Package 2 – Explanatory Document – Royalties and finance

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1. Calculating Royalties

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

Minerals are the property of the crown (s.16). Whilst minerals are in the ground they are the property of the crown. When they are recovered from the ground, they are still the property of the crown, but the person who recovered them now owes an obligation to the crown to pay a royalty (s. 17(1)). The person who recovered the minerals will not own the minerals until royalty is paid (s. 18).

Mineral types

'Minerals' and 'extractive minerals' are distinguished for the purpose of payment of royalty as different royalty rates and calculation methods apply. ***Minerals*** for the purpose of calculating royalty are:

- any naturally occurring deposit of metal or metalliferous ore, precious stones or any other mineral;
- any metal, metalliferous substance or mineral recoverable from the sea or a natural water supply;
- proppant sand;
- any extractive minerals mined for a purpose prescribed in the regulations (industrial mineral);
- any metal, metalliferous ore or mineral that has been dumped or discarded in the course of mining operations or operations incidental to mining operations; or in other circumstances prescribed in the Regulations.

Extractive minerals that are mined for a prescribed purpose are prescribed in regulation 3 of the draft Mining Regulations to include:

(a) chemical, cement, lime and glass manufacture;
(b) metallurgical flux, refractories and industrial fillers;
(c) foundries, fertiliser, agricultural, jewellery and crafted ornamental uses;
(d) the production of dimension stone.

Dimension stone is defined in regulation 3 of the draft Mining Regulation to mean stone that is cut, trimmed and finished to specific dimensions and shapes and includes cut stone, ashlars, monumental stone, roofing slate and flagging stone.

Minerals do not include soil, moss rocks, extractive minerals, or petroleum or any other substance, the recovery or production of which is governed by the *Petroleum and Geothermal Energy Act 2000*. A reference to minerals is also a reference to processed minerals or refined mineral products (s. 17F).

Extractive minerals are sand, gravel, stone, shell, shale or clay, but do not include industrial minerals, fire clay, bentonite, kaolin or proppant sand.

Royalty is payable to the crown on all mineral recovered from mineral land. Royalty is not payable in the following circumstances:

1. Royalty is not payable on extractive minerals where the terms and conditions of the tenement includes a specific provision for the management and use of the extractive

minerals as those extractive minerals are produced during the course of or as a result of carrying out authorised operations (e.g overburden). The terms and conditions of the tenement must also expressly exempt the payment of royalty on those minerals (s. 17(1a) and s. 56K);
2. Royalty is not payable on extractive minerals recovered by an owner of land recovering minerals as personal use (s. 75(2));
3. Royalty is not payable on minerals recovered for the purpose of any testing of a kind approved by the Minister (s. 17(2));
4. Royalty is not payable on extractive minerals recovered under other Acts, where those Acts expressly preclude the payment of royalty (s. 7(2b));
5. Royalty is not payable on minerals other than extractive minerals recovered from a private mine unless a relevant event has occurred (s. 17AB(1));
6. Royalty is not payable on precious stones if the precious stones are recovered under the *Opal Mining Act 1995*; and
7. Royalty is not payable where the Treasurer waives the payment of royalty (s. 17(10)).

Obligation to pay royalties

Prior to the amendment made by the *Statutes Amendment (Mineral Resources) Act 2019,* the obligation to pay royalty first arises at the time minerals are recovered from the tenement and were sold or intended for sale, or were utilised, or to be utilised, for any commercial or industrial purposes. Application of this in practice was often difficult as the interpretation 'of any commercial or industrial purposes' was not always clear. In practice, the interpretation of this was linked back to 'personal use' as referred to in section 75 for clarity, which is the section which relates to the landowners use of extractive minerals. Similarly, the definition of 'personal use' is also difficult to regulate. Consequently, to clarify when the obligation to pay royalty arises the *Statutes Amendment (Mineral Resources) Act 2019* requires that royalty is payable on all minerals unless, one of the above exemptions applies.

Royalty is only payable in respect to minerals (not extractive minerals) from a private mine if there has been a relevant event. A relevant event is a change of ownership of a private mine or a change of the person carrying out operations at a private mine. If no relevant event has occurred, no royalty is payable on minerals from a private mine (only extractive minerals). If a relevant event occurs the new proprietor must notify the Minister in a manner and form determined by the Minister, and that notice must accompany any information prescribed by the regulations (s. 17AC). The proprietor of a private mine is liable to pay royalties. Where a person other than the proprietor is carrying out the operations, that person can be liable for the royalties if the proprietor notifies the Minister in a manner and form determined by the Minister (s. 17AB(7)-(8)).

Royalty assessment principles

To quantify the royalty liability with respect to extractive minerals, a calculation is made by determining the tonnage and multiplying that by the relevant royalty rate. The royalty rate with respect to extractive minerals is 55 cents per tonne, or such lesser amount as may be prescribed by the Regulations. The rate currently set by the draft Mining Regulations is 52 cents (r. 9). The amount of royalty payable is determined based on the amount of extractive minerals removed from the ground, not the amount sold or used (including private mines). Prior to the amendments made by the *Statutes Amendment (Mineral Resources) Act 2019*, the royalty liability for extractive minerals was determined at the 'mine-gate', with the exception of extractive minerals used for a commercial purpose on a tenement. Mine-gate referred to the time in which the extractive minerals left the tenement, where they were recovered or, if those minerals were transported to a miscellaneous purpose licence, when the extractive minerals left that licence.

