

South Australia



MINING (NATIVE TITLE) AMENDMENT ACT 1995

No. 43 of 1995

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ANNO QUADRAGESIMO QUARTO

ELIZABETHAE II REGINAE

A.D. 1995

No. 43 of 1995

An Act to amend the Mining Act 1971.

[Assented to 11 May 1995]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Mining (Native Title) Amendment Act 1995*.

(2) The *Mining Act 1971* is referred to in this Act as "the principal Act".

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Amendment of s. 6—Interpretation

3. Section 6 of the principal Act is amended—

(a) by striking out from subsection (1) the definition of "the appropriate court" and substituting the following definition:

"appropriate court" means—

- (a) the Supreme Court; or
- (b) the ERD Court; or
- (c) if proceedings do not involve a monetary claim, or a claim for more than \$100 000—the Warden's Court;¹;

¹ All native title questions arising in proceedings before the Warden's Court must be referred to the ERD Court—see Part 3 *Native Title (South Australia) Act 1994*.

- (b) by striking out the definition of "declared equipment" from subsection (1) and substituting the following definition:

"declared equipment" means—

- (a) a trench digger or excavator; or
- (b) mechanically driven equipment, equipped with a blade or bucket of a width exceeding 750 mm, capable of ripping, gouging, scooping or digging earth or rock material; or
- (c) equipment that is capable of digging, boring or tunnelling underground, generally in a horizontal plane, with a cross sectional dimension greater than 750 mm;;

- (c) by inserting after the definition of "the Director of Mines" or "the Director" in subsection (1) the following definition:

"ERD Court" means the Environment, Resources and Development Court established under the *Environment, Resources and Development Court Act 1993*;¹

¹ The *Environment, Resources and Development Court Act 1993* and the *Native Title (South Australia) Act 1994* contain provisions under which the ERD Court may refer cases to the Supreme Court, or the Supreme Court may remove cases commenced before the ERD Court into the Supreme Court.

- (d) by inserting after the definition of "exempt land" in subsection (1) the following definition:

"exploration authority" means—

- (a) a miner's right;
- (b) a precious stones prospecting permit;
- (c) a mineral claim;
- (d) an exploration licence;
- (e) a retention lease (but only if the mining operations to which the lease relates are limited to exploratory operations);;

- (e) by inserting in subsection (1) after the definition of "mining tenement" the following definitions:

"native title", "native title holder" and "native title land"—see *Native Title (South Australia) Act 1994*;¹

¹ Part 5 of the *Native Title (South Australia) Act 1994* sets out the method of service on native title holders.

"native title mining determination" means a determination authorising a mining operator to enter land and carry out mining operations on the land under Part 9B;;

- (f) by striking out from subsection (1) the definition of "owner" and substituting the following definition:

"owner" of land means—

- (a) a person who holds a registered estate or interest in the land conferring a right to immediate possession of the land; or
- (b) a person who holds native title in the land; or
- (c) a person who has, by statute, the care, control or management of the land; or
- (d) a person who is lawfully in occupation of the land;;

- (g) by inserting after the definition of "precious stones field" in subsection (1) the following definitions:

"prescribed notice of entry"—see section 58A (1);

"production tenement" means—

- (a) a precious stones claim;
- (b) a mining lease;
- (c) a retention lease (if the mining operations to which the lease relates are not limited to exploratory operations);;

- (h) by inserting after the definition of "radioactive mineral" in subsection (1) the following definition:

"registered representative" of native title holders—see Part 4 *Native Title (South Australia) Act 1994*;;

- (i) by inserting after subsection (2) the following subsection:

(3) An explanatory note to a provision of this Act forms part of the provision to which it relates.

Amendment of s. 9—Exempt land

4. Section 9 of the principal Act is amended—

- (a) by striking out paragraph (d) of subsection (1) and substituting the following paragraph:

(d) land that is situated—

- (i) within 400 metres of a building or structure used as a place of residence (except a building or structure of a class excluded by regulation from the ambit of this paragraph); or

- (ii) within 150 metres of—
 - (A) a building or structure, with a value of \$200 or more, used for an industrial or commercial purpose; or
 - (B) a spring, well, reservoir or dam,

(but not if it is an improvement made for the purposes of mining operations);;

(b) by striking out from subsection (3b)(b) "dwellinghouse, factory, building" and inserting "building, structure".

