MEAC
Minerals & Energy
Advisory Council

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LEADING PRACTICE MINING ACTS REVIEW
MINING ACT 1971* AND *MINING REGULATIONS 2011

SUBMISSION OF THE MINERALS AND ENERGY ADVISORY COUNCIL

1. Introduction

1.1 The Terms of Reference of the Minerals and Energy Advisory Council (***MEAC*** or ***Council***) reflect that the role of MEAC is to:

> *provide advice and to act as a sounding board to the South Australian State Government on all aspects of the minerals and energy resources sectors. This advice is provided directly to the Minister for Mineral Resources and Energy to support the Government's economic priorities.*

1.2 It is clear from the Terms of Reference and the deliberations of MEAC that the focus of the Council is upon strategic issues confronting the South Australian minerals and energy resources sectors.

1.3 In the context of the Leading Practice Mining Acts Review in relation to the *Mining Act 1971* and the *Mining Regulations 2011* the Council considers that its submission should similarly be confined to a limited number of key strategic matters which the Council believes should be considered by the Minister for Mineral Resources and Energy in relation to the review and amendment of the Act and Regulations.

2. Fundamental Principles

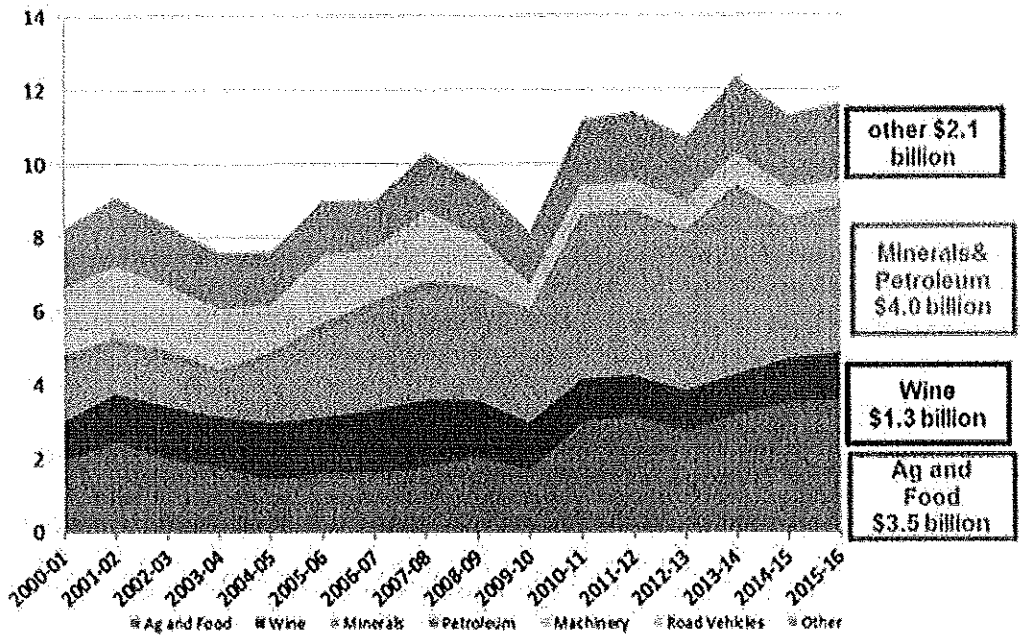
In MEAC's view the provisions of a revised *Mining Act* and the *Mining Regulations* must consistently reflect the following fundamental principles:

2.1 **Productivity:** the provisions of the legislation need to promote productivity in the minerals resources sector, not act as a hindrance to productivity. In 2013 the Productivity Commission enquired into, and reported on, the Non-Financial Barriers to Mineral and Energy Resource Exploration. In the Key Points to their report the Commission stated the following:

> *Regulatory processes that impose unnecessary burdens on resource explorers or inhibit exploration can be reformed by:*
> *– ensuring stronger and simpler coordination, transparency and accountability of exploration licence approval processes*
> *– making land access decisions that take into account the benefits of exploration to the wider community, and that are appropriate to the level of risk posed by exploration as informed by sound evidence*
> *– improving access to the existing knowledge of Indigenous heritage and accrediting state and territory government processes which meet Australian Government standards of Indigenous heritage protection*
> *– addressing state, territory and Commonwealth environmental approvals processes that are duplicative and are not commensurate with the risk and significance of the environmental impacts of exploration*

MEAC's view is that these points (and, in the context of the Review, particularly the first point) remain relevant not only to the regulation of minerals exploration, but also to minerals **production** regulation.

