Government of **Western Australia**
Department of **Mines and Petroleum**

Consultation Paper

Proposed Amendments to the Mining Legislation

27 August 2013

Preface

The Department of Mines and Petroleum (DMP) is Western Australia's lead agency in attracting private investment in resource exploration and development. This is achieved through the provision of geoscientific information on mineral and energy resources and management of equitable and secure titles systems for the mining, petroleum and geothermal industries.

The department also carries prime responsibility for regulating these extractive industries as well as dangerous goods in Western Australia. DMP collects resource royalties on behalf of the State Government and ensures that the highest level of safety, health and environmental standards are achieved in accordance with State and Commonwealth legislation, regulation and policies.

The resources sector in Western Australia has demonstrated its capacity to evolve and develop and, at the same time, DMP has maintained a focus on ensuring that its regulatory frameworks, and the administrative practices it employs, are contemporary to support responsible resource development in Western Australia.

As part of that ongoing reform program, the department is now proposing to recommend to Government a number of amendments to the *Mining Act 1978*, Mining Regulations 1981*,* *Mining Rehabilitation Fund Act 2012* and the Mining Rehabilitation Fund Regulations 2013 which are intended to facilitate greater transparency, streamline the approvals processes and strengthen compliance.

This consultation paper has been prepared to explain the proposed amendments, which are primarily of an administrative nature, and the expected benefits to the Government, community and industry.

The proposed amendments are open for public comment until 27 September 2013. Feedback will help to ensure that proposed amendments are appropriate and workable. It is intended that a final proposal for legislative amendments will be presented to the Government before the end of 2013.

I encourage you to read this consultation paper and to submit your comments on the proposed amendments to the mining legislation.

Phil Gorey
EXECUTIVE DIRECTOR ENVIRONMENT

27 August 2013

Submissions

The Department of Mines and Petroleum (DMP) invites people to make a submission on proposed amendments to the *Mining Act 1978*, Mining Regulations 1981, *Mining Rehabilitation Fund Act 2012* and the Mining Rehabilitation Fund Regulations 2013.

All submissions will be considered by DMP before the amendments to the mining legislation are presented to the State Government. All submissions made to DMP will be publicly available.

Remember to include:

- your name;
- address; and
- date.

Points to keep in mind:

- clearly state your point of view;
- indicate the source of your information if applicable; and
- suggest alternative recommendations where necessary.

Electronic submissions are welcome to:

reform@dmp.wa.gov.au

Submissions must be received by 5.00pm on Friday 27 September 2013.

If you have any queries, please contact one of the following DMP officers:

Mr Simon Skevington, Project Director Reform on (08) 9222 3632; or

Dr Phil Gorey, Executive Director Environment on (08) 9222 3290.

Copies of the current *Mining Act 1978*; *Mining Rehabilitation Fund Act 2012* and the associated regulations are available on the State Law Publisher's website at **www.slp.wa.gov.au**.

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1. Introduction

The Department of Mines and Petroleum (DMP) is Western Australia's lead agency in attracting private investment in resources exploration and development. It also carries prime responsibility for regulating these extractive industries in the State. DMP undertakes its environmental regulatory role within a State and Federal regulatory framework.

Its key roles in this regard are to:

- undertake environmental impact assessment and compliance monitoring under the *Mining Act 1978* (Mining Act)*; Petroleum and Geothermal Energy Resources Act 1967; Petroleum (Submerged Lands) Act 1982;* and the *Petroleum Pipelines Act 1969;*
- investigate and enforce compliance with environmental impact assessment approvals; and
- provide information on its regulatory services and provide advice to other government agencies.

It is recognised that proposals which may have environmentally significant[1] impacts are subject to Part IV of the *Environmental Protection Act 1986*.

Following the commencement of the Mining Act in 1982, which allowed specific conditions to be placed on mining leases for environmental management, the department's environmental regulatory role has evolved into one of its core functions.

After the Mining Act commenced, other secondary environmental approval requirements were introduced (both administratively and legislatively) over the following years.

These include:

- amendments to the Mining Act in 1990 to introduce powers to place conditions on exploration and prospecting tenements to control environmental impacts;
- amendments to the Mining Act in 2006 requiring the submission of Mining Proposals, replacing the 'notice of intent', and in 2010 a requirement for the submission of Mine Closure Plans;
- amendments to the Mining Regulations in 2012 to enable specific Annual Environmental Reports to be made publicly available; and
- commencement of the *Mining Rehabilitation Fund Act 2012* to reform the mining securities arrangements in Western Australia.