To quantify the royalty liability with respect to minerals, an ad valorem calculation is made by determining the market value as assessed at a time set by the Act, minus prescribed costs and multiplying that value by the relevant royalty rate percentage. In practice, four factors must be identified:

1. Royalty rate;
2. Market value;
3. Applicable timing of valuation; and
4. Prescribed costs

Royalty Liability = (Market Value (as valued at the applicable time) - prescribed costs) x royalty rate

Market value in this context is not used colloquially, rather the Mining Act defines market value and applicable time to determine that value through a list of valuation methods listed in a cascading order. Each of the valuation methods are explained below. The person liable to pay royalty cannot choose a valuation method, rather, the methods apply in a cascading order of preference. Eg, where the first valuation method does not apply, the second valuation will be applied, however, where the second valuation method does not apply, the third will be applied, and so forth.

The first valuation method determines the market value based on the price the minerals were sold under a contract with a genuine purchaser at arm's length. The market value will be the value shown on the sales invoice, which often represents the Net Smelter Royalty (NSR) freight on board (FOB) smelter, or in some cases Cost, Insurance and Freight (CIF) value or Cost and Freight (CTF) value. If the minerals are sold pursuant to a contract with a genuine purchaser at arms-length, an ad valorem calculation is made by determining the market value based on the contract price and the applicable timing of valuation is the day that ownership of the minerals is transferred from the person liable to pay royalty to the purchaser and multiplied by the relevant royalty rate percentage.

The advantage of this approach is that it is unequivocally defined and leads to simpler audits, lower administrative costs and fewer disputes. The disadvantage of calculating the royalty on the realised value of sales is that it relates to the payable metal rather than the value of the resource at the mine gate, and it may include realised hedging gains and losses, effectively involving government sharing in the timing risk.

More specifically:

Royalty Liability = (Contract price (as valued at the date the minerals transferred) - prescribed costs) x royalty rate

A contract with a genuine purchaser at arm's length, indicates a transaction between two independent parties in which both parties are acting in their own self-interest. Both the person liable to pay royalty and the purchaser are independent (unrelated), possess equal bargaining power, are not under pressure or duress from the opposing party, and are acting in their own self-interest to attain the most beneficial deal.

Where there is no contract with a genuine purchaser at arms-length, the Act lists a second, third, fourth and fifth valuation method in a cascading order. The applicable timing of valuation for the second, third, fourth and fifth valuation methods will be assessed at the mine-gate, being the time in which the minerals left the tenement where they were recovered or, if those minerals were transported to a miscellaneous purpose licence, when the minerals left that licence.

The ***second valuation method*** determines the market value according to any prices quoted or obtained on a relevant industry market applicable to the mineral. This is commonly referred to as the spot price. These markets are recognised by the Treasurer, after consultation with the Minister, by publishing a notice in the Gazette. The markets for the applicable minerals currently published include:

- The London Metal Exchange (http://www.lme.com): Copper, aluminium, zinc, lead, nickel, tin, steel, cobalt, molybdenum.
- The London Bullion Market Association (http://www.lbma.org.uk): Gold, silver.
- Evolution Markets (http://new.evomarkets.com): Uranium oxide.
- The Intercontinental Exchange (ICE) (https://www.theice.com)—Platts Iron Ore Spot Price: Iron ore.
- China Beijing International Mining Exchange (CBMX) (http://en.cbmx.com.cn): Iron ore.
- globalOre exchange (http://www.globalore.com): Iron ore.
- globalCoal exchange (http://www.globalcoal.com): Coal.

Transactions that reflect the gross international market price, such as an export invoice or an invoice with reference to a relevant international spot or average product value, would satisfy this calculation method. International spot and average prices reflect many transactions in liquid and competitive international markets and provide a reliable means to establish a product's value.

More specifically:

Royalty Liability = (Spot Price (as valued at the mine gate) - prescribed costs) x royalty rate

Where the second valuation method does not apply, the ***third valuation method*** determines the market value based on a price set by the Treasurer, or a method for determining an indicative price set by the Treasurer. The Treasurer sets a price or method, after consultation with the Minister, by publishing a notice in the Gazette. For example, an indicative price for salt is set at $22.86 per tonne in the Gazette. A copy of the notice can be seen here - http://www.energymining.sa.gov.au/__data/assets/pdf_file/0009/246987/Gazettal_Notice_-_Indicative_Price_for_Salt.pdf

Such an approach is undesirable as the Minister prefers not to interfere with, or be seen to be dictating, the market.

More specifically:

Royalty Liability = (Gazetted Price (as valued at the mine gate) - prescribed costs) x royalty rate

Royalty Liability = (Gazetted Method (as valued at the mine gate) - prescribed costs) x royalty rate

Where the third valuation method does not apply, the **fourth *valuation method*** determines the market value based on any price obtained in relation to sales of minerals of the same kind where those sales were to a genuine purchaser at arm's length within the same reporting period. For example, a person liable to pay royalty sells 90% of their minerals under an arm's length transaction and sells the remaining 10% of their minerals to a subsidiary.

If no relevant transactions have occurred in that reporting period, market value can be based on any price obtained by other parties within the industry in relation to sales of minerals of the same kind on the open market within the same reporting period. As explained in further detail below, the reporting period for royalty liabilities is 6 monthly, unless the tenement holder is a designated tenement holder who reports monthly.

