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Environmental Defender's Office WA (Inc)

Updated June 2006

Factsheet

36. Mining Law in Western Australia

Mining is a significant industry in Western Australia, and combined with the energy sector, accounts for approximately 80% of total State exports. In terms of area, mining takes up only a small portion of the State's land at any one time. However, because of the nature of the activity and processes used, mining can have a dramatic impact on the environment. Accordingly, legal controls on the way in which land is selected for mining, how mining is carried out, and how the land is rehabilitated at the conclusion of the process are critical for ensuring environmental standards are upheld.

This fact sheet outlines the law which regulates mining activities in WA, focusing on the Mining Act (WA) 1978 (" Mining Act") taking into account amendments that came into force on 10 February 2006. This fact sheet also explains the way in which the community can be involved in oversight of mining activities. However it does not address native title issues, or mine safety.

What is mining?

Under the *Mining Act*, "mining" includes prospecting and exploring for minerals as well as actual mining operations. "Mining operations" includes all activities which are necessary to remove minerals from the ground, including crushing, leaching and evaporating.

For an activity to be "mining", it must relate to "minerals" as defined in the *Mining Act*. Minerals include all naturally occurring substances (e.g. gold, iron ore, rock, gravel, sand and clay) which are obtainable from land by mining. However, minerals do not include petroleum products such as oil and natural gas, which are regulated by other legislation (see **Fact Sheet 38: Petroleum - "oil and gas"**). Nor do minerals include limestone, rock, gravel, shale, or non-mineral sand or clay which occur on private land. These are dealt with by other legislation (see **Fact Sheet 37: Gravel pits and quarries**).

Who owns minerals?

Most minerals are owned by the Crown, regardless of whether or not the land the minerals are on is private land or Crown land. However, minerals (apart from gold and silver) which are on land sold or granted by the Crown before 1 January 1899 may be owned by the private landowner. Most of this land is in the south west of Western Australia.

What land can be mined?

All land in Western Australia is potentially open to mining.

Crown land

All Crown land (including land held under a pastoral, timber or Aboriginal lease) which is not already the subject of a mining tenement is open to mining. For land held under a pastoral or grazing lease, an applicant for a mining tenement must notify the lease holder of the proposal within 14 days of lodging the application. Pastoral or Aboriginal holders who may suffer a loss as a result of the mining tenement may seek compensation from the tenement holder.

Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been ommitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.

Reserves

Conservation reserves; certain class A reserves

A mining lease or general purpose lease cannot be granted in relation to a national park, any class A nature reserve or any other class A reserve in the south west land division, or the Shires of Esperance and Ravensthorpe without the consent of both Houses of Parliament. In granting consent, Parliament may impose any conditions on the terms of that lease. In addition, mining can only be commenced on such land with the approval of the Minister for Mines. Before granting approval, the Minister for Mines must obtain the consent of the Minister responsible for the management of the reserve.

A mining tenement cannot be marked out (that is, "pegged") in a national park, class A nature reserve or any class A reserve in the south west land division or the Shires of Esperance and Ravensthorpe without the consent of the Minister for Mines and the Minister responsible for that reserve.

In conservation parks and non-class A nature reserves, mining can be carried out on the approval of the Minister for Mines. Before giving such approval the Minister must first obtain the recommendations (not the approval) of the Minister for the Environment and the Conservation Commission.

Where the conservation reserve is declared to be a risk area or a disease area, the holder of a mining tenement must give at least three months notice to the Minister for the Environment before commencing mining activities. The Minister for the Environment is required to give approval to the proposal unless he or she has "good and sufficient" reason to the contrary. In granting approval, the Minister may set conditions, including limiting the routes by which entry to the area is to be affected. For more information on activities in conservation reserves, see **Fact Sheet 11: Conservation reserves.**

Marine parks and marine nature reserves

Neither a mining lease nor a general purpose lease can be granted over a marine park or marine nature reserve without the consent of both Houses of Parliament and the approval of the Minister for Conservation. Once these consents are obtained, the Minister for Mines may approve mining activities within a marine park or nature reserve after consulting with the Minister for Fisheries and the Minister for Planning and Infrastructure.

