

NATIONAL COMPETITION POLICY

REVIEW OF *MINERAL RESOURCES DEVELOPMENT ACT 1990*

GOVERNMENT RESPONSE

PURPOSE

1. To set out the Government's response to the recommendations and findings contained in the National Competition Policy Review of the *Mineral Resources Development Act 1990* (MRD Act).

BACKGROUND

2. Under the Inter-governmental Competition Principles Agreement signed by the Council of Australian Governments (COAG) in April 1995, Victoria agreed to review all legislation containing restrictions on competition-under the following guiding principle.

Legislation should not restrict competition unless it can be demonstrated that:

- *the benefits of the restriction to the community as a whole outweigh the costs; and*
- *the objectives of the legislation can only be achieved by restricting competition.*

To give effect to this principle, governments agreed to review and – where appropriate - reform all current and new legislation against the principle.

3. The NCP review of the *Mineral Resources Development Act 1990* was conducted by Peter Day Consulting and was completed in March 1997. The report has been endorsed by the NRE Legislative Review Committee.

NCP REVIEW APPROACH

4. The key requirements of an NCP legislative review are to assess both the net public benefit of restrictions on competition and the viability of less restrictive alternative means of achieving the objective(s) of the legislation.
5. NCP legislative reviews are required to consider the following:-
 - the objectives of the legislation;
 - the nature of any restrictions on competition;
 - the likely effect of each restriction on competition and on the economy generally;
 - the net cost or benefit to the community of each restriction on competition; and
 - alternative means for achieving the same result including non-legislative approaches.

6. At a minimum, review reports should document the application of the following four steps designed to assist them when considering the above points.

- Step 1 Describe the industry and existing legislative framework;
- Step 2 Identify the restrictions on competition;
- Step 3 Show that the restriction is necessary to the objective;
- Step 4 Assess the costs and benefits to the community of the restriction

IDENTIFICATION OF RESTRICTIONS ON COMPETITION

7. Under the Government's guidelines for NCP legislation reviews, there are a number of legislative schemes that are deemed to contain restrictions on competition unless proven otherwise. These include legislation that:-

- allows only one company or person to supply a good or service (monopoly);
- requires producers to sell to a single company or person (monopsony);
- limits the number of producers of goods and services to less than four (duopoly or oligopoly);
- limits the output of an industry or individual producers; or
- limits the number of persons engaged in an occupation.

These restrictions may create a barrier to market entry by potential competitors. There may be other restrictions on competition which may be found by identifying any market that is affected by the legislation and then considering the impact on this market, both with the application and in the absence of the legislation.

GENERAL SUMMARY OF THE REVIEW

8. The review found that the Act and regulations are generally consistent with NCP principles. Of the 19 restrictions on competition identified, only 6 relatively minor restrictions were found not to be justified. The review went on to make 8 substantive recommendations which are examined below. A summary of each restriction identified, together with the reviewer's assessment and the Government's response is provided in Table 1.

Table 1: Summary of Assessment of Restrictions

Restriction Number	Nature of Restriction	Reviewer's Recommendation	Government Response
1	Certain land not available for exploration, mining etc.	Restriction justified.	Recommendation accepted.
2	Exclusive title attached to exploration and mining licences.	Restriction justified.	Recommendation accepted.
3	Entry criteria for granting of a licence.	Fit and proper, Intends to comply and Genuinely intends to do work, not justified.	Ministerial guidelines to be developed in relation to "fit and proper". Government to investigate practicality of replacing "intends to comply" and "genuinely intends to do work" provisions with more specific criteria.
4	Process for determining economic significance of proposed work on agricultural land.	Section 15 (10) be replaced with compensation provisions.	Ongoing need for current agricultural land provisions to be raised with VFF and VCM.
5	Licence grant subject to conditions.	Conditions relating to employment not justified.	Recommendation accepted – licensing provisions under the Act relating to employment to be revoked.
6	Term of mining licence and period of licence renewal.	Restrictions justified.	Recommendation accepted. Ministerial guidelines to be developed for determining terms of licences
7	Approval of work plan required before commencement of work.	Restriction justified.	Recommendation accepted.
8,9	Authority to commence.	Restrictions justified, except requirement of 21 days notice to Chief Inspector.	Requirement of 21 days notice to Chief Inspector to be reduced to 7 days.
11	Restrictions imposed on Miners Right.	Restrictions justified.	Recommendation accepted.
12	Restrictions on tourist mine authorities.	Restriction justified.	Recommendation accepted.
13	Land rehabilitation requirements.	Restriction justified.	Recommendation accepted. Current provisions to remain
14	Compensation to landowners.	Restriction justified.	Recommendation accepted. Current provisions to remain
16	Requirement for a licensee to provide certain information to the Minister.	Restriction justified.	Recommendation accepted.
10, 15 & 17	Requirements for certified mine managers.	Entry criteria for mine managers should be limited to health and safety objectives.	Recommendation accepted. Government to encourage industry to develop accreditation model.
18	Health and safety regulations.	Prescriptive nature unjustified – replace with more objective terms.	Recommendation accepted – Government to develop performance objective based regulations.
19	Compliance with Mineral Resources (Titles) Regulations 1991.	Restriction justified.	Recommendation accepted.