More specifically:

Royalty Liability = (Comparable Sales Price (as valued at the mine gate) - prescribed costs) x royalty rate

Where the fourth valuation method does not apply, the **fifth *valuation method*** allows the person liable to pay royalty to estimate the reasonable value of the minerals. That estimate will be determined in accordance with any requirement, and accompany any information prescribed by the regulations. Regulation 10 of the draft Mining Regulations prescribe that the tenement holder's estimate of the reasonable value of the minerals in accordance with that subparagraph must be accompanied by—

(a) sufficient information as to why the market value of the minerals could not be determined according to section 17(6)(b)(i), (ii) and (iii) of the Act; and
(b) sufficient information that demonstrates that the estimate provided by the tenement holder is reasonable; and
(c) any further information requested by the Minister.

In some situations, none of the above calculation methods are applicable and the person liable to pay royalty may need estimate their liability using their own method. In determining this value, it is expected that consideration would be given to, all the information available, supply, demand and other market factors, the last know arm's length sale and any other relevant factors.

More specifically:

Royalty Liability = (Estimated Price (as valued at the mine gate) - prescribed costs) x royalty rate

The royalty rate with respect to minerals other than extractive minerals is:

- 5% of the value of mineral ores and concentrates;
- 3.5% of the value of refined mineral products; or
- 3.5% of the value of industrial minerals.

The relevant royalty rate is set out in the Act and a full commodity list with applicable rates can be sourced here - -
http://energymining.sa.gov.au/__data/assets/pdf_file/0018/244224/Commodity_List_5_2.pdf

The Treasurer may, after consultation with the Minister, gazette specific types of mineral ores and concentrates, refined mineral products, and industrial or construction materials.

A lower royalty rate of 2% may apply to some operations where those operations have been declared to be a 'new mine' by the Treasurer (s. 17A). The reduced rate for new mines was removed in the 2018/2019 Budget, with new applications for the rate ceasing on 1 July 2020 and the lower royalty rate expiring after 5 years or 30 June 2026, whichever is earlier.

Where the Treasurer has declared that a mine is to be a new mine, the royalty rate of 2%:

- commences on the date on which the first royalty payment is due and payable; and
- expires 5 years from the commencement date or 30 June 2026, whichever is earlier.

Prescribed costs are costs prescribed in the regulations that can be deducted from the market value determined prior to calculating the royalty liability. These deductions can affect the value before and after the gate. Regulation 11(1) of the draft Mining Regulations prescribe the following costs that can be dedidućted before the gate:

(a) costs (excluding GST) genuinely incurred in transporting the minerals to a point of sale (including, for example, packaging, storage, loading, permit, fees, insurance and depreciation);

(b) any other costs (excluding GST) determined by the Minister to be a cost of a prescribed kind for the purposes of that subsection (which may vary according to a particular tenement holder, class of tenement holder, or all tenement holders).

Regulation 11(2) of the draft Mining Regulations prescribe the following costs that can be dediducted after the gate:

(a) costs (excluding GST) genuinely incurred in transporting the minerals to a point of sale (including, for example, packaging, storage, loading, permit, fees, insurance and depreciation);
(b) costs (excluding GST) genuinely incurred in shipping the minerals to a genuine purchaser in a sale at arms length;
(c) any other costs (excluding GST) determined by the Minister to be a cost of a prescribed kind for the purposes of that subsection (which may vary according to a particular tenement holder, class of tenement holder, or all tenement holders).

Despite the above calculation methodologies, the Treasurer can enter into a royalty agreement with the person liable to pay royalty to determine an alternate calculation method that determines royalty to be payable according to the weight or the volume of minerals recovered, or at an agreed price or method (s. 17(9)). The approach is beneficial to allow for flexible approaches but are reluctantly used due to the administrative processes required to finalise and then maintain an agreement. Agreements of this nature are used in practice to accommodate projects with unique royalty assessment needs.

Returns, payment and title

The tenement holder must provide ongoing reporting to the Minister on a six monthly basis about the conduct of operations, the minerals recovered, and the sale or disposal of minerals from that tenement in the form of a return (s. 17CA). Royalty returns must be furnished to the Director of Mines in a manner and form determined by the Director, and must comply with any other requirements of the Director. A return must be accompanied by any information, sample or other materials required by the Director.

The Act requires the 'tenement holder' to lodge a return every six months. Not every tenement holder recovers minerals during the return period. The regulations may exempt a person, or a class of persons, from the requirement to lodge royalty returns (s. 17CA(9)) and that exemption may be granted absolutely or on conditions, and remains in force for the period specified in the regulations (s. 17AC(10)). If there was no obligation where there is no production, the Department would struggle to distinguish between late and/or outstanding returns and those not required under the Act. However, where the nature of a tenement does not authorise the removal of minerals, the lodgement of returns can be an unnecessary burden. Consequently, regulation 12 of the draft Mining Regulations exempts the holder of a registered mineral claim, the holder of an exploration licence, the holder of a miscellaneous purposes licence and the holder of a retention lease. However, the Minsiter may determine on a case by case basis that the holder of a miscellaneous purposes licence and the holder of a retention lease are not exempt.

Unless the tenement holder is a 'designated tenement holder', returns and royalty payment are routinely due at the same time (31 January and 31 July). A 'designated tenement holder' is a tenement holder with an annual royalty liability greater than $100,000 who is designated by the Treasurer as a person required to pay royalty on a monthly basis (s. 17DA). A designated tenement holder will lodge returns 6 monthly, but pay their royalty liability monthly. In March each year the Treasurer issues a Notice of Designation and Notice of Assessment for all designated tenement holders (s. 17DA(6)). A Notice of Designation notifies the tenement holder that they are a designated tenement holder for the upcoming financial year (s. 17DA(2)). A Notice of Assessment must set out the monthly payment that the tenement holder must make for the upcoming financial year, which are reasonable amounts that the Treasurer determines will be payable for the year having regard to the royalty assessment principles. If the designated tenement holder expects a variation of more than 10% between the Notice of Assessment repayments and the actual royalty liability, the designated tenement holder must contact the Department to have their notice varied or amended (s. 17DA(8)-(9)).

