

Package 2 - Explanatory Document – Compliance and Enforcement

Mining Act	
Authorised Officers – s. 14, 14A, 14B, 14C, 14D, 14E, 14F, 14G, 14H and 88	
Liability – s 81 (+ noting s. 70HK)	
Compliance monitoring – r. 67, 86, 87 and 90 and s. 90	
Directions (environmental, rehabilitation, emergency and compliance) – s. 70E, 70F, 70FA, 70FB, 70FC, 70G, 70H, 70HA, and 70HB (Part 10B)	
Forfeiture – s. 70	
Cancellation – s. 56W	
Reinstatement and extension of term – s. 56Y and 56Z	
Offences and Penalties – s. 70HC, 70HD, 70HE, 70HF, 70HG, 70HH, 70HI, 70HJ, 70HK (Part 10C), 79A, 89A, 89B and 91	
Other remedies – s. 74, 74AA, 74A, and 86	

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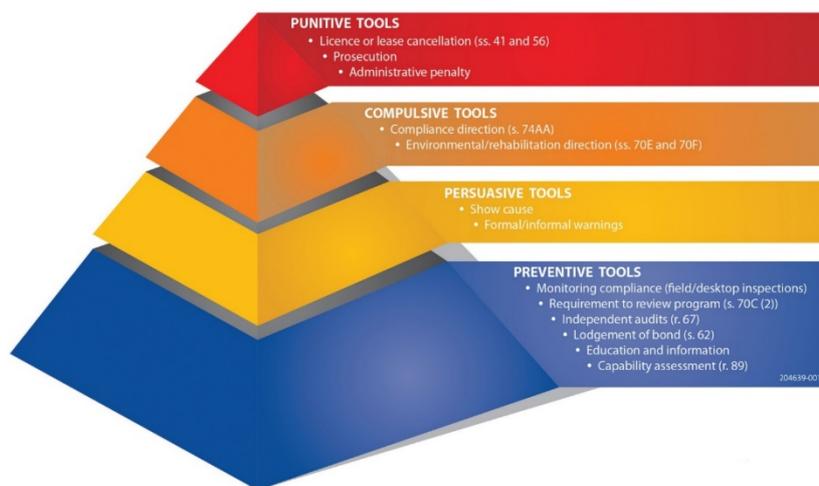
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Compliance and Enforcement Model

The Mining Act establishes a sanction, licencing, assessment and approval regime for exploration and mining operations. In regulating the Mining Act, it is Department for Energy and Mining's (DEM) role to secure compliance with:

- Requirements of the Mining Act and the Mining Regulations
- Terms or conditions of mineral tenements
- Requirements or outcomes of Programs for Environmental Protection and Rehabilitation (PEPRs)
- Requirements or objectives of Mine Operation Plan (MOPs).

The Minister for Energy and Mining and the Director of Mines, respectively, are responsible for enforcing the Mining Act in response to non-compliances (the Regulator). The roles of the Minister and the Director are delegated to Authorised Officers and other delegates within the DEM.



Once a contravention or several contraventions has been identified, the Regulator assesses the likelihood of compliance and the severity of consequences to determine how to respond. The relative certainty of compliance and the relative severity of the consequences is assessed against the degree or scale of harm, cost, loss, frequency and public concern.

1. Authorised Officers

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

The Minister may appoint authorised officers to conduct authorised tasks under section 14 of the Mining Act. To undertake any authorised investigations (section 14B) or exercise any powers under sections 14C, 14D, 14G and 14H, a public servant must be appointed as an authorised officer. An authorised investigation can be everyday activities such as 'monitoring compliance with the Act' as per subsection 14B(a).

The Minister must issue identity cards to authorised officers that include the officer's name and photograph. An authorised officer is only obligated to produce the identity card on request.

Section 14B defines 'authorised investigations' as gathering information, monitoring compliance, undertaking enquiries and inspecting.

Authorised officers under the Act can enter, search, inspect and examine any premises, land, or vehicle in connection with any operations or activities regulated by the Act and, where necessary, break into or open a part of, or anything in, the premises, land or vehicle subject to obtaining a warrant from a magistrate, warden or justice (s. 14C). Authorised officers can seize and retain anything that may be evidence of non-compliance.



To obtain a warrant, the court must be satisfied that breaking into or opening a part of, or anything in a premise, land or vehicle is reasonable in the circumstances. An application for a warrant can be made personally or by telephone and must be made following any procedures prescribed by the regulations.

Regulation 8 of the draft Mining Regulations 2020 prescribes that the procedures in relation to an application for the issues of a warrant are as follows:

- (a) if an application for the issue of a warrant is made personally—the grounds of the application must be verified by affidavit;
- (b) if an application for the issue of a warrant is made by telephone—
 - (i) the applicant must inform the magistrate, warden or justice of the applicant's name and identify the position that they hold for the purposes of the Act, and the magistrate, warden or justice, on receiving that information, is entitled to assume, without further inquiry, that the applicant holds that position; and
 - (ii) the applicant must inform the magistrate, warden or justice of the purpose for which the warrant is required and the grounds on which it is sought; and
 - (iii) if it appears to the magistrate, warden or justice from the information given by the applicant that there are proper grounds to issue a warrant, the magistrate, warden or justice must inform the applicant of the facts that justify, in their opinion, the issue of the warrant, and must not proceed to issue the warrant unless the applicant undertakes to make an affidavit verifying those facts; and
 - (iv) if the applicant gives such an undertaking, the magistrate, warden or justice may then make out and sign a warrant, noting on the warrant the facts that justify, in their opinion, the issue of the warrant; and
 - (v) the warrant is taken to have been issued, and comes into force, when signed by the magistrate, warden or justice; and
 - (vi) the magistrate, warden or justice must inform the applicant of the terms of the warrant; and
 - (vii) the applicant must, as soon as practicable after the issue of the warrant, forward to the magistrate, warden or justice an affidavit verifying the facts referred to in paragraph (iii).

Authorised officers have the power to require people to answer questions, provide information and require the person to state their name, address and provide proof of identity (s. 14C(5)). If that person does not provide the information requested by the authorised officer, they may be subject to penalties.

Authorised officers have the power to require a person to produce records and answer questions about those records (s. 14E). An authorised officer may retain the records to make copies or may seize and retain the records.

Where an authorised officer has seized or retained evidence, the evidence may be held pending proceedings, and thereafter the evidence must be forfeited or released (s. 14H). The Minister may, via a written application, authorise the evidence to be released back to the lawful owner subject to certain conditions. If the defendant is found guilty of an offence, the relevant court will determine the outcome of the evidence. Should proceedings not commence within the 'prescribed period' (at least 12 months, as described in the Act – determined by the court on application by the Minister) or the defendant is found not guilty of an offence, the evidence will be returned (and compensated if required).



An authorised officer may give expiation notices for alleged offences that are expiable (s. 14G). All expiable offences will be set out in the Regulations and cannot exceed \$7,500. All expiation fees are paid into the Mining Rehabilitation Fund (see commentary below on expiable offences).

2. Liability

Liability as amended by Statutes Amendment (Mineral Resources) Act 2019

The Mining Act does not adopt an unqualified 'polluter pays principle'. While the person who causes harm to the environment or breaches the Act can be held liable for the actions, the Mining Act holds a tenement holder to a higher standard. Holding a tenement holder to this standard is considered appropriate as a tenement holder has the necessary financial and technical capability to mine and obtains the financial benefit of selling the Crown's minerals. Therefore, with that benefit, comes the responsibility for general compliance and environmental responsibility. The Mining Act demonstrates this by deeming the tenement holder as being liable or holding the tenement holder as jointly and severally liable for third party harm.

Section 70HK(4) includes a deeming provision whereby the tenement holder is presumed to have caused the failure or contravention of a term or condition of a tenement, or their program of environment protection and rehabilitation (PEPR), unless there is evidence to the contrary.

Where the Minister gives an environmental direction or a rehabilitation direction to a person other than the tenement holder, the Act extends that liability to the tenement holder (or former tenement holder, as the case may be) and holds the current or former tenement holder jointly and severally liable for the non-compliances set out in the environmental or rehabilitation direction (s. 70E(8) and 70F(6)).