9. The review found that the main restrictions on competition contained in the legislation relate to granting licensees exclusive rights to explore or mine a given area of land. However, the review considered that the granting of licences were the most efficient means through which to secure the objectives of the legislation, one of which is “to encourage and facilitate exploration for minerals and foster the establishment and continuation of mining operations....”. The review commented that “given the risks and large scale capital investment associated with discovery and development of mineral deposits, restricting open competition is considered entirely justified in relation to the primary objectives of the MRD Act, providing the cancellation provisions for failure to work are diligently enforced”.
- 9.1 The Government considers the review to have been thorough and to have met the terms of reference. It welcomes the review’s finding that most restrictions on competition contained in the Act have a net community benefit and are the least restrictive means to achieve the Act’s objectives. The Government accepts the recommendations with only small exceptions or variations.

COMMENTS AND RECOMMENDATIONS ON REVIEW’S FINDINGS

Recommendation of Review

10. Reference to “fit and proper, intends to comply and genuinely intends to do work or cause work to be done” under section 15, Application for a licence, be revoked.

Discussion

- 10.1 The report stated that where an applicant had demonstrated a sound technical program and ability to fund that program and the Act’s cancellation provisions were efficiently applied, restrictions such as fit and proper and the intention and bona fides of the applicant could be abandoned. The report also concluded that such provisions were not transparent and were not convincing in public benefit terms. Further it was claimed that persons can be disadvantaged in attempts to secure further licences if found not to satisfy the criterion on a prior occasion despite having made restitution of some kind.
- 10.2 These provisions originally arose as a consequence of a surfeit of vexatious and unsatisfactory parties who emerged in the Victorian mining and exploration industry in the mid 1980’s. The Government considers that these provisions have made a substantial impact in enhancing the calibre of applicants and operators and in the process, enhancing the reputation of Victoria’s mining industry. Experience has also demonstrated that submission of appropriate work plans and financial credentials does not necessarily translate into actual performance of work in compliance with the Act (just shows that this is an impossible area to regulate so leave it to the market and generic law eg law of bankruptcy etc). There is, therefore, a special case to retain provisions relating to character in the Act, given the unusual nature and history of this industry in Victoria.
- 10.3 The Government recognises that “fit and proper” criteria are potentially capable of being applied anti-competitively. In order to provide greater transparency the Government intends to develop publicly available guidelines on how these probity provisions should be applied. It is anticipated that the guidelines will outline the specific criteria against which an application can be assessed, thereby limiting the potential for discretion usually associated with the interpretation of the term “fit and proper”. The guidelines will have regard to the applicant’s work plan and the extent to which an applicant can demonstrate that he or she has the financial capacity to carry out the plan.

- 10.4 The Government recognises that persons who have failed to satisfy these criteria should not be permanently excluded from holding licences at some future stage. Amendments proposed to the MRD Act making provision for performance bonds will provide some flexibility in addressing such dilemmas without affecting industry credibility.
- 10.5 In summary, the development of the mineral industry in Victoria is at a critical stage where recent gains in exploration investment are poised to materialise into tangible benefits for Victoria through translation into actual mining development. Ensuring the credibility of the industry in the perception of the public is an important element in facilitating that progress and in ensuring that this investment isn't lost to competing jurisdictions.

Response

- 10.6 Given past problems arising from the behaviour of some operators in the industry and the importance of reputation in attracting investment to Victoria in preference to other jurisdictions, the Government considers that maintaining a statutory requirement for licence holders to be fit and proper is of net benefit to the community. In order to provide greater certainty to persons applying for an exploration or mining licence, and to remove discretion traditionally associated with such provisions, the Government intends to develop transparent ministerial guidelines to aid interpretation of this provision.

The Government accepts that the requirements regarding genuine intent to comply with the Act and do work can be replaced by more specific criterion and this will be considered as part of the development of MRD Act amendments. It may be appropriate to replace the existing sections 15(6)(b) and (ba) with one sub-section setting out specific criteria relating to specific requirements which licence applicants will be required to meet. Possible alternative criteria could include a requirement that licensees provide evidence of progress at prescribed intervals.

Recommendation of Review

11. That the compensation provisions for assessment of the value of land for agricultural purposes replace sub-sections 10-19, Section 15, Mining Licence over Agricultural Land.