While the obligation to pay royalty arises from extraction, the date royalty is due and payable is later. The date royalty becomes due and payable can have 5 different dates depending on the circumstances in question.

- The default position is that royalty is due and payable on a six monthly basis at the time of lodging a return; 31 July and 31 Jan (s. 17D(1)).
- If the tenement holder is a designated tenement holder (s. 17DA), the due date differs as the designated tenement holder pays royalty monthly. Each monthly payment for a designated tenement holder is due on or before the last day of each month.
- The due date for royalty payments may differ as the Treasurer may revise the royalty liability following a royalty assessment and consequently a delayed payment date applies, however, this is one off and not reoccurring (s. 17B).
- The Treasurer, after consultation with the Minister, may extend the due date for payment (s.17D(1)).
- The Treasurer, after consultation with the Minister, may exempt the tenement holder from the requirement of pay on one of the above due dates, subject to any conditions the Treasurer thinks fit (s. 17D(3)).
- Any other time prescribed by the regulations (s. 17D(2)(c).

Where a mineral tenement is cancelled, suspended, transferred or forfeited, any royalty liability will become due and payable as at the date the transfer, forfeiture, suspension or cancellation occurs. Following that, the tenement holder must furnish to the Director of Mines a final return in the manner and form determined by the Director containing the information required by the Regulations.

Where a mineral tenement expires, any royalty liability will become due and payable as at the expiry date and the tenement holder must, on the date of expiry or earlier, furnish to the Director of Mines a final return in the manner and form determined by the Director containing the information required by the Regulations.

Where a tenement holder has applied for an approval to surrender a tenement under section 56X, the tenement holder must comply with any requirements as to the furnishing of a final return to the Director as prescribed by the Regulations.

In practice, a final return may be an administrative process as mineral tenements that are surrendered or due to expire have commonly ceased operations long before the final return is due.

A failure to furnish a return when required carries a maximum penalty of $120,000. The Regulations may also prescribe that failure to furnish a return may be an expiation offence.

The payment of royalties is more than just revenue for the state; royalties are the consideration taken by the crown for the allocation of mineral rights. What this means under law is that tenements are considered to be a sale by the crown of the minerals owned by the crown, which are to be taken by the tenement holder at a price payable over a period of years as royalties. Ownership of the minerals does not pass from the crown to the tenement holder until royalty is paid. The due date for paying royalty liability commonly falls after the minerals have been sold to a third party, the *Statutes Amendment (Mineral Resources) Act 2019* create a statutory interest in favour of the crown securing the unpaid royalty which is released upon payment to ensure the collection of royalties under the Act (s. 18). While this might seem like a complex approach for the transfer of a title, payment of monies to the crown for ownership of minerals are a means of distinguishing payment of money as royalties and not taxes. This distinction is important as the state can impose royalties, but has limited powers under the Constitution to impose taxes.

Royalty must be paid in accordance with any requirement prescribed or authorised by the regulations (s. 17G). Regulation 13 of the draft Mining Regulations allows for payment by electronic funds transfer and credit card.

Where royalty remains unpaid, the unpaid royalty liability incurs default interest. Interest amounts to $1,000 each month, plus the default interest rate (s. 17E).

Please see chapter 7 (Debt recovery) below for discussion on the recovery of unpaid royalty.

2. Royalty assessments

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

As noted above, returns and royalty payment being submitted at the same time allows the Treasurer and the Minister to make an assessment about whether the correct royalty has been paid. A royalty assessment can only properly be made from the mineral production and sale information contained in the return. The royalty liability can be ascertained without the information that must be provided in a return, but it is costly due to the requirement to get a licensed survey of the tenement (which is complicated by the need to determine the extent of personal use). Following the royalty return submission period, the Minister can interrogate the return data to identify the tenement holders (and proprietors of private mines) that should be prioritised to audit.

Audits are prioritised based on industry trend analysis, tip offs, follow-up of information received from a variety of sources and random selection for the routine verification and coverage of the royalty revenue base. It is anticipated that all tenement holders will be audited at least once every 4 years.

Where a tenement holder has been selected for an audit, the auditor will utilise authorised officer powers to undertake an authorised investigation into whether the tenement holder has assessed and paid their royalty liability in accordance with the royalty assessment (s.14).

If an audit demonstrates one or more of the following, then the Treasurer may make a royalty assessment (s. 17B(1)):

1. A person has not paid the royalty liability when it fell due
2. A person has not paid royalty in accordance with the royalty assessment principles
3. A person has not paid royalty in accordance with any agreement or determination of the Treasurer
4. A person has not paid royalty in accordance with any other relevant requirement
5. If the tenement holder's estimated their royalty liability in accordance with the fifth valuation method and the Treasurer does not agree with the estimate
6. A person makes a default in furnishing a return

7. The Treasurer is not satisfied with a return furnished by a person
8. That royalty is payable by a person who has not furnished a return
9. That a person who has furnished a return has made an over payment of royalty.

If none of the abovementioned events are triggered, the Treasurer is not entitled to make an assessment of royalty.