Where two or more persons or entities are tenement holders of a mineral tenement, each tenement holder is jointly and severally liable (s. 81). Joint and several liability means that two or more tenement holders both jointly, and separately, agree to do the same thing.. This type of liability gives rise to one joint obligation and many several obligations. Like joint liability, the tenement holders are not cumulatively liable, so the performance by one discharges all of the remaining tenement holders. However, each tenement holder is liable for the entire obligation until it is performed by one (or more) of the tenement holders. When the obligation is joint and several, the Regulator can sue all the tenement holders together or choose to sue each separately (if this is more appropriate).

Further, an employee or principal will be taken to be vicariously liable for an act or omission of an employee or agent, unless there is evidence to the contrary (s. 81). 'Vicarious liability' is the term applied to a situation where one person is held legally liable for the actions or intent of another. Although the accused did not commit the crime personally, the conduct and state of mind of that other person are taken to be the conduct and state of mind of the accused.

3. Compliance monitoring

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

A wide range of compliance monitoring tools are available to the Regulator to ensure compliance with the Act, including:



1. Authorised investigations that may be conducted by an authorised officer for the general purpose of monitoring compliance with the Act, and for gathering information about a range of listed matters (s. 14-14H (inclusive)) (discussed above)
2. Ministerial power to require a tenement holder to enter into a bond in satisfaction of any civil or statutory liability likely to be incurred in the course of carrying out mining operations, and the present and future obligations in relation to the rehabilitation of land disturbed by mining operations (s. 62) (see the explanatory document on royalties and finance)
3. Ministerial power to require a tenement holder to demonstrate through various means (e.g. specified tests, environmental monitoring or other investigations) the tenement holder's ability to achieve the outcomes of the program for environment protection and rehabilitation (PEPR) (s. 70DA)
4. Ministerial power to request the tenement holder to provide a report on the operation or administration of any provision of the Act, an assessment of the tenement holder's capability to comply with the Act, the identification, delineation or accuracy of any boundary of a mineral tenement or verifying any information or material provided to the Minister (s. 90)
5. Tenement holders must submit a technical exploration report on exploration operations (r. 72)
6. Tenement holders must report on certain airborne surveys (r. 74)
7. Tenement holder must prepare compliance report self-reporting on their compliance over the reporting period (r. 71)
8. Tenement holders must report incidents to the Minister for various breaches, failures and non-compliances (r. 73)
9. Tenement holder must hold and maintain public liability insurance (r. 74)

Compliance monitoring measures (3 to 9) are discussed below:

Audit of a program

The power to require an audit of a PEPR is a section is based on the audit provisions from the *Environment Protection Act 1993 (SA)*, where the tenement holder must, at the direction of the Minister demonstrate through various means (e.g. specified tests, environmental monitoring or other investigations) the tenement holder's ability to achieve the outcomes or requirements of the PEPR (s. 70DA(1)). This will apply to any PEPR on any tenement type.

The Minister may provide directions on the independence, qualifications or experience of the person who carries out a program audit, the period in which the audit must be completed and the completion and provision of a report (s. 70DA(2)).

The program audit must be completed in accordance with the regulations and all costs associated with the program audit must be met by the tenement holder.

The information in the audit report can be used by the Minister to require a review of a PEPR (s. 70DA(5)).

Section 70DA will replace regulation 67 of the Mining Regulations 2011.

Reports and verification of information

The *Statutes Amendment (Mineral Resources) Act 2019* introduces a new power allowing the Minister to request the tenement holder to provide a report on the operation or administration of any provision of the Act, an assessment of the tenement holder's capability to comply with the Act, the identification, delineation or accuracy of any boundary of a mineral tenement or verifying any



information or material provided to the Minister (s. 90). The Minister may require that a report is prepared by an independent expert. The report must be completed in accordance with the timeframe set by the Minister and all costs associated with the report must be met by the tenement holder. The maximum penalty for failing to prepare a report on the request of the Minister is \$20,000. Where a tenement holder fails to comply with a request to prepare a report, the Minister may take action to obtain the relevant information or material, or to obtain the required verification. The reasonable costs and expenses incurred by the Minister are a debt due to the Crown.

Section 90 will replace regulation 89 of the Mining Regulations 2011.

Technical exploration reports

Standard conditions of an exploration licence require the licensee to provide an Annual Technical Report to the Director of Mines within sixty (60) days after the expiry of each twelve (12) calendar months from the date the licence is granted, and a Final Annual Technical Report within sixty (60) days after the expiry or surrender of the licence. The Reports must contain information as required by the *Mineral Exploration Reporting Guidelines - A guide to the preparation and submission of technical reports for exploration in South Australia* approved by the Director of Mines, or as amended from time to time.

Regulation 72 of the draft Mining Regulation formalises the requirement to prepare and furnish technical exploration report under the Regulations.

Regulation 72 requires the holder of an exploration licence, or the holder of any other mineral tenement where the tenement holder is carrying out exploration operations to prepare and furnish to the Minister a technical exploration report (r. 72(1)). The Minister may determine that a class of tenement does not need to prepare and submit technical reports. A technical exploration report must be in a manner and form determined by the Minister and must contain information determined by the Minister (r. 72(5)). It is proposed that the Minister will determine requirements aligned with the *Mineral Exploration Reporting Guidelines - A guide to the preparation and submission of technical reports for exploration in South Australia*.

A technical exploration report must be furnished annually unless the Minister determines an alternate frequency or reporting date. Private mine holders must report on 30 June each year, and all other tenement holders must report on the anniversary of the date their tenement was granted (r. 72(4)).

An explorer must submit a final technical exploration report at certain times (r. 72(6)), namely:

1. Where a tenement expires – the explorer must submit a final report before the expiration date;
2. Where a tenement is cancelled or subject to forfeiture – the explorer must submit a final report within 3 months of the date of cancellation or forfeiture;
3. Where a tenement is surrendered (in whole or in part) – the explorer must submit a final report at the time of applying for surrender; or
4. Where an exploration licence is surrendered, relinquished or reduced (in whole or in part) due to requirements associated with expenditure commitments, Amalgamated Expenditure Arrangement, renewal related relinquishment requirements or retention status – the explorer must submit a final report within 2 months after the date of surrender, relinquishment or reduction.

Failing to submit a technical exploration report by the due date attracts a maximum penalty of \$5,000 and an authorised officer can issue an expiation notice of \$750.



Notice of airborne surveys

Standard conditions of an exploration licence require the licensee to provide written notification of any proposed airborne surveys, such as airborne geophysics, aerial photography, or remote sensing techniques to the Director of Mines 14 days prior to undertaking this work. This notification should provide information such as the type of survey, area to be surveyed in relation to the licence area, flight line spacing and flight height. The Department has prepared a standard form – *Notification of an airborne survey on a mineral exploration licence*. A notification of an airborne survey form is also required to be submitted for airborne surveys that will be carried out using an unmanned aerial vehicle (UAV) or drone.

Regulation 74 of the draft Mining Regulation formalises the requirement to notify the Minister of airborne survey's under the Regulations.

A tenement holder (exploration licence, mineral claim, mining lease, retention lease, miscellaneous purpose licence and private mine) who is intending to carry out an airborne geophysics survey or remote sensing techniques via air over land must notify the Minister of the holder's intention to carry out the survey (r. 74). The tenement holder must notify the Minister 14 days before conducting the survey and notice must be given in a manner and form determined by the Minister and that notice must contain information determined by the Minister.

Failure to notify the Minister before undertaking an airborne survey attracts a maximum penalty of \$52,500 and an authorised officer can issue an expiation notice of \$250 (r. 74(1)).

Compliance report

A tenement holder (exploration licence, mineral claim, mining lease, retention lease, miscellaneous purpose licence and private mine) must prepare and submit to the Minister a compliance report which demonstrates the tenement holders compliance with the Mining Act and Regulations over the period (r. 71(1)). A compliance report must be in a manner and form determined by the Minister and must contain information determined by the Minister (r. 71(4)). It is proposed that the Minister will determine requirements aligned with existing reporting requirements under regulation 86 and MD09 and MD12.

The Minister may exempt the holder of an exploration licence from the requirement to prepare and submit a compliance report, for example, explorers undertaking low impact exploration operations (r. 71(8)).