2.2 **State Development:** the critically important role of the South Australian minerals resources sector in facilitating and contributing to State Development is appropriately recognised by the inclusion of the sector as one of the State's ten Economic Priorities and one of the State's seven Strategic Priorities. The relative position of mining in the economy is shown in this graph of South Australia's exports.



The *Mining Act* and the *Mining Regulations* can play a key role in State Development. As has been recognised by numerous Warden's Court decisions and is clear from Parliamentary debates regarding the Act, the object of the Act is to promote mining. The Council considers it to be essential that the object of the Act is kept front of mind in all deliberations regarding the review of the Act and Regulations so as to ensure that the legislation plays it appropriate part in promoting State Development. MEAC also notes that the fundamental principle of State development is recognised in the State's Discussion Paper regarding the review of the *Mining Act* and the *Mining Regulations*. The objectives of the Review are stated at page 9 of the Discussion Paper. The first three objectives relate directly to State Development.

MEAC also recognises the importance of successful multiple land use and supports the regulators' promotion of multiple land use and its role in the betterment for the State as a whole.

2.3 **Sustainability:** MEAC recognises that it is essential that operations of the mineral resources sector are conducted in a manner which "delivers balanced economic, social and environmental outcomes" (Discussion Paper, page 16) and that the assessment process for sectorial operations weigh up "the impacts and benefits of exploration and production for current and future generations" (Discussion Paper, page 43). MEAC supports the statements in the Discussion Paper (page 43) that the 2011 amendments to the Act moved South Australia to a leading outcomes based environmental regulatory system. Similarly MEAC supports the statement (also at page 43) in the Discussion Paper that:

> *[m]odern regulatory practice is focused on objectives and outcomes, and is performance and risk based. Outcomes based regulation requires explorers and operators to achieve certain environmental outcomes, but do not prescribe particular activities that need to occur to achieve those outcomes*

MEAC is concerned that this sound regulatory approach is not always consistently adhered to in the administration of the Act and, in particular, the prescription of mining lease conditions. Too often the risk assessment approach is to transfer all risk to the mining operator, regardless of a thorough assessment and allocation of risk. Similarly mining lease

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conditions **do** prescribe particular activities to achieve outcomes, contrary to the outcomes based regulatory approach followed by modern regulatory practice;

2.4 **Competitiveness:** Whilst it may be trite it is fundamentally true that the minerals resources sector is a global sector. In making investment decisions resources companies will consider a variety of international jurisdictions and a variety of factors will come into play in a company making a final decision as to where it will invest. The regulatory regime in a particular jurisdiction will inevitably be one of the important factors which a company will consider in this regard. In relation to international competitiveness the Fraser Institute Annual Survey of Mining Companies provides a well-recognised benchmark regarding the State's international competitiveness. In the 2016 survey South Australia was ranked 13th in the world on the Investment Attractiveness Index (behind Australian jurisdictions Western Australia (3rd) and Queensland (10th). This result compares unfavourably to the State's performance in 2015 (10th), though better than the 2014 (16th), and 2013 (23rd) survey. Perhaps more directly relevant to the review of the *Mining Act* and the *Mining Regulations* is South Australia's results in the Policy Perception Index. In the 2016 survey South Australia ranked 21st (behind Western Australia (9th) and just ahead of Northern Territory (22nd)). (Queensland was 36th on this policy perception ranking.) Of some concern is the slow deterioration in the State's standing in this regard over the last three Surveys – 2015 (20th), 2014 (17th) and 2013 (15th).