An assessment of royalty is an amount of royalty payable by a person or an amount to be refunded to a person based on any matters the Treasurer thinks relevant. The Treasurer must cause a notice of any assessment of royalty to be served on the person liable to pay the additional amount, or is owed an excess. An excess amount can be refunded or set off against a future royalty liability (s. 17B(5)). A person dissatisfied with an assessment is entitled to appeal against the assessment in the Environment, Resources and Development (ERD) Court. After receiving an assessment, the person has one month to lodge an appeal to the ERD Court (s. 17B(6)-(7)).

Where an appeal has been lodged in the ERD Court but has not yet been determined, it does not in the meantime affect the assessment to which the appeal relates, and the amount of any royalty or civil penalty amount determined as being payable under this Act as a result of the assessment may be recovered as if no appeal had been lodged (s. 17C).

3. Rent

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

All rental collected by the Minister is paid into Treasury general revenues unless that mining lease, retention or miscellaneous purpose licence is granted over freehold land or native title land held in exclusive possession. In these cases, 5% of the rental relating to those parcels of land reports to general revenues and the remaining 95% is disbursed to the relevant owners of the land.

Rent is intended to be a right accruing to freeholder owners independent of compensation for any impact mining operations may have on that land. The Second Reading speech for the *Mining (Native Title) Amendment Act 1995* stated that 'the right to rental arises on the granting of a mining tenement, whether or not mining operations are carried out. Consequently, it is not a form of compensation'.

It is our understanding that South Australia is the only jurisdiction to still return rental to owners of land in addition to any compensation paid.

From 1 January 2020, the practice of not charging the full rental to tenement holders who are also the freeholder owner of the relevant land ceased. This means that where a holder of a Mining Lease, Retention Lease or Miscellaneous Purpose Licence is also the holder of the freehold land, the Minister will now invoice the tenement holder for 100% of rental fees, rather than invoicing for 5% as has occurred in the past.

This applies where a tenement holder and the owner of the freehold land are the same legal entity or natural person. This extends to related body corporates where the tenement holder is a company incorporated under the *Corporations Act 2000 (Cth*). A related body corporate under the Corporations Act defines bodies as being related where a body corporate is:

a) A holding company of another body corporate
b) A subsidiary of another body corporate

c) A subsidiary of a holding company of another body corporate.

Failure to pay rent to the Minister is a debt due to the crown (s. 56N).

Schedule 2 of the draft Mining Regulations set the following rental rates:

1	Mining lease	\$256.00 or \$67.50 for each hectare or part of a hectare in the area of the lease, whichever is the greater
2	Mining lease—extractives	\$216.00 or \$56.00 for each hectare or part of a hectare in the area of the lease, whichever is the greater
3	Retention lease—	
	(a) if the retention lease authorises the carrying out of only exploration operations under the lease—	
	(i) if the lease is granted for a term of less than 5 years (or an aggregate term of 5 years); or	\$975.00 or \$22.50 per km^2 in the area of the lease, whichever is the greater
	(ii) if the term or aggregate term of the lease has reached the period of 5 years from the grant date, and the lease is renewed for a period of less than 5 years (or an aggregate term of 5 years); or	\$261.00 or \$35.00 for each hectare or part of a hectare in the area of the lease, whichever is the greater
	(iii) if the term or aggregate term of the lease has reached the period of 10 years from the grant date, and the lease is renewed for a further period or periods; or	\$261.00 or \$103.50 for each hectare or part of a hectare in the area of the lease, whichever is the greater
	(b) in any other case	\$256.00 or \$34.25 for each hectare or part of a hectare in the area of the lease, whichever is the greater
4	Miscellaneous purposes licence	\$256.00 or \$67.50 for each hectare or part of a hectare in the area of the licence, whichever is the greater

4. Financial Assurance

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

The setting of a bond by the Minister, the establishment of the Extractive Areas Rehabilitation Fund and the Mine Rehabilitation Fund provide a surety mechanism to protect the State from assuming post mining rehabilitation or abandoned liabilities. Bonds provide surety that tenement holders will achieve their legal obligations, whereas the Extractive Areas Rehabilitation Fund and the Mine Rehabilitation Fund provide surety against tenement holders where they have failed to meet their legal obligations to undertake rehabilitation in line with agreed environmental outcomes, including outcomes for mine closure and completion or where those obligations continue post-surrender.

Extractive Areas Rehabilitation Fund

The Extractive Areas Rehabilitation Fund (**EARF**) provides surety for the rehabilitation of extractive mining operations (s. 63). Funds are contributed to the EARF from part of the royalty paid on extractive mineral production in South Australia. Regulation 55 of the draft Mining Regulations prescribe that 22 cents per tonne of royalty collected by the Treasurer is appropriated into the EARF.

The holder of an Extractive Mining Lease (EML) or the owner of a Private Mine (PM) is responsible for the rehabilitation of that EML or PM. Where all efforts of the Minister or Director of Mines to require a tenement holder or prevous tenement holder to rehabiliate have been exhausted, the fund is designed to facilitate the rehabilitation of extractive mineral mine sites as a last resort. Funds for this purpose are allocated for approved rehabilitation projects according to the terms of the EARF Operational Policy.

The Minister may use the EARF with respect to operations for the recovery of extractive minerals to:

(a) rehabilitate land disturbed by operations;
(b) implement measures designed to prevent, or limit, damage to or impairment of, any aspect of the environment; and
(c) promote research into methods of mining engineering and practice by which environmental damage or impairment may be reduced.

The total expenditure in a single financial year of costs associated with ensuring that the land is rehabilitated must not exceed an amount equal to 4 cents per tonne for each tonne of extractive minerals on which royalty is payable into the fund for the financial year preceding that year.

