

EXPLANATORY MEMORANDUM

MINING AMENDMENT (PROCEDURES AND VALIDATION) BILL 2018

Introduction and Overview

The purpose of the Mining Amendment (Procedures and Validation) Bill 2018 is to address the implications of the High Court decision in *Forrest & Forrest Pty Ltd v Wilson & Ors* [2017] HCA 30 (*Forrest*) by validating mining tenements and amending the *Mining Act 1978* (the Mining Act) to ensure security of mining tenure in the future.

In *Forrest*, the High Court held that a failure to strictly comply with the technical lodgement requirements of the Mining Act meant that the application was invalid and there was no jurisdiction to progress a mining lease application through to grant.

This has generated uncertainty about the validity of mining tenements that were processed in good faith and in accordance with the previous practices and understandings of the law at the time they were granted.

The first aspect of the Bill is the restoration of the status quo prior to the High Court decision — by confirming the validity of all tenements which have been granted under the Mining Act and the *Mining Act 1904* (repealed) (the repealed Act). This is achieved by inserting a new Part X into the Mining Act.

The second aspect of the Bill is amendments to the Mining Act that improve the technical lodgement requirements for tenement applications. These amendments will ensure security of tenure in the future by providing greater certainty and clarity in the application and determination process, including:

- supporting documents (such as mineralisation reports for mining lease applications) are not required to contemporaneously accompany applications;
- obsolete requirements for the Warden to forward to the Minister maps and notes of evidence are deleted;
- the assessment of a mineralisation report by the Director, Geological Survey is revised into a more logical and practical process;
- information an applicant is required to lodge in respect to supporting statements for exploration licences and mining leases is clarified;
- the definition of 'mining tenement document' is expanded to facilitate electronic lodgement of applications and registrations; and
- a power to enable regulations to be made to provide when an amount or fee, submitted in respect of an application or an instrument lodged under the Mining Act, is taken to have been received for the purposes of the Mining Act.

The third aspect of the Bill is amendment to Part 2 of the *Mining Legislation Amendment Act 2014* which has not yet been proclaimed pending the development of supporting regulations. The Bill amends the Mining Act instead of making further amendments to an unproclaimed Act.

CLAUSE NOTES

PART 1 – Preliminary

Clause 1 – Short title

Cites the short title *Mining Amendment (Procedures and Validation) Act 2018*.

Clause 2 – Commencement

Provides for the commencement of the Act:

- (a) sections 1 and 2 come into operation on the day on which the Act receives Royal Assent;
- (b) the rest of the Act comes into operation on a day fixed by proclamation and different days may be fixed for different provisions.

PART 2 – *Mining Act 1978* amended

Clause 3 – Act Amended

Identifies the *Mining Act 1978* (the Mining Act) as the Act being amended.

Clause 4 – Section 6 amended

This clause amends the terminology in section 6 of the Mining Act in respect to the lodgement of mineralisation reports, resource reports and statements for the purposes of referring proposals under the *Environmental Protection Act 1986*. This reflects the amendment made by clause 9(2) of this Bill to section 74 of the Mining Act which provides for compliance information to be ‘lodged in respect of’ a mining lease application rather than ‘accompany’ a mining lease application.

Clause 5 – Section 58 amended

This clause amends the information required to be included in a supporting statement for an exploration licence application. The obsolete requirement to provide information in respect to a methodology of exploration is deleted. In order for a mining registrar to determine whether an applicant can effectively explore the land, providing the ‘details of the programme of work’ provides sufficient information for an assessment.

The three remaining elements of the supporting statement are also clarified by specifying that the details of the programme of work proposed to be carried out, the estimated amount of money proposed to be spent on the exploration, and the technical and financial resources available to the applicant are only required in respect to the first year of term of the exploration licence.

Clause 6 – Section 59 amended

This clause deletes the obsolete requirements for the Warden to forward to the Minister, maps and notes of evidence after hearing applications for an exploration licence. The Warden will forward a report which recommends the grant or refusal of the exploration licence and sets out the reasons for that recommendation.