Amendment of s. 15—Powers of Minister, Director and authorised persons

5. Section 15 of the principal Act is amended by striking out subsection (2) and substituting the following subsection:

(2) A person exercising a power under this section must not unnecessarily impede or obstruct the lawful use or enjoyment of the land by an owner of the land.

Amendment of s. 17—Royalty

6. Section 17 of the principal Act is amended by striking out from subsections (6) and (7) "Land and Valuation Court" wherever it occurs and substituting, in each case, "ERD Court".

Amendment of s. 19—Private mine

7. Section 19 of the principal Act is amended by striking out from subsections (5), (6), (10), (13), (19), (20) and (26) "Land and Valuation Court" wherever it occurs and substituting, in each case, "ERD Court".

Amendment of s. 24—Registration of claim

8. Section 24 of the principal Act is amended by striking out subsections (4) and (4a) and substituting the following subsections:

(4) A mining registrar may refuse to register a mineral claim (other than a claim that relates solely to extractive minerals) if satisfied that—

- (a) before the claim was pegged out, an application had been lodged for an exploration licence for an area comprising the area of the claim or portion of the area of the claim; and
- (b) the application has not been refused.

(4a) A mining registrar cannot register a mineral claim if to do so would be inconsistent with a public undertaking by the Minister to the mining industry.

Amendment of s. 28—Grant of exploration licence

9. Section 28 of the principal Act is amended by striking out subsection (5) and substituting the following subsection:

(5) At least 28 days before the Minister grants an exploration licence, a notice describing the land over which the licence is to be granted and, if the licence is to relate to a particular stratum, specifying the stratum, must be published by the Minister—

- (a) in the *Gazette*; and
- (b) in a newspaper circulating generally in the State; and
- (c) if there is a regional or local newspaper circulating in the part of the State in which the licence area is situated—in the regional or local newspaper.

Substitution of s. 30A

10. Section 30A of the principal Act is repealed and the following section is substituted:

Term of licence

30A. (1) An exploration licence is to be granted for a term decided by the Minister of up to five years.

(2) If an exploration licence is granted for a term of less than five years, the licence may include a right of renewal but not so the aggregate term of the licence exceeds five years.

(3) An exploration licence that does not include in its terms a right of renewal may be renewed at the discretion of the Minister from time to time, but not so the aggregate term of the licence exceeds five years.

(4) An application for renewal of an exploration licence must be made to the Minister in the prescribed form at least one month before the date of expiry of the licence.

(5) If an application for the renewal of an exploration licence is not decided before the date on which the licence is due to expire, the licence continues in operation until the application is decided and, if the licence is renewed, the renewal dates from the date on which the licence would, but for this subsection, have expired.

(6) The Minister may, on renewing an exploration licence or, with the consent of the licensee, at any other time, alter an exploration licence in one or more of the following ways:

- (a) by adding, varying or revoking a term or condition of the licence; or
- (b) by reducing the licence area.

Amendment of s. 33—Cancellation, suspension, etc. of licence

11. Section 33 of the principal Act is amended by striking out "Land and Valuation Court" wherever it occurs in subsections (2) and (5) and substituting, in each case, "ERD Court".

Amendment of s. 34—Grant of mining lease

12. Section 34 of the principal Act is amended by striking out from subsection (1) "The Minister" and inserting "Subject to Part 9B, the Minister".

Amendment of s. 35A—Representations in relation to grant of lease

13. Section 35A of the principal Act is amended by striking out subsection (1a) and substituting the following subsection:

(1a) The Minister must, within 14 days after receiving an application for a mining lease, give written notice of the application to the owner of the land to which the application relates together with an invitation to submit written representations on the application within a specified time.