Discussion

- 11.1 The review argues that the compensation that must be negotiated and paid to owners of agricultural land establishes the relative value of the land on the one hand to the miner for mining purposes and conversely to the owner/occupier for agricultural purposes. If the compensation awarded is insufficient to ensure the viability of mining, then, the review argues, the miner will surrender the licence. Hence, the reviewer considered that the agricultural land provisions under sub sections 10 to 19 of section 15 of the Act are superfluous. The report further argues that this specific compensation issue should be resolved prior to application determination so that the Minister can consider the findings in the determination. The report does not identify whether the above proposals should apply in all instances where agricultural land is present or only those where a dispute arises.
- 11.2 Speedy determination of applications is a key objective of the Act. Provision of an individual compensation determination as part of the application process will increase determination times for some applications and therefore compromise the two tier approval process which is a core element of the Act.

- 11.3 The Government considers that the consultant's proposal does not take full account of the sensitivities and conflicts that have existed with respect to mining on agricultural land.

Response

- 11.4 Given the existing sensitivities and the value of agriculture to Victoria, it is in the public interest to have a clear expert independent dispute resolution process which is binding and supported by the two key Associations, namely the Victorian Chamber of Mines (VCM) and the Victorian Farmers Federation (VFF). We note that the independent arbitration system has not been utilised to date. The ongoing need for the system will, therefore, be canvassed with the VCM and the VFF when final amendments to the Act are developed. The need for the provisions will be kept under review.

Recommendation of Review

12. That reference to the employment condition under section 26, Grant of Licence be revoked.

Discussion

- 12.1 The reviewer argues that the imposition of conditions on a licence constitutes incurrence of compliance costs. The review found that imposition of conditions is necessary to achieve the objectives of the Act but the ability to impose conditions relating to employment level are outdated. The review suggested that the imposition of expenditure conditions is a simpler and better means of monitoring levels of activity on a licence. Additionally it would appear somewhat of an anachronism that a government body should attempt to dictate employment levels in an increasingly deregulated market place.

Response

- 12.2 The recommendation of the review that the employment condition under section 26(2) be removed is accepted.

Recommendation of Review

13. Section 31 (3) and Section 32 (2)(a) be amended so that any renewal of an exploration licence beyond 5 years must be for the area of interest and not the total area covered by the licence.

Discussion

- 13.1 The review states that any renewal of an exploration licence beyond 5 years should only be over the area of interest to the licensee and that the ability to grant renewals over an area smaller than the renewal application area should be rigorously applied to ensure this result. This would enhance competitive access to land by increasing land available to other parties.
- 13.2 These objectives can already be achieved through rigorous application of current provisions which provide that the Minister may reduce the area of a licence upon any renewal. However stronger statutory guidance as to the matters that the Minister must have cognizance for in granting such renewals beyond 5 years may enhance public interest.

Response

- 13.3 The Government will make provision in amendments to the Act that in granting renewals beyond 5 years the licensee must satisfy the Minister that he or she has a genuine need to maintain an interest over the total land that is subject to the renewal.

Recommendation of Review

14. The requirement to give notice to the chief mining inspector under commencement of work provisions should be deleted.

Discussion

- 14.1 The review claimed that whilst not onerous, the requirement to give 21 days notification to the chief mining inspector prior to commencing work did impose an unnecessary cost of compliance upon licensees. This was found to be particularly the case for holders of mining licences who have to obtain an authority to commence work. Upon the grant of such authority work can proceed immediately and in the case of small scale operations not requiring infrastructure development this frequently occurs. MPV through its Inspectorate needs to be aware of the imminent commencement of work, although a 21 day prior notification may be considered excessive. A proposal reducing this to a 7 day notification satisfactorily addresses this issue.

Response

- 14.2 Proceed with the 7 day notification provision as currently proposed in the amendments.

Recommendation of Review

15. All entry requirements for certification of mine managers not related to health and safety skills, experience and knowledge be deleted.

Discussion

- 15.1 The report examines the requirements placed on licensees and managers to provide a healthy and safe working environment. In conclusion, it argues that, whilst it is not inappropriate that entry requirements for mine managers via accreditation contain criteria with respect to health and safety, requirements for qualifications that relate more to mine efficiency are not within the objectives of the Act and therefore are not justified. The report also comments that the duplication of certain responsibilities between licensees and mine managers could prove confusing and, therefore, self defeating.
- 15.2 The conclusion in the report adds further credence to MPV's proposal to adopt a managerial accreditation system. Whilst the Department will still issue certification to suitable persons the levels of skills and experience required will effectively be developed by industry for Departmental endorsement. This model has already been developed for the management of extractive industries.

Response

- 15.3 It is intended that amendments to the Act and regulations when enacted will not contain specific provisions relating to experience and qualification requirements for mine managers. This will enable the development of an accreditation model by industry for Departmental endorsement.