Clause 7 – Section 70D amended

This clause deletes the obsolete requirements for the Warden to forward to the Minister, maps and notes of evidence after hearing applications for a retention licence. The warden will forward a report that recommends the grant or refusal of the retention licence and sets out the reasons for that recommendation.

Clause 8 – Section 70O amended

This clause amends the definition of ‘relevant mining proposal’ with the amended terminology used in respect to the lodgement of compliance information for mining lease applications. This reflects the amendment made by clause 9(2) of this Bill to section 74 of the Mining Act which provides for compliance information to be ‘lodged in respect of’ a mining lease application rather than to ‘accompany’ a mining lease application.

Clause 9 – Section 74 amended

This clause provides for new requirements for the lodging of a mining lease application.

A mining lease application shall be in the prescribed form, shall be accompanied by the first year’s rent and application fee and be lodged in the prescribed manner.

The requirement to provide a mining proposal, mineralisation report and statement, or resource report and statement (defined as ‘compliance information’ in amended section 75) is deleted as a component of a valid mining lease application. This will provide greater certainty as to whether a mining lease application is valid or not. As a result of this amendment, there are consequential amendments to sections 6, 70O, 75, 82A, 84AA and 90.

The ‘compliance information’ is to be lodged within a prescribed time from the making of the mining lease application. The mining lease application cannot be dealt with or be determined under section 75 (except refusal by the mining registrar) unless the compliance information has been lodged.

The new application requirements will prevent land-banking because if the compliance information is not lodged within the required time, the mining registrar must refuse the application. Where necessary, there will be discretion to extend the time for compliance to lodge the documentation (clause 11 provides for the amendment to section 75).

This clause provides that objections can be lodged against a mining lease application prior to the lodgement of the compliance information.

This clause amends the information required for the statement provided with either the mineralisation report or the resource report. It clarifies that the statement is to include information in respect to the location of proposed mining operations and the location and area of land that is likely to be required for any infrastructure associated with those proposed mining operations.

This clause amends the definitions of 'JORC Code' (Joint Ore Reserves Committee) and 'resource report' such that the resource report lodged in respect of a mining lease application must comply with the current JORC Code most recently adopted by the Australian Securities Exchange Limited, at the time of the making of the mining lease application.

This clause also amends the definition of 'mineralisation report' to require it to be prepared by a qualified person because prior reference to a 'qualified person' preparing the mineralisation report is deleted elsewhere.

Clause 10 – Section 74A amended

This clause revises the assessment of a mineralisation report by the Director, Geological Survey into a more logical and practical process and improves the information available for decision-making.

If the mining lease application is supported by a mineralisation report and statement, the Director, Geological Survey is required to prepare a report (referred to as the section 74A report) as to whether or not there is significant mineralisation in, on or under the land to which the application relates.

The Director, Geological Survey may request further information in relation to matters dealt with in both the mineralisation report and the statement, and that information must be provided within a prescribed time.

The section 74A report must be based solely on information contained in the mineralisation report and statement and any further information provided in response to a request of the Director, Geological Survey.

The Director, Geological Survey is to cause the section 74A report to be given to the mining registrar or warden in order to perform functions under section 75, as the case may be.

If the section 74A report states that there is no significant mineralisation, the Director, Geological Survey is to cause the section 74A report to be given to the Minister. The Minister must then refuse the application as provided under section 75(8).

The definition of 'mineralisation report' is deleted as it is no longer referred to in this section.

Clause 11 – Section 75 amended

This clause amends the process for dealing with and determining mining lease applications.

The mining registrar must refuse a mining lease application if the applicant fails to lodge the mining proposal, mineralisation report and statement or resource report and statement (compliance information) within the compliance time.

If the applicant has lodged the compliance information and there are no objections to the application to be considered by the Warden, the mining registrar is to forward a recommendation report to the Minister, plus the section 74A report if applicable. If a mineralisation report and statement were lodged in respect to the mining lease application, the mining registrar cannot forward the report to the Minister unless the section 74A report states that there is significant mineralisation.