A person with approval to mine must not disturb any land, seabed or subsoil to a depth of 200 metres within any marine nature reserve or within those parts of a marine park which are classified as a sanctuary area, recreation area or special purpose area under the Conservation and Land Management Act 1984.

A mining tenement cannot be marked out ("pegged") in a marine park or nature reserve without the consent of the Minister for Mines and the Conservation Minister.

For information on activities within marine parks and reserves, and marine management areas refer to **Fact Sheet 17: Marine reserves.**

State forests and timber reserves

Mining activities cannot be carried out in a State forest or timber reserve in the South West Mineral Field (roughly an area south-west of a line from Northampton to Hopetoun) without the consent of the Conservation Minister. Where the mining tenement is in a State forest or timber reserve that is declared as a risk area or a disease area, the holder must give three months notice to the Minister before commencing mining operations. The Minister may grant approval, subject to conditions, including limiting entry routes through the forest.

A mining tenement may only be marked out in a State forest or timber reserve in the South West Mineral Field in accordance with the *Forests Management Regulations 1993.* This includes prohibiting the felling or removal of trees without approval from a forest officer and general restrictions applying to the prevention of forest diseases. For information on activities within State forests and timber reserves, refer to **Fact Sheet 10: State forests and timber reserves.**

Reserves set aside for the benefit of Aboriginal persons

The Minister for Mines may grant approval for a person to undertake mining on a reserve set aside for Aboriginal persons under the *Aboriginal Affairs Planning Authority Act 1972,* subject to the Minister seeking the recommendations of the Minister for Aboriginal Affairs. A person with approval to undertake mining on a reserve set aside for aboriginal persons must not enter that reserve without approval from the Minister for Aboriginal Affairs.

Other reserves

For reserves other than those considered above, mining can be carried out subject to the Minister for Mines obtaining the recommendations of the Minister responsible for the management of the reserve in question.

Townsites

Mining can be carried out within any townsite defined under the *Land Administration Act 1997* subject to the Minister for Mines obtaining the recommendations of the Minister for Lands.

Private land

As a general rule, private land can be mined regardless of whether the owner or occupier of the land provides consent. "Private land" means any freehold land granted after 1899 and any leasehold land (except pastoral, timber and Aboriginal leasehold land).

However, there are some restrictions on mining on private land, including:

=> a miner cannot enter onto property for the purpose of mining unless that miner has the consent of the owner/occupier of the land or the Mining Warden grants the miner an entry permit;

=> a mining tenement cannot be granted within 30 metres of the surface of private land used for any of the following purposes without the written consent of the owner and occupier:

(a) yard, stockyard, garden, orchard, vineyard, plant nursery , plantation or land under cultivation;

(b) site of a cemetery or burial ground;

(c) site of a dam, bore, well or spring;

(d) substantial improvements;

(e) within 100 metres of any private land referred to in paragraph (a), (b), (c) or (d); or

(f) land which is a separate parcel of land and has an area of 2,000 square metres or less; and

=> mining cannot commence within the top 30 metres of soil on private land unless there is a decision about what compensation the miner will pay the private landowner. The decision can either be agreed between the land owner and the miner or determined by the Mining Warden. Note that environmental damage which does not have a financial impact on the owner cannot be the subject of compensation.

Note also that once a mining tenement is granted over private land, a miner has the right to carry out mining activities, including the right to access the tenement. However, this right does not authorise the miner to fell trees or to remove earth or rock without the written consent of the owner and the occupier of the land.

Who can carry out mining?

Even though the Crown owns all minerals, it rarely actually conducts mining itself. Rather, it gives permission to other people to carry out mining, either by granting them "mining tenements" or making State Agreements with them. It is an offence to carry out mining without a mining tenement or a State Agreement.

State Agreements are agreements between a person (or corporation) and the State government, allowing that person to carry out large scale mining developments (for example, BHP Billiton's Newman mining operations). Once a State Agreement is made, it is approved by Parliament and becomes a "State Agreement Act".