The regulation and management of the EARF will be set out the EARF Operations Policy. The Department is in the process of finalising the updated EARF Operations Policy.

Bonds

The Mining Act authorises the Minister to request a bond from an applicant or a tenement holder of such a sum, and subject to such terms and conditions, to satisfy liabilities and obligations associated with any civil or statutory liability and present and future obligations in relation to rehabilitation of land (s. 62). The bond may be any form of security as the Minister sees fit, but this is often lodged in the form of cash or unconditional bank guarantee (s. 62(2)).

The requirement to pay a bond (including its quantum) is established by the issuing of a notice by the Minister. The bond is assessed by the Minister based on the approved rehabilitation activities provided in the PEPR, and a review of the rehabilitation liability assessment provided by the tenement holder in the PEPR. The bond is costed on the basis of a third party being contracted to undertake the work, and will include a provision for contingencies and risks associated with the rehabilitation activities. The bond may be reviewed at any time, and will be considered as part of any PEPR review.

A request by the Minister for a bond does not require the agreement of the tenement holder or applicant. Equally, whether or not security is acceptable to satisfy a bond is a matter for the Minister to decide. Any terms and conditions that the Minister may choose to impose in a bond are not negotiable, but must be determined by him by reference to the two considerations set out in subsections 62(1)(a) and (b). If the Minister assesses a bond by reference to these considerations and determines the terms and conditions by which that bond must be satisfied (including whether it can be satisfied by security), it is irrelevant that the applicant for, or holder of a tenement does not agree with that assessment.

The amount of bond necessary to meet all civil and statutory liabilities, and the present and future obligations for rehabilitation is a matter for the Minister to determine. If an applicant for, or holder of a tenement does not agree with the Minister’s assessment, there is nothing to prevent them from making submissions to the Minister on the bond assessment. However, the Minister is under no obligation to review the assessment where it is reasonable and where, in his opinion, it reflects those matters in subsection 62(1). In practice, the Minister prepares a bond calculation and meets with the applicant or tenement holder to discuss the calculation. Following that engagement, if the Minister wishes to revise his assessment, it would be necessary for the original notification of the bond to be revoked, and for a new notice pursuant to section 62(1) to be provided.

In the case of exploration licences, bonds are requested on a case by cases basis after an assessment of the potential rehabilitation liability.

In case of extractive mineral leases, a bond is requested where the tenement holder's appropriated royalty contributions to the EARF are less than the estimated total rehabilitation liability.

In the case of mining lease, a bond is requested at the same time as the PEPR approval. It is a requirement of the PEPR approval letter that the bond is lodged before any operations can commence.

Bonds provide the Minister with the assurance that the holder of, or applicant for, a mining tenement has the financial capability to meet all future civil, statutory or rehabilitation liability that may result from operations being undertaken on a tenement. Mining operations by their very nature can carry significant and identifiable risks and when the Minister chooses to grant a right to mine, the Minister needs to ensure those risks are appropriately managed in the public interest. He can do this by requiring the provision of a suitable bond, along with the compliance and enforcement mechanisms available. In the event of inadequate rehabilitation of land or to compensate persons affected by operations, the Minister is then entitled to apply bond monies paid toward satisfying those outstanding liabilities.

Whilst there are provisions allowing for the enforcement of rehabilitation obligations, these provisions can only have any practical benefit where the tenement holder remains both financially and practically capable of meeting any directions made. Given the speculative nature of the industry, this may not always be the case. The bond provisions allow the Minister to ensure that a tenement holders' rehabilitation and compensation risks will be met (at least financially) before those risks are incurred.

This is reinforced by the Minister's compliance powers in respect of bonds. Where an applicant or a tenement holder refuses a requirement to pay a bond, or any other requirements in respect to a bond, the Minister may refuse the applicants' application for a mineral tenement (s. 62(2a)), cancel the tenement or prohibit operation (s. 62(3)), or recover the bond as a debt due to crown (s. 62(4)).

However, where the risks the bond is designed to cover are incurred well before the bond will be fully completed, and the company defaults on its bond obligations subsequent to the rehabilitation and compensation risk being incurred, the Minister's compliance powers become somewhat ineffective. Ordering the company to stop work or cancelling the tenement at this point will not have any practical effect on mitigating the risk as the need for rehabilitation and compensation will already have been occurred. If the company is unable to meet the bond obligations there may also be doubt as to whether it will be able to meet its rehabilitation and compensation requirements, particularly if the tenement is cancelled.

To address this issue, the *Statutes Amendment (Mineral Resources) Act 2019* allows the Minister to recover any unpaid bond as a debt due to the crown. Debt recovery is discussed below in chapter 6 (Debt Recovery). The *Statutes Amendment (Mineral Resources) Act 2019* also introduces the Mine Rehabilitation Fund as a means of addressing abandoned obligations.

Mine Rehabilitation Fund

The *Statutes Amendment (Mineral Resources) Act 2019* establishes the Mine Rehabilitation Fund (**MRF**). While a fund has been established to hold funds separate from the Consolidated Treasury Fund, the income stream to the Mine Rehabilitation Fund is currently limited. As at 1 January 2021 (the date in which the Act is scheduled to commence), the fund will be funded by:

1. Penalties (criminal, civil, administrative and expiable) collected under the Mining Act and Opal Mining Act; and
2. 'Residual Risk Payments'.

While these are the only income streams from 1 January 2021, the Minister has stated publicly that the Department will prepare and release a discussion paper proposing options for funding the fund (eg a levy or insurance options).

