and mitigated. The community lives in that environment and is best placed to help the miner understand the environment where they propose to operate. Therefore, it is integral that the community has an opportunity to contribute to both the preparation of applications but to also participate in the transparent public consultation process.

The *Statutes Amendment (Mineral Resources) Act 2019* and the draft regulations require an applicant to engage and report the results of engagement undertaken in connection preparing an application before it is submitted to the Minister for assessment (r. 42, 49, and 63). This ensures the community can work with the applicant to shape the content of the application to reflect the expectations and concerns of the community. This applies to:

1. mining leases
2. miscellaneous purpose licences
3. retention leases
4. applications for a proposed change in operations
5. applications for a special mining enterprise

At a minimum, the applicant must engaged on the environmental outcomes that are expected to occur in connection with the proposed operations and taken reasonable steps to consult with persons, especially, the owners of the land where the operations are proposed to be carried out. The application must set out the results of consultation undertaken in connection with the proposed operations, including:

1. the persons consulted (especially the owners of land)
2. any issues of concern raised by the persons consulted
3. the steps proposed or taken to address the concerns

If a lease or licence is granted by the Minister, the explorer or miner cannot commence any operations unless and until they have an operating approval known as a Program for Environment Protection and Rehabilitation (PEPR) or a Mine Operating Plan (MOP). The draft regulations require the explorer or miner to engage with the community on the preparation of the PEPR or MOP before its submitted to the Minister for assessment (r. 57 & 67). The results of consultation undertaken in connection with the proposed operations or a review of proposed operations must detail:

1. the persons consulted (especially the owners of land)
2. any issues of concern raised by the persons consulted
3. the steps proposed or taken to address the concerns.

The first requirement in the Mining Act to undertake public consultation, as opposed to targeted engagement with the community or owners of land, is under section 56H. Section 56H include a revised public consultation process for applications for mining leases, retention leases and miscellaneous purpose licences, applications for a proposed change of operations under Division 7 of Part 8B of the Act (s. 56H(1)), and applications for a special mining enterprise (s. 56B(3)(d)).

It is proposed that public consultation on a retention lease that proposes exploration operation and no mining operations will not be released for public consultation (r. 43). Claims, leases or licences that authorise exploration operations are not released for public comment, however, the explorer are required to engage with their local community on the preparation of their draft application and the proposed exploration operations.

After receiving an application, the Minister must notify the owner of the land to which the application relates and the relevant local council (s. 56H(2)) that an application has been received. The notice must be given in a form determined by the Minister.

Prior to making a decision on an application, including the terms and conditions of a grant, the Minister must seek public comment on the application (s. 56H(3)). The Minister must publish a notice in any manner the Minister thinks fit. In practice, the Minister publishes the notice in the Gazette, a state-wide newspaper, any relevant regional newspapers and online.

The notice seeking public consultation must:

1. describe the land to which the application relates and, if relevant, the particular stratum in relation to which the tenement would be, or has been, granted (as the case requires); and
2. specify a place where the application may be inspected (which may be online); and
3. invite written submissions in relation to the application to the Minister within a time specified in the invitation.

The Minister has the discretion to determine the length of time by which the application is publically exhibited (s. 56H(3)(c)). In practice, the Minister routinely exhibits applications for a number of weeks. For example, the Ardrossan Dolomite Operation retention lease proposal was exhibited for 6 weeks and the Leenders Sand Pit mining lease propose was exhibited for 8 weeks.

The Minister may refuse an application prior to publishing a notice (s. 56H(7)).

The Minister must give all submissions received during the consultation period to the applicant (s. 56H(4)(a)), and the applicant may be required to prepare a response document responding to any matter raised in the submissions (s. 56H(4)(b)). In determining whether to grant or refuse an application, or the terms and conditions of the grant, the Minister must have regard to the submissions and the responses of the applicant (s. 56H(6)).

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 (s. 56H(5)) and a response by the applicant cannot be made on the basis that the response or part of the response be kept confidential (s. 56H(5)). This aligns with the rules of natural justice as the Minister must have regard to both the submission and the response document. For example, if the Minister had regard to a confidential submission but did not provide the applicant with the opportunity to respond and therefore, for the Minister to have regard to the response, this would not align with natural justice.

If the Minister receives a submission of a potentially offensive, threatening or defamatory nature, the Minister will accept it and provide it to the applicant (s. 56H(4)(a)). The Minister can publish all submissions received, including a submission of a potentially offensive, threatening or defamatory nature (s. 15AL). The legislative requirement to pass on all submissions and the Minister's ability to publish the submissions is a qualified privilege defence to defamation for both the Minister and the applicant. Further, the Act includes an express provision limiting the Minister's exposure to any liability for publishing materials such as submissions (s. 15AL(6)).