A compliance report must be furnished annually unless the Minister determines an alternate frequency or reporting date. Private mine holders must report on 30 June each year, and all other tenement holders must report on the anniversary of the date their tenement was granted (r. 71(3)). The Mining Registrar will publish compliance reports on the Mining Register (schedule 1).

A tenement holder must submit a final compliance report at certain times (r. 71(5)-(7)), namely:

1. Where a tenement expires – the tenement holder must submit a final report before the expiration date;
2. Where a tenement is cancelled or subject to forfeiture – the tenement holder must submit a final report within 2 months of the date of cancellation or forfeiture;
3. Where a tenement is surrendered (in whole or in part) – the tenement holder must submit a final report at the time of applying for surrender; or
4. Where an exploration licence is surrendered, relinquished or reduced (in whole or in part) due to requirements associated with expenditure commitments, Amalgamated Expenditure



Arrangement, renewal related relinquishment requirements or retention status – the explorer must submit a final report within 2 months after the date of surrender, relinquishment or reduction;

5. Where a tenement is transferred – the tenement holder must submit a final report at the time of applying to the Minister for consent.

Failing to submit a compliance report by the due date attracts a maximum penalty of \$5,000 and an authorised officer can issue an expiation notice of \$750.

Incident reporting

Regulation 73 of the proposed draft Mining Regulations will replace regulation 87 of the Mining Regulations 2011.

If or when a tenement holder (exploration licence, mineral claim, mining lease, retention lease, miscellaneous purpose licence and private mine) becomes aware of the occurrence of one of the following incidents, the holder must ensure that the reportable incident is reported to the Minister.

Reportable incidents include

- (a) a contravention of, or a failure to comply with, a condition of a mineral tenement; or
- (b) a failure to achieve, or a breach of, an outcome specified in a program under Part 10A of the Act; or
- (c) a contravention of, or a failure to comply with, a condition of a program under Part 10A of the Act; or
- (d) a triggering of any leading indicator criteria set out in a program under Part 10A of the Act; or
- (e) action that causes undue damage to the environment in connection with any operations carried out under a mineral tenement; or
- (f) a failure to comply with a direction under Part 10B of the Act within the time allowed in the direction; or
- (g) action that constitutes an authorised operation without being duly authorised by or under the Act; or
- (h) a failure to achieve, or a breach of, an outcome specified in a mine operations plan under Part 11B of the Act; or
- (i) a breach of the general duty under Part 11B of the Act; or
- (j) a failure to comply with an order under Part 11B of the Act within the time allowed in the order.

An incident must be reported to the Minister within 1 business day of the tenement holder becoming aware of the incident. The holder must provide the Minister with a comprehensive report on the incident within a month after becoming aware of the incident or an alternate period determined by the Minister (r. 73(2)).

An incident report must be in a manner and form determined by the Minister and must contain information determined by the Minister (r. 73(3)). The Mining Register will publish incident reports on the Mining Register (schedule 1).

Failing to report an incident attracts a maximum penalty of \$10,000 and an authorised officer can issue an expiation notice of \$1,500 (r. 73(1)).

Public Liability Insurance

Regulation 75 of the proposed draft Mining Regulations will replace regulation 90 of the Mining Regulations 2011.



A tenement holder (exploration licence, mineral claim, mining lease, retention lease, miscellaneous purpose licence and private mine) must, at its own expense, obtain before commencing operations and maintain throughout the term of the mineral tenement comprehensive public liability insurance and for such sums insured that is reasonable taking into account the kind of tenement, the nature and extent of the operations carried out under the tenement, and relevant industry standards, in relation to any action arising out of the operations carried out under the tenement and complying with any other requirement (if any) determined by the Minister. Failure to maintain this insurance attracts a maximum penalty of \$20,000.

The tenement holder must provide to the Minister a certificate evidencing the insurance coverage and any endorsements or waivers relating to insurance coverage. Failure to do so will attract a maximum penalty of \$5,000 and an authorised officer can issue an expiation notice of \$750 (r. 75(2)).

An insurance certificate must be furnished annually unless the Minister determines an alternate frequency or reporting date. Private mine holders must report on 30 June each year, and all other tenement holders must report on the anniversary of the date their tenement was granted (r. 75(3)).

A tenement holder must notify the Minister if any insurance lapses without having been renewed or if there is a change in an insurance policy, including a change in the level of cover. Failure to do so will attract a maximum penalty of \$5,000 and an authorised officer can issue an expiation notice of \$750 (r. 75(4)).

A tenement holder must, at the request of the Minister, provide to the Minister a copy of the policy of insurance within a period specified by the Minister (r. 75(6)). Failure to do so will attract a maximum penalty of \$5,000 and an authorised officer can issue an expiation notice of \$750 (r. 75(6)).

All notifications related to insurance must be made to the Minister within 14 days and must be in a manner and form determined by the Minister and must contain any information determined by the Minister (r. 75(5)).

4. Directions

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

When an incident occasioning undue damage to the environment occurs, or the Regulator suspects that, perhaps because of lax standards of operations, an incident might occur, the Regulator may issue a direction requiring specified conduct to be stopped or prevented or requiring that certain positive action be taken. These directions enable the Regulator to respond quickly and positively to both incidents and threats, without needing to seek court orders. After all, by the time a court order is obtained, the threatened incident may have occurred, or the damage escalated.

The Mining Act, as amended by *the Statutes Amendment (Mineral Resources) Act 2019* enables the Regulator to issue environmental directions (s. 70E), rehabilitation directions (s. 70F), compliance directions (s. 70FA) and emergency directions (s. 70FB).

Environmental Directions

An environmental direction is an administrative order from the Minister to prevent or minimise damage to the environment (s. 70E). If, in the Minister's opinion, operations are being conducted in a way that results in, or is reasonably likely to result in, undue damage to the environment or a



breach of the environmental outcome under a PEPR (a program for environment protection and rehabilitation), the Minister may, by written notice given to any person involved in undertaking operations, direct that action is taken to prevent or minimise damage to the environment.

Environmental directions may:

- Require a person to discontinue, or not commence, a specified activity indefinitely or for a specified period or until further notice
- Require a person to take specific action in a specified way and within a specified period or at specified times or in specified circumstances
- Require a person to take action to prevent or minimise any damage to the environment, or to control specified activity
- Require a person to undertake specified tests or monitoring (including by a person with specified qualifications or experience and furnish the results to the Minister);
- Require a person to take action to rehabilitate or restore land
- Require a person to prepare a plan of action to address the breach(es)
- Require a person to furnish results or reports to the Minister.

Where an environmental direction is given to a person other than the tenement holder, the Minister must treat that person and the tenement holder as one and the same (s. 70E(8)). Practically, the Minister must give the same direction to the tenement holder, and that person and the tenement holder will be treated as jointly and severally liable for compliance with the direction.

Rehabilitation Directions

A rehabilitation direction is an administrative order from the Minister to direct action to rehabilitate land (s. 70F). The Minister may, by written notice given to any person involved in undertaking authorised operations, direct that action is taken to rehabilitate land in accordance with a PEPR (a program for environment protection and rehabilitation) or to a standard required with a condition of a tenement. A rehabilitation direction can be given during the term of the tenement or after the tenement has expired, or has been cancelled or surrendered, and the direction may relate to land within or outside the tenement (or previous tenement) area.

Where a rehabilitation direction is given to a person other than the tenement holder (or former tenement holder), the Minister must treat that person and the tenement holder or former tenement holder as one and the same (s. 70F(6)). Practically, the Minister must give the same direction to the tenement holder or former tenement holder, and that person and the tenement holder or former tenement holder will be treated as jointly and severally liable for compliance with the direction.

Compliance Directions

A compliance direction is an administrative order from the Minister to direct compliance (s. 70FA). The Minister may issue a direction to:

- Secure compliance with:
 - o the Act
 - o the Regulations
 - o the terms or conditions of a mineral tenement
 - o any authorisation under or in relation to a mineral tenement
 - o any direction under or in relation to a mineral tenement.
- Prevent, or bring to an end, operations that are contrary to the Act, the Regulations or a mineral tenement
- Require rehabilitation of land.



A compliance direction may impose any reasonable requirement to achieve the above, including a requirement to discontinue or commence specific operations, a requirement to carry on specific operations at specific times or subject to specific conditions, or require that specific actions be taken.