1.1 Regulatory approvals reform

Over the last four years, the Western Australian Government has implemented substantial improvements in reforming the approval processes. These reforms were in the context of the State Government's priority to improve the approvals process for new business activities, and have been well supported by stakeholders.

Consistent with this reform strategy, in May 2012 DMP announced the implementation of its Reforming Environmental Regulation (RER) program to fully integrate a risk-based approach to implement the principles of best practice environmental regulation into its regulatory functions.

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[1] Environmental significance as identified in the Environmental Protection Authority's Guidance Statement No. 33 – Environmental Guidance for Planning and Development

The implementation of this program will align with, and complement, environmental regulatory reforms being pursued by other State and federal agencies, and at the whole of government level.

Establishing a risk and outcome-based regulatory framework will ensure that DMP's regulatory effort is targeted so that it protects environmental values in an efficient and timely manner. This framework will be administered in accordance with the principles of best practice government administration – accountability; transparency; predictability; proportionality and targeted.

The implementation of the RER process will deliver changes to the way in which the department administers environmental regulation, and highlight opportunities for legislative changes to support achievement of the program's objectives. The legislative changes proposed in this consultation paper are an example of changes that have already been identified through the RER process.

1.2 Relationship to other reform programs

Over the past few years, other Western Australian State Government agencies have also progressed with implementing environmental regulatory reform programs.

The three agencies with significant environmental regulatory responsibility in the mineral and energy sector (Environmental Protection Authority, Department of Environment Regulation and Department of Mines and Petroleum) regularly collaborate on reform proposals which are of an administrative, systems and/or legislative nature.

These reform programs include those of the Department of Environment Regulation (DER) to reform industry regulation licensing business through its Re-Engineering for Industry Regulation and Environment (REFIRE) initiative, those of the Environmental Protection Authority's (EPA) Environmental Impact Assessment review, and DMP's RER initiative.

This collaboration assists in delivering reforms which are aligned and coordinated.

The EPA and DER are part of the RER process and will continue to collaborate on the development of legislative amendments to further the whole-of-government approach to environmental regulatory reforms.

2. Purpose of the proposed legislative reforms

The proposed amendments to mining legislation are focused on a number of specific areas and make up the first of three stages of ongoing legislative reform proposed by DMP.

The purpose of these amendments is to implement reforms which will facilitate greater transparency, streamline the approvals processes and strengthen compliance. The first stage includes those amendments which are considered to be primarily of an administrative nature and which will not have any significant effect on the day to day operations of tenement holders.

These changes are in line with DMP's RER program and will assist in meeting the Government's 2013 election commitments, in particular to introduce legislation which will support the implementation of the Mining Rehabilitation Fund (MRF), prior to the commencement of the mandatory levy in July 2014.

Stage two is anticipated to involve more complex amendments to further streamline the approvals processes and reduce any remaining duplication. However, these proposed amendments will require further development and more extensive consultation with industry and relevant State Government agencies and community groups.

A third stage of amendments may be required to support the implementation of a risk-based framework for environmental regulation. The scope and substance of any proposed amendments will be determined following the development of the risk-based framework.

Timing for the second and third stages is yet to be determined, but it is expected that consultation for these stages will commence in 2014.

3. The proposed amendments

The amendments proposed to the Mining Act, Mining Regulations 1981 (Mining Regulations), *Mining Rehabilitation Fund Act 2012* (MRF Act) and the Mining Rehabilitation Fund Regulations 2013 (MRF Regulations), as set out in this consultation paper, are intended to provide for greater public transparency, make the approvals processes more efficient and streamlined, and promote greater compliance with the legislation.

They relate to the following five key areas:

- recovery of expenditure from the Mining Rehabilitation Fund in some circumstances;
- issuing of infringement notices under the Mining Rehabilitation Fund Regulations;
- issuing a single Mining Rehabilitation Fund assessment notice, instead of individual notices where there is more than one tenement holder;
- streamlining the authorisation processes in the department; and
- improving public transparency.

Background information and more detail of the proposed amendments are provided below.

3.1 Recovery of Mining Rehabilitation Fund expenditure

Background

The purpose of the MRF Act is to secure adequate ongoing funds for the State to rehabilitate land affected by mining operations, where the original operator does not fulfil its mine rehabilitation and closure obligations. It establishes a pooled industry fund which will initially reduce and, over time, eliminate the State's unfunded liability for abandoned mine site rehabilitation.