After the Minister has determined whether to grant or refuse an application, the Minister must cause notice of the determination to be published in accordance with the regulations (s. 56H(8)). The regulations prescribe that the Minister must give an applicant notice of the outcome of the application (r. 33 and 37)

For an assessment of an application for a mining lease, retention lease, miscellaneous purpose licence, or a change of operations to be an accredited assessment in a bilateral agreement under the *Environmental Protection and Biodiversity Act 1999 (Cth)* (the **EPBC Act**) the assessments must include public consultation. The *Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)* (**EPBC Regulations**) requires an application to be published for no less than 14 days in a state-wide newspaper or the internet to correspond to assessment on preliminary document, or 28 days in a state-wide newspaper to correspond to assessment by Public Environmental Report (PER) or Environment Impact Statement (EIS). The EPBC Regulations further prescribes a list of information that must appear in the notice seeking public consultation. This includes a description of the proposed controlled action, the name of the applicant, the location, the matters of national environmental significance that may be affected, how to obtain the application and the deadline for submissions. The EPBC Regulations further requires the final application to take into account or address the relevant issues raised in the public consultation.

The bilateral agreement declares PEPRs for exploration activities on an exploration licence under Part 10A of the Act, and regulation 65(1) of the *Mining Regulation 2011* 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. 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.

Section 70D was introduced to ensure the Minister had sufficient power to consult on a PEPR when required under the bilateral agreement.

In addition to the legislative requirement to seek public consultation on an application under section 56H or 70D, the Minister has the discretion to seek public consultation on Ministerial Determinations. The *Statutes Amendment (Mineral Resources) Act 2019* requires that applications must meet the minimum requirements set out in the Act, Regulations and Ministerial Determinations. The Minister has prepared general Ministerial Determinations for applications under the Act but also prepares tailored or project-specific Ministerial Determinations on occasion.

3. Entry onto land

Entry onto land as amended by the Statutes Amendment (Mineral Resources) Act 2019

The Mining Act, as amended by the *Statutes Amendment (Mineral Resources) Act 2019*, introduces a regime for notifying owners of land of proposed operations during the exploration stage of operations. Section 58A includes three notices:

1. Notice of entry (s. 58A(1));

2. Notice of advanced exploration operations (s. 58A(2)); and
3. Notice of intention to apply for a mining lease, retention lease or miscellaneous purpose licence (s. 58A(3)).

A notice of entry must be served on the owner of land prior to prospecting for minerals or prior to entering an exploration licence or a mineral claim to carry out authorised operations. Serving a notice of entry is a means of obtaining permission to enter land from the owner and/or occupier for the purpose of the tort of trespass.

If the holder of a mineral claim or exploration licence wants to undertake advanced exploration operations, they must serve a further notice. A notice of advanced exploration operations must be served on the owner of land prior to commencing advanced exploration operations. Advanced exploration operations are exploration operations which involve the use of declared equipment, which are operations not within the scope of low impact exploration operations, or which the Minister determines or the regulations prescribe are within the scope of advanced exploration operations.

A tenement holder may serve on the owners of the land a notice covering the requires of both a notice of entry and a notice of advanced exploration operations. It may also be possible in the case of a mineral claim which can only be established for 1 year to serve a notice covering all three notices.

Subject to the terms and conditions of a mineral tenement and the requirements of a program for environment protection and rehabilitation (**PEPR**) under part 10A, the holder of an exploration licence or mineral claim can only undertake:

- a) low impact exploration operations (as defined) after serving a notice of entry; and
- b) advanced exploration operations (as defined, which includes low impact exploration operations) after serving a notice of advanced exploration operations.

A notice must be served 42 days prior to entering or commencing operations. Failure to serve a notice of entry or notice of advanced exploration operations is a maximum penalty of \$20,000.

Prior to applying for a mining lease, retention lease or miscellaneous purpose licence, a person must serve on the owner of land to which the application relates, a notice of intention to apply for a lease or licence. The notice must inform the owner of the person's intention to enter the land to carry out authorised operations if the application is granted. The notice is of no effect if the person does not apply for the relevant lease or licence within 12 months of serving the notice. There is no offence for failing to serve a notice of intention to apply for a lease or licence, however, such a notice is a prerequisite for applying for a mining lease, retention lease or miscellaneous purpose licence.

All notices under section 58A must be served on the owners of land, the holder of a licence under the *Petroleum and Geothermal Energy Act 2000* (SA) (if relevant) and the Mining Registrar. An owner of land is defined under the Act as being:

- a. a person who holds a registered estate or interest in the land conferring a right to immediate possession of the land; or
- b. a person who holds native title in the land; or
- c. a person who has, by statute, the care, control or management of the land; or
- d. a person who is lawfully in occupation of the land.