A number of different types of mining tenements can be granted:

Prospecting licence

Prospecting licences enable holders to enter land and explore for minerals, including undertaking activities necessary for exploring, such as drilling bores, digging trenches and pits, taking samples for testing, and taking water. Prospecting licences do not, however, allow mining or production.

Area: Maximum 200ha.

Term: Four years, however, if the prospecting licence was granted after 10 February 2006, being the date of the commencement of the *Mining Act Amendment Act (WA) 2006* and the Minister is satisfied certain grounds exist, it may be extended for one further period of four years. Those grounds are set out in the regulations and provide that mining was "impracticable" for difficulties or delays arising from: law, administration, politics, environmental requirements, aboriginal heritage survey requirements, obtaining a mining or general purpose lease, access problems due to weather, and/or any other reason the Minister considers explains why the licence site was unworkable.

Alternative grounds for the renewal of the licence are the work done already on site justifies a renewal, or, if the licence has retention status, the continuation of grounds on which the retention status was granted.

If the prospecting licence has 'retention status', more than one extension may be granted. The holder of a prospecting licence that expires within 12 months after 10 February 2006 has the right to apply for a new prospecting licence.

Exploration licence

Exploration licences enable holders to enter land and explore for minerals, including undertaking activities necessary for exploring, such as drilling bores, digging trenches and pits, taking samples for testing, and taking water. Exploration licences do not allow mining or production.

Area: Maximum 70 blocks (each block is 310ha), unless the land is in an area pre-determined by the State, in which case the maximum area is 200 blocks.

Term: five years, however if the Minister is satisfied that certain grounds exist, it may be extended for one period of five years, and by further periods of two years. The grounds are the same as for extending a prospecting licence.

On or before the day on which the initial five yr period ends, the exploration licence holder must surrender for registration 40% of the number of the blocks that are subject to the licence, unless a deferral has been applied for or granted by the Minister. The grounds for a deferral are the "impracticability grounds" referred to above under the heading 'Prospecting licence'.

Mining lease

The mining lease is the main production tenement under the *Mining Act*. In order to extract large volumes of minerals, a person must have a mining lease. Holders of a mining lease can mine the land, extract minerals and conduct any other operations that are necessary for that purpose. There is no limit on the amount of a mineral that can be obtained from a mining lease.

Area: No limit.

Term: Up to 21 years renewable for further 21 year periods.

Unless a mining lease is being applied for pursuant to a government agreement, an application for a mining lease must either be accompanied by:

- a mining proposal, or
- a statement setting out details of the mining operations and a mineralisation report by a qualified person setting out details of exploration results.

Both documents must be made available for public inspection.

If an application is accompanied by a Mining Proposal it must include information that conforms to the guidelines on the Department of Industry and Resources website, at http://www.doir.wa.gov.au/documents/environment/Mining_Guidelines.pdf

including: site description, consultation undertaken, environmental commitments made, site history, existing development on site, technical geological and hydrological details, description of flora and fauna on site, social environmental description, including aboriginal heritage assessment, mining operation details including transportation corridors, an environmental impact assessment which include proposals as regards clearing and water management and plans or documentation relation to mine closure and rehabilitation.

If an application is accompanied by a Statement and Mineralisation report, the Director of Geological Survey must give the Minister a report as to whether or not there is significant mineralisation in, on or under the land to which the application relates. If that report states there is no significant mineralisation, the Minister must refuse to grant the mining lease. 'Significant mineralisation' means exploration results on the land indicate that there is a reasonable prospect of minerals being obtained by mining operations.

Retention licence

Retention licences are granted to people who hold an exploration or prospecting licence over land on which there is a known mineral deposit, but which is not feasible to mine. A retention licence may be granted if production from the mineral deposit is not currently economically feasible, is subject to marketing problems or if there are difficulties in obtaining the requisite approvals including authorisations from environment agencies. Retention licences give the licence holder similar rights to explore the land as an exploration or prospecting licence.

Area: Whole or part of the area covered by the exploration or prospecting licence.