The MRF Act establishes a Fund for levies paid by holders of "mining authorisations", which are effectively mining tenements under the Mining Act

Under the MRF Act, Fund money can be spent on rehabilitating abandoned mine sites or land affected by operations on abandoned mine sites.

An abandoned mine site is simply land on which there has been mining that has been declared by the Chief Executive Officer (Director General) of the Department of Mines and Petroleum, by way of a notice published in the Government Gazette to be an abandoned mine site. An abandoned mine site declaration can be made whether or not the operator of the mine is still in existence.

Mining tenement holders are required to rehabilitate land affected by their mining operations by way of tenement conditions. Under s114B of the Mining Act, these responsibilities continue to apply to a person who was a tenement holder even if the tenement itself is expired, surrendered or forfeited.

Decisions about expenditure from the MRF are made by the CEO in consideration of advice from the Mining Rehabilitation Advisory Panel. There is nothing in the Act preventing MRF funding being allocated, even if the person responsible for carrying out the relevant work is still in existence. That said, the MRF is not intended to relieve mining operators of their legal responsibility to rehabilitate land. The MRF is intended, as a matter of policy, to be a source of last resort. In most cases, all alternative sources of funding rehabilitation work will have been exhausted before a decision is made to fund the work from the MRF.

Generally, rehabilitation will only be funded where the original operator cannot be found, or is unable to comply with their ongoing legal obligations to rehabilitate the land. However, there may be some situations where environmental or safety considerations mean it is preferable to fund the rehabilitation in a timely manner, rather than pursue the responsible person.

However, the MRF Act currently does not include any provisions to allow the State Government to recover the reasonable costs incurred by the MRF in undertaking rehabilitation work which the mine site operator has not undertaken. While DMP would be able to pursue the application of penalties under the Mining Act for failures to undertake appropriate rehabilitation, the maximum financial penalties would likely be significantly less than the rehabilitation costs which would be borne by the MRF.

The proposal is intended to address this issue by minimising the potential for mine site operators to avoid bearing the costs of rehabilitation.

Proposal

Under this proposal, the MRF Act will be amended to insert a new provision so that where money has been paid from the Fund to rehabilitate an abandoned mine site, or affected land relating to an abandoned mine site, part or all of the money can be recovered from the person responsible to carry out the work. It is proposed that there is no time limit for the exercise of the recovery right. This will provide for situations where the existence of a responsible person becomes apparent after the expenditure is made.

The new provision will provide that this money is recoverable in court as a debt due to the Fund (rather than to the Crown in general). Where more than one person is responsible for the work, e.g. where there are multiple tenement holders, each person will be jointly and severally liable.

It is therefore proposed that the MRF Act is amended to provide that where money has been paid from the Fund to rehabilitate an abandoned mine site, or affected land relating to an abandoned mine site, part or all of the money can be recovered from the person responsible for carrying out the work.

3.2 Mining Rehabilitation Fund Infringement Notices

Background

As outlined above, the MRF Act has been recently enacted to ensure that the State has adequate ongoing funds available to rehabilitate land affected by mining operations, where the original operator does not fulfil their mine rehabilitation and closure obligations.

For the integrity of the Mining Rehabilitation Fund to be maintained, the MRF Act imposes obligations on tenement holders and provides offences for failing to comply with these obligations.

These penalties are generally considered appropriate, but there may be an occasion when an offence is at the lower end of the scale in terms of culpability and an alternative compliance mechanism is considered more appropriate, rather than prosecution through the courts. DMP also considers its *Enforcement and Prosecution Policy* (March 2010) in determining whether a prosecution is warranted.

The obligation under the MRF Act for tenement holders (under the Mining Act) to submit disturbance data annually is critical for the operation of the Mining Rehabilitation Fund. However, the prosecution, and potential application of a maximum penalty of $20, 000, in each instance may not be appropriate even though providing a specific deterrent to non-compliance is necessary.

Proposal

In order to provide an alternative option to respond to contraventions of the MRF Act, it is proposed to enable infringement notices to be issued for the offence of failure to lodge assessment information before the due date.

The capacity to issue an infringement notice for failing to provide assessment information by the due date was originally proposed to be included in the MRF Regulations. However, this provision was not progressed at that time as it was not possible to synchronise the consequential amendments which were required to regulations under the *Criminal Procedure Act 2004* and the *Fines, Penalties and Infringement Notices Enforcement Act 1994*.