If the applicant has lodged the compliance information and there are objections to the application to be considered by the Warden, the Warden must hear the mining lease application. If a mineralisation report and statement are lodged in respect to the mining lease application, the Warden cannot hear the application unless the section 74A report states that there is significant mineralisation. The Warden is to forward a recommendation report to the Minister, plus the section 74A report if applicable. The obsolete requirement for the Warden to forward to the Minister, maps and notes of evidence after hearing an application for a mining lease is deleted.

The Minister is to receive the report or reports from the mining registrar or the Warden and grant or refuse the mining lease as the Minister thinks fit.

However, if a mineralisation report and statement were lodged in respect to the mining lease application and the Minister receives an unfavourable section 74A report under section 74A(4A), the Minister must refuse the mining lease application.

This clause provides that only the Minister can approve an extension of time to lodge compliance information.

This clause also defines certain words and phrases used in section 75.

Clause 12 – Section 82A amended

This clause amends section 82A such that mining leases granted from applications where a resource report and statement were lodged are subject to the condition requiring approval before mining operations of a prescribed kind can be carried out. The clause also reflects the amendment made by clause 9(2) of this Bill to section 74 of the Mining Act which provides for mineralisation report and statement, and a resource report and statement to be 'lodged in respect of' a mining lease application rather than 'accompany' a mining lease application.

Clause 13 – Section 84AA amended

This clause amends reference to the lodgement of mining proposals, for the purposes of reviewing mine closure plans. This reflects the amendment made by clause 9(2) of this Bill to section 74 of the Mining Act which provides for compliance information to be 'lodged in respect of' a mining lease application rather than to 'accompany' a mining lease application.

Clause 14 – Section 90 amended

This clause amends reference to the lodgement of a supporting statement, for the purposes of making a general purpose lease application. This reflects the amendment made by clause 9(2) of this Bill to section 74 of the Mining Act which provides for compliance information to be 'lodged in respect of' a mining lease application rather than 'accompany' a mining lease application.

Clause 15 – Section 97A amended

This clause deletes the obsolete requirements for the Warden to forward to the Minister, maps and notes of evidence after hearing an application for the restoration of a mining tenement. The Warden must, as soon as practicable after the hearing of the application, transmit to the Minister a report which recommends the grant or refusal of the restoration application together with the Warden's reasons for that recommendation.

Clause 16 – Section 98 amended

This clause deletes the obsolete requirement for the Warden to forward to the Minister notes of evidence after hearing an application for forfeiture of a mining tenement. The Warden will forward a report and the warden's recommendation, if any, on the forfeiture application.

Clause 17 – Section 102 amended

This clause deletes the obsolete requirements for the Warden to forward to the Minister, maps and notes of evidence after hearing applications for exemption from the expenditure condition. The Warden must as soon as practicable after the hearing of the application transmit to the Minister a report which recommends the grant or refusal of the application and sets out the reasons for that recommendation.

Clause 18 – Section 125B inserted

This new clause provides that the validation provisions introduced by new Part X do not cause compensation to be payable to any persons under any law or derogate from any entitlement to compensation that existed before the coming into operation of that Part. This new clause preserves the status quo with respect to compensation prior to the commencement of new Part X.

Clause 19 – Section 162B amended

This clause is amended to allow regulations to be made in order to regulate applications for extensions of prescribed periods and prescribed times, and the exercise of power by the Minister or warden to extend a prescribed period or prescribed time.

Clause 20 - Section 162 amended

This clause enables regulations to be made to provide when an amount or fee, submitted in respect of an application or an instrument lodged under the Mining Act, is taken to have been received for the purposes of the Mining Act. This amendment is necessary in order to facilitate electronic lodgement and allow flexibility to adapt to new payment facilities that may become available in the future.

This clause also enables regulations to be made to authorise and regulate the publication and dissemination of information contained in a ‘mining tenement document’. This amendment was previously made, but not proclaimed, in Part 2 of the *Mining Legislation Amendment Act 2014*. The Bill amends section 162 of the Mining Act instead of making further amendments to an unproclaimed Act.