Term: Up to 5 years renewable for further 5 year periods.

Instead of applying for a retention licence, since 10 February 2006, a holder of an exploration or prospecting licence may apply to the Minister to convert its existing licence to 'retention status'. The Minister may approve retention status if satisfied that there is an identified mineral resource located in, or under that land, and mining is impracticable for the same reasons as outlined above for retention licences. 'Retention status' is only available for licences granted after 10 February 2006.

A holder of an exploration or prospecting licence with retention status may have to comply with an approved work program, and may be required to show cause why the holder should not be applying for a mining lease. The holder or such a licence has reduced expenditure requirements in the year in which retention status is approved, and no further expenditure requirements in the years following.

General purpose lease

General purpose leases provide access to additional land for activities associated with mining operations. For example, a general purpose lease can be granted for operating machinery, depositing or treating minerals or tailings, or any other specified use directly connected with mining operations. A general purpose lease gives the miner rights of exclusive occupation of the land in order to carry out mining operations.

Miscellaneous licence

Miscellaneous licences are granted to provide access to a mining lease for vehicles, ore-carrying conveyor belts, water pipelines and the like. Miscellaneous licences do not grant exclusive occupation rights and they may co-exist with another mining tenement over the same land.

Who grants mining tenements?

Any person may apply for a mining tenement at the office of the Mining Registrar for the relevant mineral field. The decision to grant a tenement is usually made by the Minister for Mines. In making this decision, the Minister takes

into account the recommendation of the Mining Registrar or the Mining Warden (note though that the Minister is not bound by any such recommendation).

The Mining Registrar prepares recommendations for the Minister when there is no objection to a tenement being granted. The Mining Registrar can also grant uncontested applications for miscellaneous and prospecting licences.

Where there is an objection to an application, the matter will go before the Mining Warden for hearing. After the Mining Warden has heard the objection, the Mining Warden makes a recommendation to the Minister.

How do I find out about an application for a mining tenement?

Once an application has been lodged, the applicant must, within 14 days:

- notify the affected owners and occupiers (usually only the land owners and any registered mortgagees);
- place a notice at the site of the tenement and at the office of the Registrar for that mineral field; and
- publish a notice in a newspaper or newspapers nominated by the Director General of the Department of Industry and Resources.

There is no other requirement for an applicant to advertise their application.

Who can lodge an objection to a mining tenement application?

Any person can object to the grant of any mining tenement. However, you cannot object to the grant of a mining lease on the basis that there is no significant mineralisation in, on or under the land. Furthermore, unlike an application for a retention licence, objections cannot be made to an application for retention status for an exploration or prospecting licence.

Objections must be lodged within 35 days of the date of the application and must be in the prescribed form (forms are available from the Department of Industry and Resources). Objections must be lodged at the Mining Registrar's Office in the mineral field in which the application is made. The objector must serve a copy of the objection on the applicant.

Objections must set out the grounds on which a person objects to the issue of a mining tenement. Objections can be lodged on environmental and public interest grounds. Examples of objection include the unreasonable impact the mining activity could have upon flora and fauna, noise, light, dust, traffic or lifestyle.

Lodging an objection does not necessarily mean that the matter will be heard. This is because the Mining Warden has a discretion as to whether he or she will hear an objection. Much will depend upon the nature of the tenement application and the nature and content of the objection in that specific case. However, the Mining Warden may generally refuse to hear an objection if the objection is self-evidently without merit or if the objection is misconceived.

Hearing of objection before Mining Warden

The hearing before the Mining Warden is quite formal. The objector and the applicant are usually (but do not have to be) represented by lawyers. They can tender written evidence and can call witnesses, including expert witnesses.

Any witnesses who are called may be cross-examined. The Warden usually gives people an opportunity to make submissions at the opening and closing of the hearing. At the conclusion of the hearing, the Warden will prepare a recommendation to the Minister.

Is there a right of appeal against the Warden's recommendation or the Minister's decision?

Generally, no. It may be possible to have that recommendation, or the decision of the Minister, reviewed in the Supreme Court.