The proposed amendments will not alter the current tenement holder reporting requirements under the MRF.

Under the proposed amendments, infringement notices could be issued for the offence of failing to submit assessment information on or before the due date under the MRF Act. It is intended that the "modified penalty" attached to the infringement notice will be $4 000.

The main benefits of the proposed amendments are expected to be:

- penalties for failing to submit timely assessment information for MRF levy calculation will be proportionate to the offence;
- a greater level of compliance, which will result in adequate funding being available for the rehabilitation of abandoned mines; and
- increased compliance will mean the contribution rate can be revised downwards sooner than if compliance is poor.

It is therefore proposed to amend the Mining Rehabilitation Fund Regulations to provide for the capacity to issue infringement notices for the offence of failing to submit assessment information on or before the due date under the MRF Act.

Consequential amendments will also be required to the *Fines, Penalties and Infringement Notices Enforcement Regulations 1994* and the *Criminal Procedure Regulations 2005*.

3.3 Mining Rehabilitation Fund Assessment Notices

Background

The Mining Rehabilitation Fund requires tenement holders to submit environmental data to the department annually using the online system, declaring the number of hectares disturbed and the type of disturbance.

The MRF Act provides for tenement holders to be issued with assessment notices, which set out the amount of levy payable for a year and the date by which the payment is due. It also provides for reassessment notices to be issued where the original levy amount has been assessed incorrectly, or calculated on the basis of incorrect data. In addition, the Act provides for the issue of adjustment notices and withdrawal notices.

Joint tenement holders are jointly and individually liable for any obligations attached to the tenement. One practical effect of this is any arrangement that is in place between the tenement holders (as to the proportion of MRF levy liability to be assumed by each) will not be taken into consideration by DMP in determining compliance with the MRF legislation. If all or part of a levy is unpaid for a year, each tenement holder is equally liable for the unpaid amount and any applicable interest.

Where there are multiple tenement holders, DMP is required to send individual copies of assessment (and reassessment) notices to ensure that each person who is liable to pay is aware of the amount and due date. Currently, the MRF Act requires the CEO to give assessment or reassessment notices to “the person liable to pay the levy”.

Under the Mining Act, approximately 3 630 tenements (or 16 per cent of the total tenements issued) are held by multiple tenement holders. Of these 1 100 have more than two joint holders. The requirement to issue individual copies of assessment and reassessment notices to joint tenement holders is administratively onerous and costly. It also increases the risk of miscommunication between tenement holders and can lead to over or under-payment of the levy. DMP currently experiences over or under-payments of approximately 10 per cent of payments for rents and other associated fees, where there are joint tenement holders.

Overpayment of the levy creates an additional administrative burden. The department needs to identify the tenement to which the over-payment relates, and make special arrangements for its refund or retention in each case with the agreement of the tenement holders. Under-payment of the levy is associated with administrative and compliance costs, and results in reduced revenue to the Fund. Under-payment also exposes the tenement holders to fines and penalties under the MRF Act.

It is estimated that more than 6 000 assessment notices will be sent during 2014-15, with comparable numbers in the following years. However, if a single notice is sent to each liable tenement holder, rather than multiple notices to each liable tenement holder, this number will reduce significantly.

The levy will not be payable, and no assessment notice will be sent, where information submitted by tenement holders confirms that the assessable land disturbance falls below a $50,000 threshold.

Proposal

It is proposed to amend the MRF Act so that, where there is more than one registered tenement holder for a Mining Act tenement, a single notice can be issued to a person, or to all the tenement holders, at a contact address nominated at the same time as assessment information is submitted. This is instead of issuing a notice to each liable person, as is currently the case.

The existing online MRF assessment data reporting system will be adjusted to require the nomination of a single contact address—at the time of data submission—rather than continuing to issue a notice to each liable person. The address may be that of one of the tenement holders, a tenement management agent, or any other address. This nomination will be effective for MRF purposes only.

It is therefore proposed to amend the MRF Act so that, where there is more than one registered tenement holder, a single notice can be issued for that tenement.

3.4 Streamlining authorisation processes

Background

The Mining Act requires that tenement holders submit for approval a Programme of Work or a Mining Proposal (including an approved Mine Closure Plan) prior to commencing ground disturbing activity. The authority to approve these applications is set out in the Mining Regulations.

The authority to approve these applications has been established in regulations by specifying senior positions in the department.

Following research, there is no justification of the need for the independent identification of a statutory official to approve these environmental applications.