Nationally, South Australia has:

- 14% of the land area
- 7% of the population,
- 3% of the 2015/16 minerals (ex-oil/gas) production,
- 0.2% of the 2015/16 mining capital expenditure and
- 3% of the minerals exploration expenditure. The latter reflects the challenges of cover and limited known target styles in South Australia.

Suffice to say that the Review provides an ideal opportunity to reset the regulatory framework in South Australia in a manner that maximises the State's national and international competitiveness. MEAC suggests that the Review Team consider the legislative regimes that apply in the international jurisdictions with the top three rankings for the Policy Perception Index in the 2016 Survey to assess the features that give them their competitive edge. Those jurisdictions are Ireland (1st), Saskatchewan (2nd) and Sweden (3rd). This will enable the Review Team to consider the adoption of features that promote international competitiveness and which are relevant to the South Australian regulatory environment.

3. Specific Recommendations

3.1 Recommendation 1:

That the Mining Act should expressly reflect the objects of the Act

MEAC is of the view that the objects of the *Mining Act* should be reflected in the Act expressly and in more expansive terms than is currently the case. The objects should reflect the numerous Warden's Court decisions and Parliamentary debates regarding the Act that the object of the Act is to promote mining. Furthermore prominence should be given to the Crown's ownership of minerals and the right and obligation of the State to permit exploitation of these resources in a sustainable manner and for the benefit of the South Australian community at large.

A possible wording for this proposed object statement follows:

An Act to promote mining, recognising the State's ownership of minerals and its right and obligation to permit exploitation of such minerals in a responsible and sustainable manner for the benefit of South Australia as a whole.

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3.2 **Recommendation 2:**

That the Act should require relevant Government regulatory bodies and departments involved in regulating mining to develop a Charter of Performance, reflecting key performance criteria for their areas. Performance against the Charter should be required to be reported to Parliament annually.

MEAC broadly supports the proposals in the Discussion Paper regarding transparency and the benefits of a streamlined rigorous and competitive regulatory system. However MEAC believes these proposals should be extended by the inclusion in the Act of an express requirement that the relevant regulators develop a Charter of Performance to govern their administration of the Act. Thus these groups would have flexibility in developing the Charter, and could amend it relatively easily as technology develops, as their performance continuously improves, and as public expectations change. We expect that the Charter would be developed with relevant consultation to ensure that the KPIs in the Charter reflect those which the public would expect of the mining regulators. As a further level of public accountability, reporting against the Charter should be reported on each year to parliament as part of Government's usual reporting processes.

The key performance criteria could include the following:

(a) a commitment to objective scientific assessment;
(b) a focus on objectives and outcomes;
(c) practices which are performance and risk based;
(d) availability of capable and qualified expertise (internally or externally) to enable informed assessment;
(e) appropriate risk assessment of proposals and allocation of risk in accordance with recognised standards;
(f) defined time lines for assessment of proposals;
(g) broader release of proponent documents and public submissions to the public and proponents (subject only to commercially sensitive information and disclosure which would slow regulatory processes or trigger vexatious opposition)

We consider that development of such a Charter should occur as soon as possible, given the considerable competitive advantages for South Australia in demonstrably being able to measure, and improve, its administrative performance.

3.3 **Recommendation 3:**

That the regulatory cost of the minerals resources sector doing business in South Australia should be such as to ensure that the State is internationally competitive with respect to such costs and commensurate with changing risk profiles over time of explorers and their evolution to producers.

