

25 September 2017

Daniel Woodyatt

Director, Resource Policy and Engagement

Mineral Resources Division

Department of Premier and Cabinet

Dear Dan,

**Re: Leading Practice Mining Acts Review of the Mining Act 1971**

We refer to your email dated 18 September 2017.

This email asks for an indicative response to 82 Recommendations for changes to the Mining Act 1971 (the Act). Our respective organisations have appreciated the opportunity to be involved in this review. We cautiously welcome what would appear to be positive Recommendations for amendments to the Act, however our support is subject to having the opportunity to analyse the contents and implications of the changes as set out in the draft Bill.

1. ***If amendments to the Mining Act 1971 that accurately reflected the 82 Recommendations were drafted and passed, would that likely create a better environment for you/ your sector within South Australia in the future (compared to that created under the current Act and Regulations)?***

The current Act and supporting Regulations contain significant deficiencies, as identified in the EDO Submission to the Review. We are pleased to see the Review Team has made Recommendations and proposed amendments which will address a number of key recommendations the EDO made to the Review, in regards to improving environmental protection. If these amendments are passed, they are very likely to create a better environment for South Australia in the future. These include, very broadly: the Recommendations that seek to ensure there is increased transparency, especially through the public availability of information; the Recommendations that seek to extending the range of compliance and enforcement mechanisms available to the Regulator under the Act, to make these consistent with other modern, leading practice environmental and resource legislation; and the Recommendations that seek to ensure land is properly rehabilitated. The Recommendations regarding rehabilitation of current and future mining activities are likely to lead to improved environmental outcomes when mines are closed in the future, while the establishment of a rehabilitation fund will create better environmental outcomes by providing funds for legacy sites to be rehabilitated.

2. ***What, in your / your organisation's view, are the key Recommendations that (if enacted) would likely provide the most positive benefits for South Australians?***

There are many Recommendations that concern protection of the environment, and the EDO is of the opinion that all of the proposed amendments that improve environmental protection should be

enacted. To rank them is a difficult exercise at short notice, but key Recommendations that are likely to provide the most positive benefits are:

- Improved transparency. From an environmental perspective, the proposed amendments ensure a wide range of information will be publicly available, including through the Mining register. This is a major improvement on the current legislative regime. The amendments improve the right of landowners, the local community and the general public to receive information about planned mining activities, and expected environmental and social impacts, and how these will be mitigated and managed. The right of access to information maximises transparency and accountability the decision-making processes, thereby helping to ensure more effective participation, lead to better environment and social outcomes, and improving trust in the regulator and mining industry. We support as a priority the following Recommendations:
  - The Mining Register to contain a record of all dealings and history of tenements, including: PEPRs; directions; bonds; penalties; cancellations, surrenders and suspensions.
  - The modernised powers for compilation, keeping and provisions of materials, and public release of prescribed materials.
- Investigation and Monitoring. We support as a priority the following amendments: new/ additional modernised investigative powers for the Regulator to assist in gathering evidence for prosecutions; and a new Ministerial power to require an independent audit of a PEPR.
- Compliance and Enforcement. The compliance and enforcement provisions of the Mining Act will be strengthened by the addition of a range of new, additional provisions regarding liability and penalties. These provide benefits to the community by updating and improving the range of mechanisms available to the Regulator under the Mining Act to deal with poor behaviour – to deter, prevent, manage and punish poor behaviour. The proposed amendments will bring the powers of the Regulator into line with other modern environmental/natural resource legislation. Many (if not all) of the compliance and enforcement mechanisms, and liability provisions, are already standard provisions in other legislation, including the *Environment Protection Act 1993* (SA). They are uncontroversial and accepted in relation to the compliance and enforcement of environmental protection in relation to all other types of industrial and development activity. The EDO submission recommended many of these types of provisions be added to the Act. We support as a matter of priority all of the following Recommendations that expand environmental compliance tools, and in particular:
  - The introduction of civil offences and penalties.
  - The introduction of continuing offences.
  - The introduction of enforceable voluntary undertakings.
  - Introducing directors' liability for offences.
  - Where there is more than one tenement holder, 'clarifying' where there is joint and several liability for compliance with the Act.
  - 'Clarifying' where tenement holders are vicarious liable for acts of agents/employees.
  - Making all offences summary offences.
  - Expanding evidentiary provisions to remove obstacles to conviction.
- Rehabilitation. The introduction of amendments to enable the Regulator to better ensure land is rehabilitated, and the establishment of a Fund to ensure legacy sites are rehabilitated, will provide very positive environmental outcomes for South Australians. We support and prioritise all the following Recommendations:
  - The introduction of a new Fund to hold residual risk payments.
  - Payment of all fines/penalties to a Fund, to assist with the rehabilitation of former mine sites.