At this stage, the preparation of this discussion paper has been tabled for consideration post 1 January 2021 due to the prioritisation of the development of the regulations and the commencement of the *Statutes Amendment (Mineral Resources) Act 2019*. Consequently, it is our intention post 1 January 2021 to establish a project plan for the application of the MRF and the current bond provisions for rehabilitation financial assurance, the preparation of a discussion paper and seek industry feedback on the proposed options.

Irrespective of the plan to prepare the above mentioned discussion paper, the Department will consider the implementation of necessary policies and procedures for 'residual risk payments' into the Mine Rehabilitation Fund.

A residual risk payment is a payment made by a tenement holder prior to, or after cancellation, surrender, or expiry to cover any ongoing environmental risks post surrender. This was adopted from a Canadian model which was established on the premises that in some cases ongoing maintenance and monitoring obligations may exceed the likely life of the tenements holder (natural person or company) and therefore would ultimately fall back to government as a legacy mine liability, and therefore, the State was best placed to estimate that at surrender and absorb the liability early in consideration of adequate payment (as compared to no consideration later).

The Minister may require a residual risk payment where funds are needed to achieve appropriate environmental outcomes on the closure of operations and action is required to—

(i) reinstate, supplement or improve rehabilitation of land that fails to establish a safe, stable and self-contained environment; and
(ii) to maintain environmental management processes; and
(iii) to take further action to restore the environment because of environmental damage or impairment resulting from authorised operations.

Where the Minister requires a residual risk payment, that amount must be paid within 28 days (8).

The Department can, from 1 January 2021, quantify and accept funds for the ongoing monitoring and maintenance of mine post surrender (noting that they must meet the closure requirements of their Program for Environmental Protection and Rehabilitation (PEPR) including achievement of the completion criteria which carry an obligation for periods of monitoring and maintenance to demonstrate satisfactory achievement of the approved environmental outcomes for mine completion). The power to accept a residual risk payment is initiated by the Minister, at the Ministers sole discretion. Regulation 54 of the draft Mining Regulations allows the Minister to request a residual risk payment up to 24 months after the ceasation of a tenement.

Disclaiming onerous property

A liquidator under the *Corporation Act 2000 (Cth)*, and a trustee under the *Bankruptcy Act 1966 (Cth)* can terminate a tenement holder's rights, interests, liabilities and property in or in respect of the disclaimed property. A tenement is property for the purposes of both Acts. The Acts are slightly different in the manner that property is disclaimed, but the effect is the same. The rationale underpinning the power to disclaim onerous property is to promote the efficient liquidation of a company or bankruptcy of a person by allowing onerous assets to be disclaimed, reducing the administrative and financial burden on the creditors.

In 2017, in Western Australia, the liquidator of the Kimberley Diamond Company (KDC) disclaimed rights, interests and property held by KDC in certain mining tenements (Ellendale diamond mine). While KDC had contributed over $800,000 to the Mining Rehabilitation Fund, the estimated rehabilitation liability was reported to be between $28-40m. It is said to be the first time a liquidator has disclaimed in such a way in Western Australia. An operation in Queensland was also disclaimed in 2017.

In 2019, the Department for Energy and Mining received a notice disclaiming onerous property under the Bankruptcy Act in respect to an Extractive Mineral Lease.

In the case of a notice to disclaim onerous property under the Corporations Act, the Department has 14 days from receipt of the notice to apply to the court to have the disclaimer set aside. In the case of a notice to disclaim onerous property under the Bankruptcy Act, the Department has 28 days from receipt of the notice to notify the trustee that the trustee must apply to the court to disclaim the property. If the Department does not respond to the notice under either Act in the time allocated, the tenement will be disclaimed.

The power to disclaim under the Corporations Act is only available to liquidators and is not available to receivers, nor is it available in the context of voluntary administrations.

Where a tenement is disclaimed, the tenement holder's rights, interests, liabilities and property in or in respect of the tenement are disclaimed (aka terminated).

Under the Corporations Act, the disclaimed property itself does not terminate, but rather, the court will order that the property vest in or be delivered to a person entitled to the property, or if no one can be identified, the crown (bona vacantia or by escheat) (section 568F(1)). In the case of Ellendale Diamond Mine, the mining tenements reverted to the crown and were subsequently cancelled.

Under the Bankruptcy Act, allows interested persons to apply to the court to be vested in the disclaimed property (ss133(9)), however, the Act does not provide for the case where there is no court order. In such case its likely that the tenement would simply cease upon disclaimer.

Where a mineral tenement has been disclaimed by a liquidator or trustee, the liquidator or trustee would not have the power to disclaim a bank guarantee held in respect of that tenement as it is not technically "property" of the tenement holder – it is a promise to pay between the bank and the Minister. Cash bonds are not property of the tenement holder either – it is held beneficially by the Minister against future liabilities. Similarly, the EARF is not property of the tenement holder either – it is a fund controlled and managed by the Minister at the Minister's discretion which is funded by money owed to the Treasurer.

Further, a disclaimer of onerous property, which related to a tenement, cannot require the refund of a bond held under the Mining Act, and will not operate to limit the Minister's power to expend the bond or monies held in the EARF or MRF. A bond and monies in the EARF or MRF are not held to address the tenement holder's liability as or when it arises in the course of operations, but are held as a last resort. It is the responsibility of the tenement holder to address their liability when it falls due (hence lease conditions, PEPR requirements, and powers to issue directions), and in the event of the tenement holder failing to adequately rehabilitate land or to compensate persons affected by its operations, the Minister is then entitled to apply bond or fund monies toward satisfying those outstanding liabilities.