Emergency Directions

An emergency direction is an administrative order from an authorised officer to direct action in an emergency (s. 70FB). If, in an authorised officer's opinion, operations are being carried out in a way that results in, or that is reasonably likely to result in, undue damage to the environment, a breach of an environmental outcome in a PEPR (a program for environment protection and rehabilitation) or a breach of a term or condition of a mineral tenement, and action is urgently necessary, then the authorised officer may issue (in writing or verbally) an emergency direction. An emergency direction may impose any reasonable requirement, including a requirement to take specific activities or actions for a specific period, or a requirement to furnish a specific report to the Minister. If an emergency direction is given verbally, the authorised officer must confirm the direction in writing at the earliest opportunity, but not exceeding 2 business days (s. 70FB(3)). Irrespective of whether a direction is issued in writing or verbally, the Director of Mines must confirm the actions taken by the authorised officer with 3 business days, or the emergency direction will expire (s. 70FB(4) and r. 76).

The maximum penalty for failing to comply with an environmental, rehabilitation, compliance or emergency direction is \$250,000. Where a person has failed to comply with a direction, the Warden's Court may order that that person cannot establish any further mineral claims (s. 70HA). This applies to mineral claims, as the Minister approves or refuses other tenement applications.

An environmental, rehabilitation, compliance or emergency direction may direct an act or omission that might otherwise constitute a contravention of the Act or Regulations and the person undertaking the act or omission will not be liable to a penalty for compliance with the requirement (s. 70FC). For example, a direction may require the rehabilitation of land where the person undertaking the rehabilitation does not have an approved PEPR.

A person served with a direction cannot refuse to provide information as required by a direction on the grounds it may incriminate the person or make the person liable to a penalty (s. 70HB). For example, a report or results that include incriminating evidence against that person. However, any information provided cannot be used against that person in any proceedings for an offence or for the imposition of a penalty (other than proceedings for making a false or misleading statement) but that information can be used against a company.

The power to issue such directions is constrained only by the legal principles that directions should reflect a reasonable and proportionate response to the contravention in respect of which the direction is issued and that the content of a direction should be within the powers conferred by the Mining Act and Regulations. If that were not so, then the Regulator could effectively amend existing legal standards without parliamentary scrutiny.

Persons served with such directions should also be able to understand what they have to do to comply with them. As failure to carry out, or breach of, a direction will be a criminal offence, it is essential that those served with such directions should know how to avoid criminal liability by complying with the direction. Where a direction is vague, uncertain or ambiguous as to its requirements for compliance it risks being declared void and of no effect.

A person served with an environmental, rehabilitation, compliance or emergency direction has a right of appeal on the merits (s. 70G). Such an appeal may claim, for example, that there was no factual basis for the making of the direction, or that the direction goes beyond what is reasonably



necessary to remedy the breach or anticipated breach. An application for merits review must be made to the ERD Court within 28 days of receiving the direction.

Where the recipient of an environmental, rehabilitation, compliance or emergency direction does not comply with the terms of the direction, the Regulator is empowered to do, or arrange to have done, any necessary work and recover the reasonable costs from the offender (s. 70H). The costs incurred constitute a debt due to the Crown that the Minister or Director of Mines can recover from the bond, as a debt in a competent court or take enforcement action as the secured party of a statutory interest under the *Personal Property Securities Act (Cth) 2009* (see s. 85).

5. Forfeiture

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

‘Use it or lose it’ is a widely accepted tenet of the resources sector. The Mining Act includes an expectation that a tenement must be worked. Minimum expenditure obligations and working conditions are designed to ensure tenement holders are genuine in their efforts to explore and extract and they are not sitting on land in the hope of some future payday, a practice known as land-banking or tenement warehousing.

The fundamental purpose of the scheme for regulating exploration in South Australia is to encourage exploration activity and to ensure exploration is undertaken diligently, targets identified, tested and advanced. The fundamental purpose of the scheme for regulating mining in South Australia is to encourage mining activity and to ensure mining entitlements are not allowed to lie idle. Exploration is to be encouraged to ensure that mining rights are discovered and mining is to be encouraged to ensure mining rights are exploited efficiently for the general economic benefit of the state.

South Australia and jurisdictions like Western Australia, Queensland, and New Zealand (albeit all slightly different) include a quasi self-regulatory system whereby a person can lodge a plaint over a tenement in the Court alleging the holder has not met its minimum expenditure obligations or working conditions and request for it be forfeited if they can prove their case. The court makes a recommendation to the Minister, who then makes a decision. If the forfeiture is granted, the plaintiff gets the first option to apply for the tenement and, if granted, gets an opportunity to work the ground.

While a forfeiture regime has been in place in South Australia as early as the *Gold Mining Act 1885*, amendments made to the regime in 2011 resulted in unintended difficulties for plaintiffs to establish a forfeiture case.

The Regulator is often faced with non-compliance for various reasons, but unless another operator wants to take over the tenement, it is not always in the public interest to cancel the tenement. Industry self-regulation is, therefore, an important tool to allow other interested operators to challenge non-compliance and seek to take up the tenement.

Section 70 of the *Statute Amendment (Mineral Resources) Act 2019* establishes a revised approach to forfeiture that reflects modern mining and the South Australian framework. Mineral claims, mining leases and retention leases are eligible for forfeiture. Private mines and miscellaneous purpose licences cannot be plainted, and exploration licences can only be plainted if prescribed by the Regulations. Regulation 56(1) of the draft Mining Regulations prescribes that exploration licences will be subject to forfeiture.



To apply for forfeiture, the applicant must be able to demonstrate (r. 56(2)):

- (i) their capacity to meet the terms and conditions of the tenement; and
- (ii) their capacity to meet the outcomes, criteria and requirements of the relevant approved program under Part 10A of the Act; and
- (iii) their capacity to replace any bond or security in place under section 62 of the Act; and
- (iv) a history of compliance with the provisions of the Act and any corresponding law.

The application must be supported by:

- (i) evidence of technical, operational and financial capabilities and resources available to the applicant to undertake the operations contemplated by the relevant approved program under Part 10A of the Act; and
- (ii) evidence of the capacity to rectify or address the grounds on which the tenement would be forfeited, as applying under section 70(2b) of the Act.

An applicant cannot be made in relation to an exploration licence in the first 2 years from being granted or transferred (r. 56(2)). This prohibition is intended to provide an explorer time to commence their operations.

The Warden's court may hear an application for forfeiture and recommend to the Minister that the tenement be forfeited. The Court may recommend that the Minister forfeit the tenement if satisfied that:

- a) there is a breach of the Act or Regulations; or
- b) there is a breach of a term or condition of the tenement; or
- c) there is a breach of a PEPR; or
- d) there is undue damage to the environment as a result of authorised operations; or
- e) there is a failure to carry out activities associated with holding the relevant type of tenement within a reasonable time or to a reasonable extent.

While (a) to (d) above are self-explanatory, (e) was included to capture operations that sit disingenuously in care and maintenance, or where a tenement is granted, and the tenement holder fails to apply for a PEPR or commence operations in an expedient manner.

The Court must also be satisfied that one of the above occurrences is of sufficient gravity to justify the forfeiture of the tenement. This threshold test was retained from the existing regime to rely on the established common law commentary on what is considered to be sufficient gravity (*De Blaquiére v Reid* (1980); *Wells v Simnovec* (1998); *Sickerdick v B & M Property Enterprises Pty Ltd (in Liq)* (2003); *Boral Resources (SA) Ltd v Matthews* (2006)).

Fundamentally, for a lease or licence to be subject to forfeiture, an explorer or miner would need to be incapable of exploring or mining to such an extent that another explorer or miner should be given the opportunity. An explorer or miner could be incapable of exploring or mining either physically or competently and diligently.

Examples of a failure to explore or mine physically would include not expending, not operating, not obtaining approvals, not submitting statements, returns, reports, etc. These would be non-compliances that result in the explorer not undertaking exploration activities or the miner not undertaking mining operations. Where these non-compliances remain unremedied, the lease or licence may be subject to forfeiture. While it may be more common in the case of production tenements for these non-compliances to remain unremedied, in the case of exploration licences the regulatory framework governing exploration in South Australia includes alternative punitive



measures. For example, where there is a failure to meet expenditure commitments or submit exploration statements, the Minister can punish the non-compliance by reducing the area. Where there is a failure to obtain approvals, the Minister may validate the failure (where warranted) by granting retention status or care and maintenance. Where the Minister has addressed the non-compliance through the alternative punitive measures, the exploration licence will return to good-standing. Consequently, where the Minister has addressed non-compliance, there will be no grounds for forfeiture.