What environmental conditions can be placed on mining tenements?

Conditions in the licence

All mining tenements contain standard conditions requiring the tenement holder to fill-in all holes on land and to take steps to prevent damage to trees and property. In addition, the Minister may, upon granting a mining tenement or at any other time, impose conditions on the tenement for the prevention or reduction of injury to land. These conditions will often require the tenement holder to rehabilitate land and prepare an annual environmental report.

An applicant for a mining tenement must lodge payment of security for compliance with conditions of the licence. One of the most significant conditions that can be placed on a mining tenement is for the holder to pay a sum of money to the Minister for Mines as security to cover the cost of rehabilitation works. If the tenement holder breaks one of the conditions imposed upon their tenement they may be required to forfeit the tenement, pay a fine or lose money held under a security.

Conditions imposed following an environmental impact assessment

The Environmental Protection Authority ("EPA") can assess any mining proposal that is likely to have a significant effect on the environment. A mine or other mining activity is usually only assessed once, unless subsequent changes are of sufficient scope as to constitute a new proposal.

Applications for mining lease which are likely to have a significant effect on the environment that are accompanied by a mining proposal may be referred to the EPA by any person. Applications for mining lease accompanied by a statement and mineralisation report, however, can only be referred to the EPA by the applicant, unless the application is pursuant to a government agreement. Recent law changes mean that, if it is in the former category (application with mining proposal attached) which appears likely to have a significant effect on the environment comes before the Minister for Mines but has not already been referred to the EPA, the Minister for Mines must refer it to the EPA for assessment before granting a mining tenement.

However, if the application is accompanied by a statement and mineralisation report, there is no requirement for the Minister for Mines to refer such an application to the EPA, even if the Minister has notice that the proposal may have a significant impact on the environment. Furthermore, it is impossible for this kind of application to be referred by any person. When the mining proposal is lodged later, as is required, third parties will be able to refer the proposal to the EPA in the usual way.

A Memorandum of Understanding (MOU) current exists between the Department of Industry and Resources (DoIR) and the EPA which requires the DoIR to refer proposals that are located in specific environmentally sensitive locations for assessment under the EP Act.

An MOU also exists between the Department of Industry and Resources (DoIR) and the Department of Environment and Conservation (DEC) in relation to mining on DEC managed land.

If the EPA decides to formally assess the mining proposal, the Minister for Mines cannot grant the mining tenement until the assessment is finalised and the Minister for the Environment has made a decision about the proposal. For further information on this subject, refer to **Fact Sheet 5: Environmental impact assessment in Western Australia**.

In cases in which there are likely to be significant impacts on matters of national environmental significance, conditions may also be imposed by the Commonwealth Environment Minister (see **Fact Sheet 6: Commonwealth environmental impact assessment**).

Pollution controls

Mining operations must not allow any sludge, refuse, mine water or pollutant to become an inconvenience to the holder of any other mining tenement or to the public, or in any way injure or obstruct any road or thoroughfare or any land used for agricultural, pastoral, fruit-growing, forestry or other useful purpose. Failure to comply with this provision is an offence and is subject to a maximum penalty of $5,000 (or up to five times this amount for a company).

The pollution provisions of the *Environmental Protection Act* (WA)1986 also apply to mining projects. This means that any mine operation that causes pollution without approval may be liable to prosecution. The Act also requires larger scale mining operations to obtain a "works approval" and "licence" to operate. The type of mining operations that require a works approval or licence include those where:

- more that 50,000 tonnes of ore is processed each year;
- more than 50,000 tonnes of water is pumped out and discharged each year;
- more than 5,000 tonnes of metal is extracted from ore using a chemical solution; and
- more than 5,000 tonnes of mineral sands ore is processed each year.