Identifying owners within the scope of (c) and (d) can be difficult, or may not be accessible from publicly available resources, therefore, the obligation to serve a notice on an owner within (c) and (d) has been limited. The tenement holder's (or prospective tenement holder's) obligation to serve a notice on the owner within the scope of (c) or (d) only applies to the extent that the tenement holder (or prospective tenement holder) is aware of such an owner, or it is reasonable to expect the tenement holder (or prospective tenement holder) to be aware of such an owner.

Notices must be served in accordance with the Regulations (s. 58A(5) and r. 78). The regulations require

All notices are served on the Mining Registrar and are published on the Mining Register (s. 58A(6) and r. 64).

Notices are not required if:

1. The land is in a precious stones field (s. 58A(14)(a)); or
2. The tenement holder is authorised to enter the land by agreement with the owner of the land (s. 58A(14)(b)); or
3. The tenement holder is authorised to enter the land under a native title mining determination (s. 58A(14)(c));
4. The tenement holder is authorised to enter the land under an indigenous land use agreement registered under the *Native Title Act 1993* (Cth) (s. 58A(14)(d));
5. The tenement holder (or a related body corporate) has previously given notice under section 58A as a prospective applicant or as the holder of an earlier mineral tenement over the land to which entry and operations are proposed (s. 58A(14)(e)).

New notices do not need to be served if the owner changes or the registered holder of the mineral tenement changes (s. 58A(16) and s. 6).

An owner of land with exclusive right to possession or a pastoral lessee has the right to object to a notice served under section 58A within 3 months of service in an appropriate court (Warden's, ERD or Supreme Court) (s. 58A(9)). If the Court receives a notice of objection, the Court must send a copy of that notice to the tenement holder (or prospective tenement holder) (s. 58A(10)).

Rule 14 and 15 of the *Warden's Court Rules 2016* currently specified that a notice of objection must include the full particulars of the objections, and have annexed to it, a copy of the notice served under section 58A and a supporting affidavit as to the relevant facts.

The Court must be satisfied that operations on the land could result in substantial hardship or substantial damage to the land in order to hear an application for objection (s. 58A(12)). In hearing an objection, the Court may:

- a) Determine that the land, or a particular part of the land, should not be used for the purposes of the proposed authorised operations (s. 58A(12)(a));
- b) Determine conditions on which operations may be carried out on the land with least detriment to the interests of the owner and least damage to the land (s. 58A(12)(b)); and
- c) Determine an amount of compensation payable (s. 61(3)).

The Court may, if the Court thinks fit, postpone the hearing of an objection to entry by a person who has given notice of intention to apply for a mining lease, retention lease or miscellaneous purpose licence until after the application has been made (s. 58A(11)). It is reasonable that a court would post such a hearing until the details of the proposed operations are made available as to determine whether the land should be used for the proposed operations or what conditions to impose (if any).

A person who contravenes or fails to comply with an objection determination of the Court is guilty of an offence with a maximum penalty of \$150,000 (s. 58A(13)).

Notices must be given in the form determined or approved by the Minister (s. 58A(15)). Ministerial determination will set out the full list of particulars what must be in a notice. Copies of these draft determinations have been released for public comment.

4. Compensation

Compensation as amended by the Statute Amendment (Mineral Resources) Act 2019

Section 61 entitles the owner of any land on which authorised operations are carried out in pursuance of the Act to receive compensation for any economic loss, hardship and inconvenience suffered by him in consequence of operations.

In determining the compensation payable under section 61, the following matters are considered:

- a) any damage caused to the land by the person carrying out the operations; and
- b) any loss of productivity or profits as a result of the operations; and
- c) any other relevant matters.

The compensation may include an additional component to cover reasonable costs reasonably incurred by an owner of land in connection with any negotiation or dispute related to—

- a) the tenement holder gaining access to the land; and
- b) the activities to be carried out on the land; and
- c) the compensation to be paid under section 61.

Section 61 sets the scope for what gives rise to compensation as a result of operations, for the purpose of determining an agreement between a landowner and tenement holder, and for an appropriate court when making an order.

It is a condition of a mining tenement that the Minister may, at any time, require the tenement holder to pay an amount of compensation specified by the Minister. The Minister has never used this power.

Section 75A states that in determining the compensation to be paid to a body or person under this Act, compensation that has been paid to the body or person, or to which the body or person is entitled under this Act or other laws, must be taken into account.

The Amending Act also clarifies for the avoidance of doubt that rent paid to an owner of land is not compensation.