Examples of a failure to explore or mine competently and diligently would include non-compliances that give rise to reasonable doubt of the financial, technical and social capabilities of the explorer or miner. Failures of this kind will be harder to establish and would likely require a combination of non-compliances, such as substantial or regular unpaid debts, multiple and frequent complaints and non-compliance, or prolonged inability to reasonably obtain or retain access to land. Ultimately, the court would need to be satisfied that an explorers or miners financial, technical and social incapacities are of sufficient gravity to forfeit a lease or licence to another explorer or miner.

Where the Warden's Court has recommended forfeiture, the Minister *may* forfeit the tenement to the Crown, and the applicant is entitled to the transfer of the tenement for the balance of its term. The Minister is not obligated to accept the Warden's recommendation. However, where the Minister does accept the Warden's recommendation, the right to the transfer of the tenement does not arise in any circumstances prescribed by the Regulations and the right expires at the end of a period prescribed by the Regulations.

If the Minister accepts the Warden's recommendation, the right to the transfer of the tenement does not arise in any circumstances prescribed by the regulations and the right expires at the end of a period prescribed by the Regulations. Regulation 56(3) of the draft Mining Regulations prescribes that a right to the transfer of a mineral tenement does not arise unless and until:

- an application is made in a manner and form determined by the Minister;
- that application is furnished to the Minister within 14 days of the date of the order; and
- the application is consented to by the Minister.

Unless and until the Minister has the certainty that the applicant wants to exercise their right to have the tenement transferred, the Minister should not forfeit the tenement to the Crown.

The transfer of the tenement takes effect on publication of a notice in the Gazette.

To be an applicant to apply to the court for forfeiture of a tenement, the applicant must meet the necessary requirements set out in the Regulations.

6. Cancellation and Suspension

Cancellation and suspension as amended by the Statute Amendment (Mineral Resources) Act 2019

Cancellation and suspension are punitive tools and will be used by the Regulator where the relative certainty of compliance and the relative severity of the consequences demonstrate a high degree or severe scale of harm, cost, loss, frequency and public concern.

Suspension of a lease or licence may be considered in the following circumstances:

- When preventive, persuasive and available compulsive techniques have been used, and compliance has not been achieved



- When the breach is of sufficient import that it is considered that suspension is warranted whether or not lower-level strategies have already been applied
- When there has been a series of breaches that are considered in combination to add up to a breach of sufficient import for it to be considered suspension is warranted, whether or not persuasive strategies have already been applied
- When there is a high level of disengagement by senior management of the mining operation and there is a high probability that further serious breaches will occur.

The period of suspension may continue until the non-compliances have been rectified.

Cancellation of a lease or licence may be considered where a tenement has been suspended and satisfactory compliance has not been fully achieved within the maximum period of suspension.

Section 56W of the *Statute Amendment (Mineral Resources) Act 2019* replaces and amends sections 33, 41, 56 and 85 of the current Mining Act and introduces a unified approach to cancellation and suspension of a tenement. Section 56W is in addition to the Minister's power to cancel a tenement where the tenement holder fails to pay a bond.

The Minister may suspend or cancel an exploration licence, a mining lease, a retention lease or a miscellaneous purpose licence. Mineral claims were not included due to the nature of the operations undertaken on a mineral claim and the 12-month term of a claim.

The Minister may suspend or cancel a mineral tenement if the tenement holder contravenes or fails to comply with a term or condition of the tenement or a provision of the Act or Regulations.

The Minister may suspend all or some of the operations. The length or term of the suspension will be dependent on the nature of the suspension and the obligations or requirement or compliance required by the Minister.

Cancellation is finite and cannot be undone as the power to reinstate a tenement only applies to tenements that have expired.

Prior to taking action to suspend or cancel a tenement, the Minister must take reasonable steps to notify the tenement holder of the proposed course of action, including the grounds on which the Minister intends to act, and provide the tenement holder with an opportunity to make a written submission on the alleged grounds.

After notifying the tenement holder and considering any submissions, the Minister may suspend or cancel the tenement by registering an instrument on the Mining Register and by notifying the tenement holder of the cancellation or suspension. The tenement holder has 28 days from receipt of the notice to review the grounds of cancellation or suspension in the ERD Court.

7. Reinstatement and extension of term

Reinstatement and extension of term under the Statutes Amendment (Mineral Resources) Act 2019

Sections 56Y and 56Z of the *Statutes Amendment (Mineral Resources) Act 2019* are new powers that allow the Minister to reinstate an expired tenement or extend the term of a tenement. The policy behind creating these two new powers was to address situations where a tenement holder fails or refuses to renew the term of the tenement prior to expiry when there are outstanding liabilities. Under the current Mining Act 1971, the Minister has only one power to address outstanding liability after expiry, which is the power to issue a rehabilitation direction to the immediate past tenement



holder. While the Minister can already address rehabilitation after expiry, the two new powers allow the Minister to have access to the full range of compliance and enforcement tools available under the Mining Act to ensure full compliance.

Sections 56Y and 56Z of the *Statutes Amendment (Mineral Resources) Act 2019* were based on powers available under the *Environment Protection Act 1993 (SA)* whereby the Environment Protection Authority may renew a licence.

This new section allows the Minister to extend the term of a mineral tenement or reinstate an expired mineral tenement (mining lease, retention lease or miscellaneous purposes licence) if the Minister determines that the tenement holder has contravened or failed to comply with a provision of the Act. This will mean that the tenement holder will continue to be subject to the terms and conditions of the tenement and the requirements of the Act but their right to undertake activities will be limited to rehabilitation only.

Section 56Y establishes the Minister's new power to extend the term of a tenement and section 56Z establishes the Minister's new power to reinstate a tenement. The Minister's power to extend the term of a tenement or to reinstate a tenement was limited to mining leases, retention leases or miscellaneous purpose licences. Exploration licences were not included due to the complexity of determining how an extended-term or reinstated tenement would work with the limited term of exploration licences and compulsory relinquishment requirements at anniversary dates under section 30A. Similarly, mineral claims were not included due to the limited 1-year term and prohibition on renewal. Further, the risk of significant non-compliance, which would warrant an extension, is less likely in the case of an exploration licence or mineral claim, compared to that of a production tenement.

The Minister's powers to reinstate a tenement are also limited to an 'expired' tenement not a tenement that has been surrendered or cancelled. This is because expiry happens by operation of the Act at a time dictated by the tenement conditions, whereas the Minister has oversight and control over surrenders and cancellations. Surrender cannot occur unless the Minister approves the surrender application and cancellation only occurs on the initiation of the Minister.

The Minister can only extend the term of a tenement or reinstate a tenement if the Minister considers:

- a) that the tenement holder to which this section applies has contravened, or failed to comply with, a provision of this Act; and
- b) that the term of the tenement should be extended in order to support the requirement that the tenement holder take action-
 - a. to rehabilitate the land in accordance with the requirements of a program under Part 10A; or
 - b. to rehabilitate the land to a standard required to secure compliance with a condition of the mineral tenement; or
 - c. to prevent or address undue damage to the environment,

(including to land outside the area of the mineral tenement).

The circumstances in which the Minister can extend the term of the tenement or reinstate a tenement are the same. Both section 56Y and 56Z have been limited to these circumstances, as the policy reason for these sections was to allow the Minister to ensure that all non-compliances are addressed and not abandoned. Further, we wanted this policy position clear in the Act to ensure tenement holders do not lobby the Minister to re-instate their tenement in the event they inadvertently let it lapse.

The circumstances where the term can be extended or reinstated is also limited to rehabilitation operations so as not to trigger the right to mine under the *Native Title Act 1993 (Cth)*. Further, subsection 56Z(11) expressly states that Part 9B does not apply to a reinstated tenement. Reinstating a tenement could be considered a grant of a tenement under Part 9B and the Minister cannot grant a tenement until an NTMA has been entered with the native title holders. Excluding the



operation of Part 9B in this circumstance will ensure the requirement to obtain an NTMA will not prevent rehabilitation.