- The proposed amendment to make it clear rehabilitation directions can be issued after the expiry of a tenement.
  - Introducing new accountable surrender processes to ensure all environmental outcomes are achieved prior to approving a surrender of whole or part of a tenement.
  - The new Ministerial power to reinstate a tenement where a mineral tenement holder has contravened or failed to comply with a provision of the Act, to ensure full rehabilitation occurs and that environmental outcomes are met.
- Ministerial power to grant tenements. We support the introduction of a new provision that the Minister must not grant a mining lease, retention lease or miscellaneous purposes licence unless satisfied that “appropriate environmental outcomes will be able to be achieved” provided minimum standards and key assessment criteria are developed and enshrined in the Act. The will ensure the Minister is able to refuse an application where appropriate environmental outcomes are simply not able to be met by an applicant.
  - Programs for Environmental Protection and Rehabilitation (PEPRs). PEPRs are the means by which the Regulator ensures operators assess environmental impacts, and take action to avoid, minimise, and/or mitigate any potential adverse impacts on the environment. We support the following amendments, which will enable the regulator to ensure the content of PEPRs is adequate, and help to ensure that operators are abiding by their PEPR. By doing this, environmental benefits will be achieved for the community.
    - The broad Ministerial power to condition a PEPR.
    - The new Ministerial power to require an independent audit of PEPR (as noted above).
  - Administrative Directions. The following amendments strengthen the provisions pertaining to Administrative Directions, filling gaps in the successful operation of the current provisions:
    - Expanded scope of compliance directions.
    - As noted above - rehabilitation directions can be issued after the expiry of tenement.
    - Emergency direction powers can be issued verbally.
    - Introducing a restriction so a person cannot establish a new claim if that person has not taken action required by a direction.
    - Clarifying it will not be a defence to fail to comply with a direction or provide information required by a direction on the ground it may incriminate a person.
  - Private Mines. The EDO submission to the Review argued that current provisions for the environmental regulation of private mines are inadequate and do not meet community expectations. We support the transition of private mines to ensure “more consistent regulation of private mines”/“further consistency in the regulation of private mines” (we assume this is consistency with environmental regulation of other mines that are regulated under the system of tenements).
  - Protected areas. We support the amendments that clarify protection to specially protected areas, and areas protected under the *Wilderness Protection Act 1992 (SA)* and the *National Parks and Wildlife Act 1972 (SA)*.
3. ***As a preliminary step in moving towards having an improved Mining Act for South Australian communities and operators, should the Parliament seek to pass legislation that reflects the initial 82 Recommendations as a matter of urgency?***

The Parliament should pass legislation to reflect the initial Recommendations that have been identified in this Report (at Q2 above), as a matter of urgency. The content of these Recommendations should already be incorporated in the Mining Act. The community should already be empowered to have access to the types of information identified in the Recommendations, and indeed, the lack of provisions ensuring such information must be available has led to conflict, lack of

trust in developers and the Regulator, and, wasted significant and increasing time and resources in Freedom of Information applications. The Regulator should already have the powers of monitoring, investigation, compliance and enforcement that have been available to the Environment Protection Authority for years, as well as other available to regulators in other jurisdictions.

4. ***What, in your / your organisation's view, are the remaining key issues that should be addressed in the Mining Act 1971 in later amendment rounds?***

There are a number of matters in relation to mining and the environment, most of which were raised in the EDO Submission, which we believe should be addressed in the Act;

-The inclusion of ESD as a specific objective or as an express matter for consideration by the Minister when administering the Act, equivalent to the Environment Protection Act 1993(SA) and to interstate mining legislation, such as that in Victoria

-Introduction of a civil remedies provision, with broad standing provisions, equivalent to the relevant provision in the Environment Protection Act 1993 (SA)

- Merits review of decisions to approve (and reject) mining leases, with broad standing provisions

- A mandated code for undertaking community consultation which includes modern methods for notification, appropriate consultation methods and timing and extending consultation to exploration licence applications and draft PEPRs.

-Transfer of regulation of mining activities from the DPC to the Environment Protection Authority (EPA)

-Establishment of an independent scientific committee to ensure decisions ( whether about conventional or unconventional resource extraction) are informed by the best available science

-Establishment of an office of Land and Water Commissioner to provide oversight and advice with respect to the conduct of exploration and mining across South Australia. The Commissioner would have the ability to review approvals and advise the State government and the community whether projects have been assessed in accordance with the regulatory and legislative framework.

-Providing the Minister for the Environment with a right of direction over the granting of a mining lease where a proposed operation is likely to have significant impacts on the environment and community.

-Continued efforts to bring Olympic Dam in line with community expectations eg regarding application of the *Aboriginal Heritage Act 1988* (SA) and in regards to posting a bond/consideration of rehabilitation and closure

- Follow closely the Queensland Chain of Responsibility legislation and depending on analysis of its operation, seek similar provisions.

Please feel free to contact Melissa Ballantyne – EDO Solicitor – on 0431 398 452 to discuss any aspect of this Response.



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