The definition of ‘mining tenement document’ in section 162 is also expanded to reflect the amendment made by clause 9(2) of this Bill to section 74 of the Mining Act which provides for compliance information to be ‘lodged in respect of’ a mining lease application rather than ‘accompany’ a mining lease application. The expanded definition of ‘mining tenement document’ will also allow regulations to be made in respect to the public release of a broader range of documents.

Clause 21 – Part X inserted

New Part X is inserted into the Mining Act to address the implications of the *Forrest* decision. It restores the status quo prior to the High Court decision, by confirming the validity of all mining tenements that were granted under the Mining Act and the repealed Act. It also deals with pending applications that may be affected by the *Forrest* decision. The validation of title includes the grant of mining tenement applications and post-grant applications related to title. This is defined as: amendments to include private land, amalgamations, renewals, extensions of term, retention status, restoration and surrenders which may be affected by the *Forrest* decision.

New section 164 defines certain words and phrases used in the new Part X.

New section 165(1) provides that: pending applications for the grant, amendment or renewal of a mining tenement which were lodged before the commencement of Part X can be dealt with and be determined after the commencement as if the prescribed requirements of the Mining Act or the repealed Act (whichever applicable) had been complied with. The prescribed application fee must have been paid before the commencement of a hearing, if there was one, or before the grant of the mining tenement or the determination of the application. Pending applications will be valid upon grant or registration, whichever is applicable [as per section 166(1)(b)].

Pending applications cannot continue to be dealt with and be determined, to the extent that, the consent in writing of the owner and occupier of private land was required under the Mining Act, and those consents were not given.

An application that has been marked in the register as invalid cannot be validated under Part X [section 165(5)]. An authorised officer (already defined in section 103A) has power, and is taken to have always had power, to mark in the register an application as being invalid. This reflects the *Forrest* decision, in that non-compliant mining lease applications have been marked in the register as invalid. Non-compliant applications can be marked in the register as invalid by an authorised officer.

New section 166 validates the grant, amendment or renewal of mining tenements, which occurred prior to the commencement of Part X, or after the commencement, if the application was a pending application under section 165(1).

The prescribed application fee must have been paid before the commencement of a hearing, if there was one, or before the grant of the mining tenement or the determination of the application.

The grant, amendment or renewal of a mining tenement and anything done or purportedly done on that tenement, is taken to be, and to be always have been, valid and effective to the same extent as if the prescribed requirements of the Mining Act or the repealed Act (whichever applicable) had been complied with.

To the extent that it applies, the grant or amendment of a mining tenement will not be validated if the consent in writing of the owner and occupier of private land was required under the Mining Act, and those consents were not given.

The amendment of a mining tenement will also not be validated if an application for the restoration of a forfeited mining tenement was made before the application to amalgamate was granted, and the application for the restoration was granted.

Because the grant of a mining tenement is subject to survey, new section 166 does not operate to validate the grant of a mining tenement to the extent that the tenement was granted over the land subject of an existing mining tenement.

PART 3 – Mining Legislation Amendment Act 2014 amended

Clause 22 – Act amended

Identifies the *Mining Legislation Amendment Act 2014* as the Act being amended.

Clause 23 – Sections 4 to 7 deleted

This clause deletes sections 4, 5, 6 and 7 of the *Mining Legislation Amendment Act 2014*, which are awaiting proclamation.

Sections 4 and 5 of the *Mining Legislation Amendment Act 2014* change the terminology of 'programme of work' lodged in respect to exploration licence and retention licence applications to distinguish it from environmental programmes of work. These changes are being deleted by the Bill as the change in terminology is no longer necessary.

Section 6 of the *Mining Legislation Amendment Act 2014* removes the requirements in respect to the Director General of Mines ensuring mining lease application information is available for public inspection from the Act into the Regulations. This change is being deleted by the Bill and the obligation will remain in the Mining Act.

Section 7 of the *Mining Legislation Amendment Act 2014* amends the regulation-making power in section 162 of the Mining Act in respect to the public release of information. As this includes an amendment to the definition of 'mining tenement document' which is also being amended in the Bill, the Bill amends section 162 of the Mining Act instead of making further amendments to an unproclaimed Act.