The reinstatement of a tenement is more complicated than renewal as reinstatement involves the tenement ceasing then being reinlivened. This provides the Minister with some discretion as to how the tenement is reinlivened.

Firstly, the Minister may reinstate a tenement over an area smaller than the area of the original tenement. This is a discretionary power of the Minister, which was proposed so that the Minister could only reinstate the area to which the non-compliance relates and still allow the Minister to release the remaining ground under sections 28 and 29A. Secondly, the Minister has the discretion to set the further term or a future date to which the reinstated tenement will expire.

The Minister must take reasonable steps to consult with the tenement holder before extending the term of a tenement and subsections 56Y(4) and(5) provide the tenement holder with merit appeal rights in the ERD Court. There is no obligation to consult and there is no merit review of the Minister's decision to reinstate a tenement but, as you know, that does not limit judicial review. However, a notice of reinstatement of a tenement must be given to the tenement holder and the owner of the land.

8. Offences and Penalties

Offences and penalties as amended by the Statutes Amendment (Mineral Resources) Act 2019

Put simply, offences are the crime and penalties are the punishment for the crime. This section will consider the broad offences under the Act as well as specific offences such as illegal mining. Other specific offences are also discussed above under parts 1 (Authorised Officers) and 4 (Directions) and a comprehensive list can be found in the attached table. This section will also give an overview of the penalty regime under the Act and Regulations.

All offences in the Mining Act as amended by the *Statutes Amendment (Mineral Resources) Act 2019* are criminal offences (s. 89A). With the exception of offences committed on a private mine, all offences in the Act and Regulations are subject to continuing, that is, for each day that a breach exists, or a contravention remains unremedied, another offence occurs (s. 70HG). This occurs at a rate of one-tenth of the maximum penalty prescribed for that offence. This does not occur automatically- the court must determine the additional penalty for acts or omissions that continue or the court can determine the defendant guilty of a further offence for acts or omission that continue after conviction. For example, if the maximum penalty is \$250,000, then the defendant may be liable for an additional \$25,000 each day that the offence remains unremedied or the breach continues following conviction.

All offences under the Act are classified as summary offences (s. 70HJ). The classification of an offence determines procedural rights and obligations as set out in the *Criminal Procedure Act 1921 (SA)*. There are two major classifications: summary offences and indictable offences. Indictable offences are subdivided into either minor indictable or major indictable. Classifying offences as a summary offence has an effect on the time limit for prosecutions, rights to trial by jury and maximum penalties. Firstly, the statute for limitations for summary offences is generally 2 years; however, the Mining Act has extended this to 3 years (s.70HI and s. 70HE(13)). This can be extended up to 10 years with the authorisation of the Attorney-General (s. 70HI). Secondly, summary offences are matters that are tried by a judge alone, and the defendant does not have the right to a trial by jury. Thirdly, the maximum term of imprisonment cannot exceed 2 years.



Offence - Illegal Mining

A person who carries out operations without being duly authorised under the Mining Act, or a person who sells, disposes or utilises of minerals that is contrary to the Act, is guilty of an offence with a maximum penalty of up to \$250,000 or 2 years imprisonment (s.70HC). Without being duly authorised could mean operating without or contrary to a lease or licence (including its terms and condition) or without a PEPR or MOP.

While this has not been tested, the words “*without being duly authorised*” could possibly include operations without the necessary access to land requirements. It was held in *Johnson v Niutta & Anor [2010] SAERDC 22* that the words “the authority required by this Act” in section 74A referred to the obligation to have obtained a tenement before carrying out operations, the obligation to either have an agreement with the landowner, concerning entry onto and the conduct of mining operations on the land, or have served a notice of entry upon the landowner in accordance with section 58 of the Act.

A new subsection (s. 70HC(2)) has also been introduced to allow the regulations to limit prescribed classes of ancillary operations that are not to be considered illegal mining- for example, activities approved under the *Planning, Development and Infrastructure Act 2016 (SA)*.

Offence – Obstruction of a person authorised to mine etc

A person who, without lawful excuse, obstructs or hinders a tenement holder in the reasonable exercise of the right conferred under this Act, is guilty of an offence with a maximum penalty of \$150,000 (s. 70HC). This is the only offence under the Act enforceable against a person not involved in authorised operations, such as an owner of land.

Offence – Offences by bodies corporate

It is usual for environmental legislation to provide that where a corporation has committed an offence, then directors or other managers of the corporation are to be deemed guilty of the same offence. This means that a corporate director can be individually liable for the offences committed by the corporation. As a corporation may become liable because of the actions or state of mind of employees and agents, this, in turn, exposes corporate officers personally to the offences committed by their workforce (see commentary on vicarious liability above).

The effect of these provisions is not only to reverse the normal burden of proof that would apply if company officers were to be prosecuted as individuals — that is, that the prosecution should prove its case rather than the accused be required to disprove liability — but it also, as with employer liability, extends criminal liability to persons who do not actually commit offences but who nevertheless are deemed to be responsible for them. The prosecution, of course, first has to prove that the corporation committed an offence and disprove any defences available to directors. In 2009, the Council of Australian Governments published a set of agreed principles relating to directors’ liability. In response to this, South Australia aligned its statute book with the *Statutes Amendment (Directors’ Liability) Act 2011*. Consequently, section 70HH aligns with these principles, and, in order to demonstrate that a director is guilty of an offence by a body corporate, the prosecution must also prove:

- The director knew, or ought reasonably to have known, that there was a significant risk that such an offence would be committed; and
- The director was in a position to influence the conduct of the body corporate in relation to the commission of such an offence; and
- The director failed to exercise due diligence to prevent the commission of the offence.

Offence – False or misleading information



A person who furnishes information to the Minister, the Director, the Mining Registrar or any other person involved in the administration of this Act that is false or misleading in a material particular is guilty of an offence with a maximum penalty of \$150,000. This is a broad-ranging offence that applies to any person and captures any type of information that must be furnished under the Act or regulations. While this offence is broad, any prosecution must establish a physical element of the offence, being that the information was false or misleading in a material way, which is a matter of judgement rather than existing fact.

Penalties

While all offences are criminal, the Act allows penalties to be criminal, civil, expiable or administrative. As demonstrated in the attached table, the Act and Regulations establish offences and maximum criminal penalties for the respective offences. Where no maximum penalty is expressed for that particular penalty, the maximum criminal penalty for failing to comply with a compliance direction will apply, or the maximum civil penalty will apply (s. 70HE). Where an administrative penalty is to apply, the Act will indicate; however, the value of that penalty will be set out in the Regulations (s. 91). The Act does not indicate what offences can be expiated; rather, the Regulations will list these penalties. Each penalty type is considered below:

Criminal penalties

Criminal prosecution is a last resort. This is due to the inevitably high commitment of human and financial resources to court action and because it is usually more efficient to realise a solution to a problem through negotiation and use of administrative or civil tools and sanctions. The maximum criminal penalty under the Mining Act is \$250,000 and 2 years imprisonment. Criminal prosecutions also burden the accused with a criminal record.

Civil penalties

As an alternative to criminal prosecution, the Act specifies that criminal penalties may be recovered by the Director of Mines by negotiation or application to the ERD Court, as a civil penalty (s. 70HE). This has the advantage that the offence only has to be proved on the balance of probabilities, which is a lower burden of proof than a criminal prosecution. It also enables the Director to ask for civil penalties rather than criminal sentencing.

The Director of Mines may only exercise its power to recover civil penalties (including by negotiation out of court) in cases where the offence does not require proof of intention or some other state of mind (*mens rea*). An offender may choose to be prosecuted for a criminal offence rather than become subject to civil penalty provisions (s. 70HE(3)). In exercising their powers to proceed and sentence by way of a civil penalty, both the Director of Mines and the court are instructed to have regard to relevant considerations prescribed by the section, including the seriousness of the offence, the purpose of the conduct and the offender's record. The maximum amount the Director of Mines may recover by negotiation as a civil penalty in respect of the contravention is the amount specified by the Act as the criminal penalty or \$150,000, whichever is lesser. The court can, however, determine a civil penalty exceeding \$150,000 but not exceeding the maximum applicable criminal penalty. Any amount recovered as a civil penalty will be paid into the Mine Rehabilitation Fund (s. 70HE(16)).