As noted in paragraph 3.4 of this submission, international competitiveness is critical for the State to attract the mineral resources sector investment which can assist in driving the State's development and economy. The cost of doing business in the State is a material factor in company investment decisions. Whilst this issue is a broader one than merely the provisions of the *Mining Act* and the *Mining Regulations* in MEAC's view there are a number of changes to the legislation which will significantly improve the State's jurisdictional cost competitiveness:

(a) **Rental:** Under the Act an obligation to pay rental to freehold owners and exclusive native title holders arises when a retention lease, mining lease or miscellaneous purposes licence is granted. MEAC assumes the requirement to pay rental under these provisions is intended to "compensate" an owner for the impact of mining operations on their property. However, since the introduction of Part 10A of the *Mining Act* in 2011 an operator is only permitted to commence mining operations on land once a PEPR has been approved. The same considerations apply in respect of exempt land. In MEAC's view rental should only be payable from the time the mining operator is entitled to commence mining operations on the relevant land;

(b) **Assessment Fees:** Revised mining lease assessment fees were introduced in December 2014 by amendment to the *Mining Regulations*. They reflect a very significant increase in the fees payable by some proponents, based as they are on the on capital cost of a project up to a maximum of $202,404. No other Australian jurisdiction levies assessment fees on a capital cost basis. Fees in other States are charged on a fixed basis, the highest fee for a mining lease application being that in New South Wales - $10,000, noting that all other states have additional fees for other parts of the assessment process. Furthermore the South Australian fees are payable at the time an application is made for a mining lease. At that time many proponents have still to secure funding for their projects. MEAC considers there are good reasons to reduce the fees and, in any event, to stage the payment of the fees (as is the case for development application fees under the *Development Act*). For example 30% of the fee on application; 30% on a proponent submitting its Response Document (or being notified none is required) and 40% on finalisation of the assessment. In addition, offering flexible fee arrangements to cater for priority assessment at the election of applicants would provide benefits for all parties and the State.

(c) **Bonds:** The Discussion Paper reflects the current practice of "requiring explorers and operators to give a security bond which covers the present and future costs of the rehabilitation of all land disturbed by operations" (Discussion Paper, page 36). The Paper also sets out details of DSD's proposed "leading practice financial assurance model...that will meet three 'non-negotiable criteria'":

(i) "appropriately cover the financial risk and environmental liability relating to a project that would otherwise fall to Government and the community (preferably in a way that generates revenue for the rehabilitation of any legacy sites)";
(ii) "appropriately incentivises progressive compliance and rehabilitation behaviour";
(iii) "be flexible and cost effective for operators".

In MEAC's view, in order to ensure the cost competitiveness of the State for the mineral resources sector we suggest the following:

(iv) in relation to minerals exploration, a clear distinction in the amount of the bond required should be made between low impact exploration and intensive exploration. A consequence of this view is that exploration bonds should be reassessed on a periodic basis or at intervals relative to the stage of exploration (e.g. when application is made to use declared equipment). In this way the second and third objectives of DSD's proposed financial assurance model will be met;
(v) in relation to minerals production, a bond to cover the present costs of rehabilitation should be required with reviews undertaken periodically to ensure that the bond in place will cover the then anticipated scope of required rehabilitation. Again, both the second and third objectives of DSD's proposed financial assurance model will be met through this approach;
(vi) in relation to all bonds, any proposal to impose on any single operator security bond requirements which "generate revenue for the rehabilitation of legacy sites" is without foundation. Such an approach will inevitably increase the amount of bonds. The premise that a single operator should have a responsibility for legacies left by their predecessors, or caused by previous land owners or occupants or by a failure of rigorous regulation, is ill-founded.

(d) **Part 9B Agreements:** MEAC recognises that it is appropriate that an explorer be required to comply with Part 9B of the *Mining* Act before carrying on exploratory operations which affect native title. The costs of compliance with Part 9B are substantial. If possible legally, it is desirable that the requirement to comply with Part 9B coincides with an exploration stage at which an explorer is in a position to make a decision whether to incur the costs of undertaking more intensive exploration.

In 2011 the definition of declared equipment in the *Mining Act* was amended to provide:

> *(ab) drilling equipment within a class prescribed by the regulations;*

The *Mining Regulations* were then changed to state:

For the purposes of paragraph (ab) of the definition of ***declared equipment*** *under the Act, a prescribed class of drilling equipment is any mechanically driven machinery that is capable of drilling to depths greater than 2.5 metres below the ground.*

DSD's subsequent policy has been to not authorise the use of declared equipment unless the relevant explorer has complied with Part 9B.