A notice to disclaim onerous property will disclaim the tenement holder's liabilities in respect of the tenement, such as a rehabilitation obligation and any debts due to the crown. Where the bond is not sufficient to cover the outstanding liability in respect to disclaimed property, the Minister cannot commence enforcement proceedings under the Mining Act to recover the outstanding amount if that tenement has been disclaimed. Further, the Minister cannot issue a rehabilitation direction under section 70F on the former tenement holder after the disclaimer has cause the tenement to vest in the crown or ceases. This reinforces the importance of taking bonds, and conducting bond reviews to ensure the bond adequately addresses the liability.

5. Fees

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

The Department provides a diverse range of services, support and benefits to the mineral resources sector and the public to deliver effective, efficient, and transparent regulation; increase South Australia' resource exports; and grow future industries and jobs (strategic direction 2018–2021). These services are funded from different revenue sources, including general taxation, state royalties, sales of public assets, government investments, cost recovery and other revenue-raising measures.

In November 2019 the *Legislation (Fees) Act 2019* passed Parliament, and it authorised the setting of fees and charges by disallowable ministerial notice. From 1 January 2021, a fee notice will set out all the fees payable under the Mining Act and Regulations and the Minister will be able to increase government fees and charges each year by a standard indexation rate by gazetting a notice, rather than amending regulations.

In administering these fees, regulation 78 of the draft Mining Regulations, allows the Minister, Mining Registrar or Director of Mines to waive, reduce or refund a fee (in whole or in part) and may accept payment by instalments.

The Department's overarching cost recovery policy is that, where appropriate, non-government recipients of specific government activities should be charged some or all of the costs of those activities. These activities include the provision of services and regulation. In addition to cost recovery fees, other types of charges that are imposed by the Department include rent, fines, penalties, and royalties.

Key considerations in determining whether a fee should be applied and if so, how much, are:

- the nature of the Department's service (e.g. is the Department the only provider);
- who might be charged (e.g. is there an identifiable individual or group that benefits from the service or creates the need for it?);
- the impact of cost recovery on competition, innovation or the financial viability of those who may need to pay the fees and the cumulative effect of other government activities
- whether it is efficient to cost recover the service (e.g. are the costs of administering cost recovery appropriate to proposed charges for and revenue from the service?)
- how cost recovery might affect:
    - the policy outcomes for the service
    - other government policies and legislation (e.g. policies relating to working conditions policy or compliance and enforcement policy)

6. Debt recovery

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

A person may incur debts under the Mining Act for failing to pay:

1. Fees;
2. Rental (s. 56M);
3. Expiation fee and administrative penalties;
4. Royalty (Part 3);
5. A bond (s.62);
6. A residual risk payment (s. 62AA).

These debts are monies owed to the crown.

All these debts can be recovered by the Department by instructing the Crown Solicitors Office to instigate proceedings in court. This explanatory will not consider recovery via a court order; rather, this paper will consider recovery from the bond, statutory interest under the *Personal Property Security Act 2009 (Cth)* and the *Fines Enforcement and Debt Recovery Act 2017 (SA)*.

Bond

As discussed above, the bond is held by the Minister to satisfy liabilities and obligations associated with any civil or statutory liability and present and future obligations in relation to rehabilitation of land (s. 62). All of the above debts are statutory liability, and section 62(6)(b) expressly allows the Minister to use any money under a bond to satisfy any liability to pay an amount that is due to the crown under the Mining Act or Regulations.

Personal Property Security Act 2009 (Cth)

Section 85 of the *Statutes Amendment (Mineral Resources) Act 2019* creates a statutory lien over the personal property of a tenement holder to secure payment of debts due to the crown. This lien is recognised under the *Personal Property Security Act 2009 (Cth),* and the lien sits in priority to all security interests in the same collateral.

In other words, where a debt is owed to the crown under the Mining Act, a priority charge over the assets of the tenement holder is created to secure payment of that debt. This will apply to all of the above debts. This charge will only relate to the assets of the tenement holder that fall within the definition of 'personal property' under the *Personal Property Security Act 2009 (Cth).* Generally speaking, personal property is everything other than land, buildings and fixtures to land. The charge will be a priority charge because it will sit in priority to all other charges over the tenement holder's personal property.

The crown does not need to register the charge on the Personal Property Securities Register, rather, in the event the tenement holder is bankrupt, insolvent, in liquidation, etc, the crown can recover any unpaid debt in preference of other creditors with charges over the same property.

This scoping paper will not consider the process for enforcing a statutory lien under the *Personal Property Security Act 2009 (Cth).*

Fines Enforcement and Debt Recovery Act 2017 (SA)

The *Fines Enforcement and Debt Recovery Act 2017 (SA)*, which commenced in April 2018, creates a centralised government debt recovery for monies owing to a public authority and defines 'debt' as '*an amount of money owed to a public authority that is recoverable in a court of competent jurisdiction, but does not include a pecuniary sum or an amount payable under an expiation notice*'.

While the definition of debt is broad, the *Fines Enforcement and Debt Recovery Act 2017 (SA)* only allows for the recovery of unpaid fees, administrative penalties and expiation notices collected under the *Statutes Amendment (Mineral Resources) Act 2019.*

The Department and the Attorney-General's Department are working together to consider options to expand the scope of the *Fines Enforcement and Debt Recovery Act 2017 (SA)* to include rental and royalties.

All other civil and criminal penalties under the Act must be applied by a Court, and where that amount is unpaid, the crown can seek to enforce the court order.