Recommendation of Review

16. The prescriptive nature of the current Health & Safety Regulations is unjustified and should be re-written in objective terms

Discussion

- 16.1 It is accepted that the current regulations are prescriptive in nature and in line with proposals in the Act itself to introduce a stronger “concept of care” and management liability system it is desirable to revise the regulations along a performance objective based approach.

Response

- 16.2 Development of performance objective based regulations will continue as part of the overall legislative reform agenda.

OTHER ISSUES RAISED

Recommendation of Review

17. That an application for a small area mining licence can be registered before the consent of a prior tenement holder is negotiated.

Discussion

- 17.1 The report concludes that the interests of the small miner are recognised and accommodated as far as possible in the situation where the best interests of Victoria are considered under the Act to lie in the discovery and development of major mineral deposits. However, the reviewer went on to outline two amendments that could be made to the Act to:
- provide that the Minister must reduce the area of a licence when extending the term beyond 5 years to the land containing the deposit which is the subject of this concession; and
 - allow an application for a small area mining licence to be registered before the consent of a prior tenement holder is negotiated.
- 17.2 In circumstances other than the limited circumstances provided for in section 25 (1)(c) of the Act, a small miner who wishes to take out a mining licence, not exceeding 5 ha in area (the title of interest to the PMAV) over an exploration licence (EL) must obtain the consent of that EL holder. In the case where section 25(1)(c) criteria are satisfied the Minister may override any refusal to consent. However in this case the relevant party must demonstrate that they have attempted to acquire the consent of an EL holder.

- 17.3 One submission to the review argued that having to seek consent of an EL holder prior to lodgment of application requires them to "show their hand to competing parties" who may then make application. A further argument is that there exists potential for an unscrupulous EL holder to encourage another party (more acceptable or amenable to the EL holder) to make application. Even if the recommendation were adopted potential for such a scenario would not be negated. An EL holder could still refuse consent (with all the processing delays that may be involved) and subsequent to the refusal of the application for a small mining licence give the nod to another party. This concern can only be alleviated by provision for the Minister to overturn a refusal of EL holder consent in all instances. The report does not recommend and the Government is not proposing any changes to the circumstances in which the Minister can overturn an EL holder refusal to consent. Therefore the above recommendation would only prove of value where the current criteria contained in section 25 (1)(c) are satisfied.
- 17.4 Some streamlining of process could be achieved where section 25(1)(c) criteria are satisfied in accepting an application for a small mining licence without approaching the EL holder for consent and then seeking a Warden's recommendation prior to a determination of the application.

Response

- 17.5 The recommendation is only partially accepted. An amendment which permits lodgment of a small mining licence application where section 25(1)(c) of the Act is satisfied without the EL holder's consent or without requiring such consent to be sought will be enacted in amendments to the Act.

Recommendation of Review

18. It be an offence for the holder of an exploration licence to seek or receive a financial incentive to grant consent for a mining licence without the agreement of both parties and the Minister.

Discussion

- 18.1 It is assumed that the above recommendation is made on the basis that the seeking of a financial reward for an EL holder's consent deters would be miners from endeavouring to secure ground and therefore competition is restricted. MPV believe that such events are rare. Also it may be appropriate that some recompense occur for the relinquishment of the right to explore for minerals over a specific area.
- 18.2 It is not appropriate to involve the Minister in commercial disputes between parties, particularly where the EL holder's consent must be acquired. In the circumstances where the Minister could override a refusal of an EL holder to consent, the Minister could do so where satisfied that an EL holder had unreasonably withheld consent (such as where unreasonable demands for recompense were apparent).
- 18.3 The Government considers costs to establish an unwieldy process involving a third party arbitrator (such as the Regulator-General) for the rare occasions when such an incident would arise would not be offset by benefits. Currently it is possible for the Mining Warden to be requested to investigate and make recommendations to the Minister on such a matter. A possible outcome of this process could be that a relevant party seeking unreasonable recompense could be considered to have failed the probity requirements necessary to operate under the Act.

Response

- 18.4 On balance the recommendation is not accepted. The matter will be raised with the Chamber of Mines to ensure that their relevant Codes of Conduct reflect the unacceptability of EL holders seeking unreasonable recompense when considering consent to small miners. Affected parties are able to seek investigation through the Mining Warden who would then be in a position to make any recommendations to the Minister that he or she believed appropriate

IMPLEMENTATION OF REFORMS

Minerals & Petroleum Victoria are currently in the process of undergoing a substantial review of its role with respect to occupational health and safety in the industries, which it administers. This includes exploration and mining under the MRD Act. This process will necessitate some amendments to the Act. This response accepts that certain further amendments should proceed and consideration needs to be given to other amendments on certain issues. The implementation of this review of the Act and regulatory environment will conclude by the end of the year 2000.