If a person is convicted of a criminal or civil offence, the Court may, in addition to any penalty imposed, make additional orders. These include:

- An order requiring the person to take a specific action;
- An order requiring the person to make good any environmental damage or take specific action to prevent or mitigate further harm;



- An order requiring the person to pay into the Mining Rehabilitation Fund equal to the financial benefit they gained from the offence; or
- An order requiring the person to pay compensation to any persons who have suffered loss or damage as a result of the offence.

Expiation of offences

Expiation is governed by the *Expiation of Offences Act 1996*. The general view is that expiation is reserved for minor offences. The most common and obvious example is parking infringements.

An expiation fee is often called a fine; however, it is not a fine. Practically, an expiation fee is the price that is paid for making an offence or criminal conviction go away and avoid going to court. If an expiation fee is issued and paid, the offence goes away, and the Regulator cannot seek to prosecute the offence.

The general principle is that expiation notices should be used for clear cut offences in which it can be said with considerable certainty that the offender either did it or not.

Administrative offences

Administrative penalties are imposed 'by notice in writing' from the Director of Mines to the tenement holder (or former tenement holder) and immediately become statutory debts due to the Crown (s. 91). Once imposed, the Director has 7 years in which to enforce that debt or 15 years for royalty debt (as royalties are a specialty) unless that time period is extended in accordance with, or by operation of, the *Limitation of Action Act 1936 (SA)*. The Director may issue an administrative offence without consultation, warning or prior notice. Administrative penalties are unique to the Mining Act and the *Petroleum and Geothermal Energy Act 2000 (SA)*.

The Act prevents the Director from concurrently imposing an administrative penalty and instituting a prosecution in respect of the same act or default. Therefore, the Director must carefully determine which measure is the most appropriate where a breach of a provision enlivens the right to either impose an administrative penalty or commence a prosecution because, once either course is chosen (e.g. by imposing a penalty 'by notice in writing' or commencing proceedings), the alternative course is excluded. Decisions as to which measure to pursue in such circumstances will usually be based on the particular facts in each case, the evidence available, any relevant time constraints, and the weight of the relevant factors.

Evidentiary provisions

Evidentiary provisions are common provisions in Australian legislation and these provisions allow a certificate signed by a person administering a law to be evidence of a fact stated in the certificate. These provisions enable an administering authority to put evidence before courts about a range of basic matters relating to its activities records without the need to call witnesses. The purpose of evidentiary provisions is to improve administrative efficiency and reduce the workload of officials administering the legislation.

Under the Mining Act, the Minister can certify (s. 70HK (1))—

- that a person named in the certificate was or was not at a specified time a tenement holder; or
- that a specified provision was a term or condition of a specified mineral tenement at a specified time; or
- that a specified provision was a requirement or condition of a program under Part 10A; or
- that a specified determination, direction, decision, order or requirement was made or given on a specified day; or
- that at a specified time the Minister, the Director of Mines or the Mining Registrar gave notice of any specified matter under or in connection with the operation of this Act; or



- that at a specified time the Minister, the Director of Mines or the Mining Registrar had not received any notice, instrument or other document, or had not received any information of a specified kind; or
- that at a specified time a specified person was an authorised officer under this Act; or
- that a particular delegation was in force under this Act at a specified time, is, in the absence of proof to the contrary, proof of the matter so certified.

Further, it is also common for legislation to include a range of presumptions that must be disproved by the defendant. This shifts the burden of proof from the plaintiff to the defendant. In the Mining Act, it is also assumed to be proved, unless there is evidence to the contrary that (s. 70HK(2)-(5)):

- any land referred to in the complaint is mineral land or land exempt from operations under this Act,
- a document purporting to be a lease or licence under this Act will be accepted as such;
- a breach of a PEPR (a program for environment protection and rehabilitation) or the terms or conditions of a tenement occurred as a result of an act or omission of the tenement holder; and
- a fact determined by the use of an electronic, sonic, optical, mechanical, measuring or other device or technique by an authorised officer or a person assisting an authorised officer is correct.

9. Other Remedies

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

Modern environmental law frameworks have sought to establish civil remedy regimes, not only as an alternative to criminal sanctions, but as a means of more effectively remedying and compensating for environmental offences and providing deterrents to others.

Civil remedies

Many, if not most, statutory schemes for environmental protection allow for civil enforcement of the legislation. Civil enforcement may be undertaken by the Minister or Director (s. 74), in addition to their power to issue directions as discussed above in part 4 (Directions). Other similar acts, such as the *Environment Protection Act 1993 (SA)*, allow civil enforcement by members of the public or local government in the absence of any action being taken by the Regulator. While the Greens proposed such rights, the Government did not pursue third party civil enforcement *as such rights can undermine confidence in the Regulator and deter investment from the sector due to risk of activism, legal costs and significant delays. Further, the nature of the evidence required to prove a breach, the costs of taking action (financial and emotional), and the possibility of vexatious litigation for commercial or personal gain are all reasons why the Government determined that third party civil enforcement was unnecessary and ill-advised* (second reading speech in Upper House).

Under the new civil remedy regime, the Minister or Director of Mines can apply to the court for the following orders (s.74):

- (a) an order restraining a person from engaging in conduct that is or may be in contravention of the Act or Regulations and, if the Court considers it appropriate to do so, requiring the person to take any specified action;
- (b) an order requiring a person to take that action where that person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to take any action required by the Act or Regulations;
- (c) an order for the payment of compensation for the injury, loss or damage, or for payment of the reasonable costs and expenses incurred in taking that action to a person who has suffered injury or loss or damage to property, as a result of a contravention of the Act or



Regulations, or incurred costs and expenses in taking action to prevent or mitigate such injury, loss or damage;

- (d) an order against a person who has contravened the Act or Regulations for payment (for the credit of the Mining Rehabilitation Fund) of an amount in the nature of exemplary damages determined by the Court;
- (e) order the payment of exemplary damages where appropriate;
- (f) an order restraining a person from engaging in conduct of a particular kind; and
- (g) an order requiring a person to take a specified action.

Enforceable voluntary undertakings

An enforceable voluntary undertaking is a legally binding agreement between the Minister and the person who proposed the undertaking. The person is obliged to carry out the specific activities outlined in the undertaking relating to a contravention or alleged contravention of the Act or Regulations.

As an alternative to court-imposed remedies for breaches, the concept of regulators entering into an environmental undertaking with those in breach has been seen as having definite advantages. In essence, this would be possible where a breach has occurred or is anticipated and an administrative resolution based on enforceable undertakings is to the advantage of both the regulator and the regulated in ensuring compliance with the law. In other words, this is an outcomes-based solution, rather than simple punishment, that does not depend on court-based action and findings of guilt.

This new remedy allows the Minister to accept a written undertaking given by a person in connection with a matter relating to a contravention or alleged contravention of the Act or Regulations. The undertaking can be varied or withdrawn by the person at any time with the written agreement of the Minister. The undertaking is not an admission of guilt and the Minister cannot commence proceedings against the person in relation to the contravention or alleged contravention while an undertaking is in place. The Minister may agree to an undertaking while proceedings are on foot; however, the Minister must take all reasonable steps to discontinue the proceedings.

The maximum penalty for breaching an undertaking is \$50,000. The Minister may seek to enforce an undertaking in the ERD Court. In addition to imposing penalties, the ERD Court may order the person to comply with the undertaking, discharge the undertaking, pay costs to the Minister or any other order this Court considers appropriate.

Compliance orders

Only one section of the Mining Act allows for civil enforcement by an owner of land, whereby an owner of land may apply to the ERD Court to stop unauthorised operations, and, if those operations have resulted in damage to land, to take specified action to rehabilitate the land (s. 74A).

It was held in *Johnson v Niutta & Anor* [2010] SAERDC 22 that section 74A provides a remedy for a landowner both in circumstances where the mining operator does not hold the requisite authorisation (exploration licence or mining lease, etc.) or has failed, in the absence of an agreement with the landowner, to notify the landowner by serving a notice of entry in accordance with the Act and Regulations. The words “the authority required by this Act” in section 74A referred to the obligation to have obtained a tenement before carrying out mining operations, and the obligation to either have an agreement with the landowner concerning entry onto, and the conduct of mining operations on, the land or have served a notice of entry upon the landowner in accordance with section 58 of the Act.