In MEAC's view the "line in the sand" represented by the amplified definition of declared equipment in the *Mining Act* and DSD's policy is not legally justified, does not promote exploration and adds significant costs to explorers doing business in the State at a stage in the process of exploration which is not justified.

Rather, in MEAC's view, the *Mining Regulations* require further amendment to provide the current provisions do not apply to shallow auger and air core drilling that facilitates surface surveying by geochemical and geophysical techniques;

(e) **Exempt land:** The current provisions of the *Mining Act* relating to exempt land require a mining operator, as a precondition to carrying on mining operations on the land, to negotiate an agreement with a person having the benefit of the exemption or to obtain a determination from a court that the benefit of the exemption be waived. Considerable costs are incurred by both operators and owners in complying with these procedures. Moreover, an operator incurs very significant costs in progressing a project to the stage when obtaining a waiver of the benefit of any exemption is appropriate. The current provisions of the *Mining Act* do not extend to provisions to deal with the possible eventuality that the relevant court refuses to make a determination that the benefit of the relevant exemption (possibly held by a single land owner) be waived. In the event this arises in respect of a mining project that the State considers it is in the State (and, possibly, national) interest should proceed, neither the State nor the operator has any recourse. In MEAC's view this potential impasse should be remedied by providing (as is the case under Part 9B of the *Mining Act*) that the relevant court, in making such a determination, acts as an arbitration tribunal and giving the Minister the right to overrule the determination.

3.4 **Recommendation 4:**

> *That MEAC strongly supports those initiatives in the Discussion Paper to amend the Mining Act which streamline existing, or introduce new, provisions and processes which promote productivity*

There are a number of initiatives for amendment of the *Mining Act* in the Discussion Paper which promote efficient regulation of the minerals resources sector and consequent productivity. These are strongly supported by MEAC and include:

(a) the proposal to do away with subsequent exploration licences and provide for an ability to repeatedly renew licences;
(b) extending the caveat provisions of the Act to permit the caveating of non-proprietary interests in a tenement (and removing DSD from any role in assessing whether an interest is, in fact, caveatable);
(c) the possibility of doing away with mineral claims;
(d) greater flexibility in relation to the shape and size of exploration tenements;
(e) the possibility of introducing a more flexible "generic" mineral lease extending to both minerals and extractive minerals;
(f) the grant of mineral leases which more accurately reflect a project's mine life; and

(g) greater capacity to amend the conditions of a mineral lease during the life of a project to take account of the project's evolution.

3.5 **Recommendation 5:**

That amendments are required to the Mining Act and other legislation (in particular, the Development Act) to ensure that minerals and other developments progress in an orderly co-ordinated and compatible manner

In MEAC's view the objective of this recommendation is essential to ensure that both minerals and other developments in the State are able to proceed on a basis that does not bring each into conflict with the other – that is, that development in the State can proceed on a co-ordinated and compatible basis.

Two examples will suffice to illustrate the issue:

(a) the exempt land provisions of the *Mining Act* (section 9(2)) provide:

Where any land is subject to a claim, lease or licence under this Act and that land would, but for this subsection, be land exempt from mining operations in pursuance of this Act by reason only of a fact or circumstance occurring or arising subsequent to the pegging out, or granting, of the claim, lease or licence, that land shall not be exempt from operations in pursuance of this Act.

Example: An explorer and a potential wind farm developer are active in the same area. If the explorer applies for a mining lease before the developer constructs any wind turbine the land will not be exempt. Alternatively if the developer acts first, the land will become exempt and the explorer will need to obtain a waiver of exemption from the developer as a pre-condition to carrying on mining in the area. Regulation thus becomes a matter of "first in best dressed".

(b) the possibility of non- mining activities encroaching over time on an existing mining operation also needs to be regulated more effectively.

Example: a quarry is established in a peri-urban area remote from any residential area. Over time urban encroachment results in residences being in close proximity to the quarry. This gives rise to complaints from residents regarding the quarry operations.

There is a need to regulate these and similar competing interests to land more effectively.