5. Agreement making and consent

Agreement making and consent under the Statutes Amendment (Mineral Resources) Act 2019

The Mining Act, Regulations and non-regulatory documents approach the access of privately owned land and the commencement of authorised operations by encouraging agreement-making between the owners of land and tenement holders. This creates a need to negotiate access rights and compensation to resolve the inherent tension that arises from that relationship, as the property

rights of the owners of land cannot be ignored while also respecting the entitlement of the tenement holders to exploit the right to the mineral resources granted by the State and the communities collective rights to derive benefit from the exploited minerals.

Whilst the Mining Act encourages negotiating agreements in good faith, the Act, as discussed above, establishes minimum statutory requirements to ensure tenement holders engage, consult and obtain consent from owners of land prior to entering the land or commencing operations. These minimum statutory requirements also set the foundations for minimum terms and conditions of an agreement. Providing minimum statutory requirements seeks to provide a balance between private property rights and public rights in the context of mineral resources without unnecessarily restricting contractual freedom.

Agreement-making under the Act is set out in the following sections:

- section 9AA – agreement to waive exempt land
- section 58A – agreement in respect of access to land, object rights and notice periods
- section 61 – agreement in respect of compensation
- section 75 – agreement to use extractive minerals

The agreement-making process in respect to sections 9AA, 58A and 61 is detailed above. Section 75 relates to specific rights connected with extractive minerals. Subsection 75(1) states that 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 exists except with the written consent of the owner of the land. This subsection refers to a different type of owner of land to that of an owner as defined under section 6. The right in subsection 75(1) is granted only to the real property owner (fee simple) or to native title groups if that native title group have exclusive possession of the land. This right preserves an owner of land's right to use extractive minerals for their own personal use. Consent of the owner is not required if the Director of Mines determines that the terms and conditions of a mineral tenement authorise the recovery and use of extractive minerals produced as a result of operations or extractive minerals required for the pursuance of the mining operations.

To support all agreement-making processes under the Act, section 82 was introduced to deem processes to reduce duplication. This new section states that in the event the tenement holder and the landowner are the same people, 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.

6. Service requirements

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

The Mining Act, as amended by the *Statutes Amendment (Mineral Resources) Bill 2018*, includes sections throughout the Act that require the service of a notice, agreement, direction, order or document. To reduce duplication and ensure consistency, the Act requires a notice, agreement, direction, order or document to be served in accordance with the Regulations.

In respect of land access provision, the notices which must be served in accordance with the regulations includes: notices of entry (s. 58A(5)), notices requesting a waiver (s. 9AA(1) and (1a)) and notice to rescind (s. 9AA(4)).

A person who holds native title in land must be served in accordance with Part 5 of the *Native Title (South Australia) Act 1994*, which requires notices to be given personally or by post to:

- a) The native title holders registered representative; and
- b) The relevant representative Aboriginal body for the land.

If an owner of land or a licensee under the *Petroleum and Geothermal Energy Act 2000 (SA)* is a company registered under the *Corporations Act 2001 (Cth)*, a notice may be served in accordance with section 109X of the Corporations Act, by:

- a) leaving it at, or posting it to, the company's registered office; or
- b) delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory; or
- c) if a liquidator of the company has been appointed—leaving it at or posting it to, the address of the liquidator's office in the most recent notice of that address lodged with ASIC; or
- d) if an administrator of the company has been appointed—leaving it at or posting it to, the address of the administrator in the most recent notice of that address lodged with ASIC.

Service in accordance with the *Corporations Act 2001 (Cth)* is valid service irrespective of the requirements of the Mining Act. Where there is an inconsistency between the Mining Act and the *Corporations Act 2001 (Cth)* on the requirements of service, the *Corporations Act 2001 (Cth)* will prevail (s. 109 of the Australian Constitution).

Subsection 58A(5) includes a regulation-making power for prescribing the manner in which notices must be served on owners of land and licensees under the *Petroleum and Geothermal Energy Act 2000 (SA)*.

Notices to request a waiver (s. 9AA(1) and (1a)) and the notice to rescind (s. 9AA(4)) must be served in accordance with the Regulations.

Subsection 92(1)(nb) includes a regulation-making power to provide for the service of any notice, direction, order or another document.

If the owner is not a holder of the native title, or a company, regulation 78 of the draft Mining Regulations 2020, specifies that a notice or document under the Act may:

- a) be served on the person personally; or
- b) be posted by registered post in an envelope addressed to the person:
 - a. at the person's last known address; or
 - b. if the person has an address for correspondence or service – at that address; or
- c) be served by email sent to an email address provided by the person (in which case the notice will be taken to have been given or served at the time of sending).