In addition, the stipulation of specific officials under the Mining Act is problematic from an administrative perspective. Most critically, any change in the organisational structure (even minor changes to position titles within the organisation, or a change in duties) requires an amendment to the Mining Regulations. This is an administratively intensive exercise and therefore often delayed.

While it is possible to simply update the Mining Regulations with current position titles, this will only provide a short-term solution. The Mining Regulations will require updating each time position arrangements are altered. DMP’s Environment Division has grown since these provisions were first introduced in response to a growing service delivery expectation. An increased number of positions within the division are now considered appropriate to make decisions on such applications and therefore it is likely to increase the frequency at which the decision making authority must be updated.

It is appropriate therefore to have an alternative approach which can minimise the requirement to regularly update the Mining Regulations.

In Western Australia, the *Environmental Protection Act 1986* provides the authority to approve similar environmental applications (e.g. licences) to the CEO (or by delegation).

Proposal

It is proposed to amend the Mining Act to provide for the Director General to be authorised to approve Mining Proposals and Mine Closure Plans, and for the Director General to delegate these powers appropriately within the agency.

It is therefore proposed to amend the Mining Act to directly vest the approval functions to the Director General for Mining Proposals, Mine Closure Plans and Programmes of Work, and for the Director General to be able to delegate these powers appropriately within the department.

3.5 Improving transparency

Background

For a number of years, DMP has been implementing new systems and approaches for receiving applications and publication of approvals related information, with the principal aim of improving stakeholder understanding of departmental decisions, and facilitating the sharing of environmental data and reports.

For instance, in June 2009, DMP introduced the new online Environmental Assessment and Regulatory System (EARS), and the upgraded Petroleum and Geothermal Register, which allowed proponents to track their applications for environmental assessment online and identify at what stage it is in the approvals process. These systems show whether an application is under assessment by DMP or another agency, if it is on hold, and whether it has been approved, rejected or withdrawn from the process.

In September 2011, DMP released its strategy for future transparency arrangements for its environmental regulation, which remains the guiding policy for improving transparency of environmental regulatory decisions within DMP.

Further reforms were undertaken and, in 2012, the department extended online lodgement to petroleum environment proposals and also introduced online lodgement and publication of annual environmental reports lodged by mining companies.

With the success of transparency reforms undertaken over the last few years, there is benefit in continuing to pursue the opportunities for improving transparency.

In some cases, however, the legislation does not provide for public release of approvals; for instance:

- DMP currently receives around 3 000 mining related proposals each year, and only around 1 000 of these are made publicly available in some form (Mining Proposals, some Mine Closure Plans, and parts of Annual Environmental Reports); and
- the MRF Act, which commenced on 1 July 2013, requires clearance and rehabilitation data for approximately 20,000 tenements to be submitted to DMP annually from 1 July 2014. However, there are no specific provisions in the Act about the public release of data.

Removing doubt regarding the ability to publish approvals and accompanying reports submitted to DMP will also assist in the pursuit of a virtual environmental data library.

Proposal

It is common practice among Australian jurisdictions for public notification of environmental applications, approvals and performance reporting. Public reporting of the activities of regulatory agencies is also consistent with the principles of best practice environmental regulation.

In Western Australia, the Environmental Protection Act provides for applications, approvals and reporting to be made available publicly.

However, in difference to the Environmental Protection Act, the proposed amendments to the mining legislation will provide the Director General with the option to make the information publicly available (guided by DMP policy), rather than establishing a statutory requirement to make it so. The details of how and which plans/information/data may be made available will be determined by way of DMP policy.

Provisions already exist in the Mining Act which allow for data or information provided to DMP to be released publicly if more than five years old. This measure will allow the transition of all environmental data and information to be made publicly available over time.

This proposal is to amend the Mining Act and regulations so that information submitted with a Programme of Works or a Mining Proposal, or updated versions of those plans, or any information submitted to comply with environmental reporting requirements, can be made publicly available. The proposal is to also amend the Mining Rehabilitation Fund Act to allow data and information reported by tenement holders to be made publicly available by the Director General.

It is therefore proposed to amend the Mining Act to provide for an approved Programme of Work, Mining Proposal, Mine Closure Plan, or any information submitted to comply with environmental reporting requirements, can be made publicly available as determined by the Director General.

It is also proposed to amend the Mining Rehabilitation Fund Act to allow data and information reported by tenement holders to be made publicly available by the Director General.