Failure to comply with an order may be subject to a penalty of \$250,000.

Removal of Machinery

The Minister may cause any machinery or other goods that have been abandoned in the area of a mining tenement that has been transferred or ceased (forfeited, surrendered, cancelled or expired) to be seized. The seized machinery or goods will be forfeited to the Crown and may be sold by the Minister. The proceeds of the sale will be paid to the Treasurer. The Treasurer may deduct the costs



associated with seizing, holding, maintaining, repairing, cleaning or selling the abandoned machinery or goods from the proceeds of the sale of the machinery or goods.

The Treasurer will pay those funds to the owner of the abandoned goods after deducting the costs. If that money is not claimed within 2 years, the money shall be forfeited to the Crown.



Act / Regulations	Offence	Maximum Value (where no express maximum is given the penalty may be \$250,000 via compliance direction or \$150,000 via civil penalty)	Expiation fee
s. 8A (2)	Mining in Opal development area without authority		
s. 9	Mining in exempt land without a waiver		
s. 9AA (2)	Incorrect waiver notice	incorrect notice will prohibit the tenement holder from applying to the court	
s. 9AA(14)	Indemnify legal fees of up to \$2,500		
s. 14C(2), 88	Obstruct Authorised or other officer	\$10,000 or 6 months imprisonment	
s. 14C(3)	Fail to give assistance to Authorised Officer	\$10,000 or 6 months imprisonment	
s. 14D(2)	Fail to answer Question by Authorised officer	\$10,000 or 6 months imprisonment	
s. 14D(3)	Fail to comply with info request by Authorised officer	\$10,000 or 6 months imprisonment	
s. 14D(6)	Fail to state full name and address and produce evidence of identity	\$5,000	
s. 14E(2)	Fail to produce record for Authorised officer	\$10,000 or 6 months imprisonment	
s. 15(3)	Obstructs geological investigation	\$20,000 or 6 months imprisonment	
s. 15AA (9)	Must give a notice or agreement to the Mining Registrar for publication on the register	\$5,000	\$210
s. 15AG(3)	Must notify the Mining Registrar of a person operating on behalf of the tenement holder	\$5,000	\$210
s. 15AJ(1)	Must compile or create designated material	Administrative penalty - \$5,000	
s. 15AJ(2)	Must keep designated material	Administrative penalty - \$5,000	
s. 15AJ(3)	Must provide to the Director	Administrative penalty - \$5,000	
s. 15AJ(4)	Must produce on request	Administrative penalty - \$5,000	
s. 15AJ(5)	Must comply with a requirement relating to a request of the Director	Administrative penalty - \$5,000	



Act / Regulations	Offence	Maximum Value (where no express maximum is given the penalty may be \$250,000 via compliance direction or \$150,000 via civil penalty)	Expiation fee
s. 15AK(1)	Must make tests and take samples at the request of the Director	Administrative penalty - \$5,000	
s. 15AL(5)	Fails to comply with a condition of a release of materials	\$120,000	
s. 17AB(8)	Must notify the Minister than a person other than the proprietor is liable for Royalty		
S. 17AC	Notify of a relevant event	\$20,000	\$1,000
s. 17(12), 17AB(7) 17B, 17C, 17D, 17E, 17G, 18	Must pay royalty	+ default interest	
s. 17CA(8)	Must lodge royalty return	\$120,000	\$1,000
s. 20	Prospect with machinery or explosives without tenement		
s. 21(2)	Mineral claim must be identified in accordance with the manner and form determined by the Registrar		
s. 25(2)	Removes more than 1 tonne from claim	Administrative penalty - \$5,000	
s. 30AAA(3)	Must furnish expenditure statement to the Minister		
s. 31	Failure to pay annual EL fee		
s. 33B	Submit a work program as part of retention status		
s. 56C(7)	Failure to comply with condition of exemption (SME)	\$250,000	
s. 56E(2)	Are must be identified in a manner and form determined by the Mining Registrar		
s. 56E(4)	Tenement boundary must be maintained	Administrative penalty - \$5,000	
s. 56L	Must comply with tenement terms and conditions	\$250,000	



Act / Regulations	Offence	Maximum Value (where no express maximum is given the penalty may be \$250,000 via compliance direction or \$150,000 via civil penalty)	Expiation fee
s. 56M	Must pay rental		
s. 56Q	Change of operations cannot be made without an approval of the Minister	\$250,000	
s. 58, 58A,	Failure to serve notice of entry	\$20,000	\$1,000
s. 58A(13)	Failure to comply with court determination on entry to land	\$150,000	
s. 62	Failure to pay bond	\$150,000	
s. 62AA(8)	Make a residual risk payment with 28 days	\$20,000	\$1,000
s. 62AA(8)	Interference with a person monitoring or maintaining a tenement on behalf of the Minister	\$20,000 or 6 months imprisonment	
s. 63F	Mining operations (exploration) without NT agreement		
s. 63Q, 63R, 63V	Breach of NT agreement		
s. 63ZBA(7)	Breach of condition to inspect the native title register	\$50,000	
s. 70B(1), 70D(1)	Carry out operations without PEPR		
s. 70C(2), 70D(2), R.68	Failure to review PEPR		
s. 70DA	Failure to audit a PEPR		
s. 70DB(1)	Fail to have a PEPR	\$250,000	
s. 70DB21)	Fail to comply with a condition of a PEPR	\$250,000	
s. 70DB(3)	Fail to comply with a requirement to review a PEPR	\$250,000	
s. 70DB(4)	Fail to conduct a PEPR audit	\$250,000	
s. 70DB(5)	Fail to comply with approved PEPR	\$250,000	



Act / Regulations	Offence	Maximum Value (where no express maximum is given the penalty may be \$250,000 via compliance direction or \$150,000 via civil penalty)	Expiation fee
s. 70E(5)	Failure to comply with Environmental Direction	\$250,000	
s. 70F(3)	Failure to comply with Rehabilitation Direction	\$250,000	
s. 70FA(4)	Failure to comply with Compliance Direction	\$250,000	
s. 70FB(6)	Failure to comply with Emergency Direction	\$250,000	
s. 70HC	Illegal mining	\$250,000	
s. 70HD	Obstructing a person authorised to mine	\$150,000	
s. 73G(1)	Carry out operations without MOP (private mine)		
s. 73H	Failure to comply with objectives in MOP(private mine)		
s. 73I(4)	Failure to comply with Compliance order (Private Mine)	\$250,000	
s. 73J(4)	Failure to comply with Rectification order (Private Mine)	\$250,000	
s. 73KA(6)	Failure to comply with Emergency Order (Private Mine)	\$250,000	
s. 74AA(3)	Failure to comply with an enforceable undertaking	\$50,000	
s. 74A(3)	Failure to comply with a compliance order	\$250,000	
s. 79A	Furnishing false or misleading information	\$150,000	
s. 80(1d), (5)	Interfere with overlapping operations	\$20,000	
s. 88	Obstruct officer in administration of Act	\$10,000 or imprisonment for 6 months	
s. 90	Failure to provide a report to the Minister verifying information	\$20,000	\$1,000
R 71(2)	Failure to submit a compliance report at the end of a reporting period	\$5,000	\$750



Act / Regulations	Offence	Maximum Value (where no express maximum is given the penalty may be \$250,000 via compliance direction or \$150,000 via civil penalty)	Expiation fee
R 71(5)	Failure to submit a compliance report when transferring a tenement	\$5,000	\$750
R 71(7)	Failure to submit a final compliance report when due	\$5,000	\$750
R 72(1)	Failure to submit a technical exploration report at the end of a reporting period	\$5,000	\$750
R 72(6)	Failure to submit a final technical exploration report when due	\$5,000	\$750
R 73(1)	Failure to report an incident	\$10,000	\$1,500
R 74(1)	Failure to notify of an airbourne survey	\$2,500	\$250
R 75(1)	Failure to hold and maintain public liability insurance	\$20,000	
R 75(2)	Failure to provide the Minister with a certificate evidencing the insurance coverage	\$5,000	\$750
R 75(4)	Failure to notify the Minister of a change in public liability insurance	\$5,000	\$750
R 75(6)	Failure to provide a copy of the public liability insurance policy	\$5,000	\$750