For more information on licensing and works approval under the *Environmental Protection Act,* refer to **Fact Sheet 27: Pollution and environmental harm.**

Other controls

Air quality laws – mining and mineral processing activities can have significant localised impacts on air quality. In the case of areas in the vicinity of Kalgoorlie-Boulder, Coolgardie and Kambalda, the *Environmental Protection (Goldfields Residential Areas) (Sulphur Dioxide) Policy 2003* operates to control the emissions of sulphur dioxide. For more information on the laws that apply to air pollution, refer to **Fact Sheet 26: Air quality.**

Contaminated site laws – to the extent that mine sites are contaminated with toxic chemicals or other contaminants, controls may apply to rehabilitation and remediation. For further information, see **Fact Sheet 30: Contaminated sites.**

Conditions in State Agreement Acts – many State Agreement Acts contain provisions for the protection and management of the environment including rehabilitation and/or restoration of the mined areas for the prevention of the discharge of tailings or pollutants into watercourses, lakes or underground water supplies.

Controls on taking, using or interfering with watercourses, wetlands or groundwater – mining operations are subject to the normal laws relating to taking and using water, and interfering with water resources. For information on the controls that apply, refer to the following fact sheets: **Fact Sheet 21: Rivers and watercourses**, **Fact Sheet 23: Wetlands** and **Fact Sheet 22: Groundwater.**

Biodiversity protection – mining operations are also subject to the State and Commonwealth laws relating to the protection of native species and their habitat (see: **Fact Sheet 8: Biodiversity conservation in Western Australia** and **Fact Sheet 9: Biodiversity conservation under Commonwealth law.**

Planning approval – the Minister for Mines (and the Warden or Registrar) is required to take into account the provisions of any town planning scheme in force under the *Planning and Development Act 2005* or local laws in force under the *Local Government Act 1995* before granting a mining tenement. However, a town planning scheme or local law cannot affect or prevent the granting of a mining tenement or the carrying out of any mining operations.

Where an application has been made for a mining lease or a general purpose lease, and the carrying out of any mining

operations would be contrary to the provisions of a town planning scheme or local law, a local government may write to the Minister for Mines and the Minister for Planning. The Minister for Mines may not grant a tenement until the recommendation of the Minister for Planning has been obtained.

Clearing native vegetation – mining operations are subject to the provisions of the *Environmental Protection Act* in relation to clearing native vegetation (see **Fact Sheet 7: Clearing native vegetation**)

Aboriginal heritage issues - both Federal and State Aboriginal heritage laws protect Aboriginal sites of significance which may be located in the tenement application area. For further information, refer to **Fact Sheet 13: Protecting heritage.**

Can uranium be mined in Western Australia?

Since 22 June 2002, any new mining lease granted by the State Government has included a condition, imposed under the Mining Act, prohibiting the mining of uranium. However, there is no ban on mining of uranium on mining leases that were in place prior to this date. Subject to approval under the *Environmental Protection Act* (WA) 1986 and the *Environment Protection and Biodiversity Conservation Act* (Cth) 1999, uranium mining could take place on those leases.

How can you become involved?

The following options are available to anyone wishing to have input into mining developments:

- monitor newspapers for information on applications for mining tenements;
- lodge an objection with the Mining Registrar for tenement applications that you believe will have environmental impacts;
- refer proposals to the Environmental Protection Authority for assessment (see **Fact Sheet 5: Environmental impact assessment in WA**);
- report pollution, environmental harm or potentially illegal land clearing to the Department of Environmental Protection (see **Fact Sheet 7: Clearing native vegetation** and **Fact Sheet 27: Pollution and environmental harm**);
- contact Parliamentarians on proposals to change a national park or class A nature reserve to accommodate a mining operation.

Contacts and further information

For emergency pollution reports, telephone the Department of Environment and Conservation (DEC) on **(08) 6364 6501** or after hours **1300 784 782**

Department of Industry and Resources, (formerly Department of Mines) East Perth	Tel: (08) 9222 3333
Environmental Protection Authority, Perth	Tel: (08) 6364 6500
Department of Planning and Infrastructure, Perth	Tel: (08) 9264 7777
State Law Publisher, William Street Perth (for copies of WA legislation)	www.slp.wa.gov.au

The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- to provide community groups and individuals with legal advice and representation to help protect the environment;
- to promote law reform that improves environmental protection; and
- to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over $2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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