Amendment of s. 37—Nature of lease

14. Section 37 of the principal Act is amended by striking out from subsection (2) "Part 9 of".

Amendment of s. 38—Term and renewal of mining lease

15. Section 38 of the principal Act is amended by inserting after subsection (3) the following subsection:

(4) If an application for the renewal of a mining lease is not decided before the date of expiry, the lease continues in operation until the application is decided and, if the lease is renewed, the renewal dates from the date on which the lease would, but for this subsection, have expired.

Amendment of s. 40—Rental

16. Section 40 of the principal Act is amended by striking out subsection (2) and substituting the following subsections:

(2) If a mining lease is granted over land consisting of, or including, land subject to a relevant interest (*ie* an estate of fee simple or native title conferring a right to exclusive possession of the land), the amount paid to the Minister by way of rental under the lease must, after deduction of 5%,¹ be dealt with in accordance with the following principles—

- (a) the proportionate entitlement of each holder of a relevant interest in the land must be worked out by determining what proportion of the total area of the land subject to the lease is represented by land in which the holder holds a relevant interest; and
- (b) a proportion of the net amount available for distribution, equivalent to the holder's proportionate entitlement, must be paid to each holder of a relevant interest in land subject to the lease; and
- (c) if a balance remains after distribution under paragraph (b), the balance is to be retained by the Minister.

¹ The net amount remaining after the 5% deduction is referred to subsequently as the net amount available for distribution.

(3) If no-one is registered under the law of the State or the Commonwealth as the holder of native title in native title land over which a mining lease has been granted, the Minister must establish a trust fund and pay the amount to which the holder of native title is entitled under subsection (2) into the trust fund until a determination is made of who is entitled to the payment.

(4) If no valid claim has been made on the trust fund within five years after its establishment, the Minister may dissolve the fund and pay the amount standing to its credit into the Consolidated Account but, if the fund is dissolved, any claim that might have been made against the fund assuming that it had continued in existence may be made instead against the State.

Amendment of s. 41A—Grant of retention lease

17. Section 41A of the principal Act is amended by inserting in subsection (1) "and Part 9B" after "subject to this section".

Amendment of s. 41C—Nature of lease

18. Section 41C of the principal Act is amended by striking out from subsection (2) "Part 9 of".

Amendment of s. 41D—Term and renewal of retention lease

19. Section 41D of the principal Act is amended by inserting after subsection (3) the following subsection:

(4) If an application for the renewal of a retention lease is not decided before the date of expiry, the lease continues in operation until the application is decided and, if the lease is renewed, the renewal dates from the date on which the lease would, but for this subsection, have expired.

Amendment of s. 41E—Rental

20. Section 41E of the principal Act is amended by striking out subsection (2) and substituting the following subsections:

(2) If a retention lease is granted over land consisting of, or including, land subject to a relevant interest (*ie* an estate of fee simple or native title conferring a right to exclusive possession of the land), the amount paid to the Minister by way of rental under the lease must, after deduction of 5%,¹ be dealt with in accordance with the following principles—

- (a) the proportionate entitlement of each holder of a relevant interest in the land must be worked out by determining what proportion of the total area of the land subject to the lease is represented by land in which the holder holds a relevant interest; and
- (b) a proportion of the net amount available for distribution, equivalent to the holder's proportionate entitlement, must be paid to each holder of a relevant interest in land subject to the lease; and
- (c) if a balance remains after distribution under paragraph (b), the balance is to be retained by the Minister.

¹ The net amount remaining after the 5% deduction is referred to subsequently as the net amount available for distribution.

(3) If no-one is registered under the law of the State or the Commonwealth as the holder of native title in native title land over which a retention lease has been granted, the Minister must establish a trust fund and pay the amount to which the holder of native title is entitled under subsection (2) into the trust fund until a determination is made of who is entitled to the payment.

(4) If no valid claim has been made on the trust fund within five years after its establishment, the Minister may dissolve the fund and pay the amount standing to its credit into the Consolidated Account but, if the fund is dissolved, any claim that might have been made against the fund assuming that it had continued in existence may be made instead against the State.

Amendment of s. 46—Registration of claims**21. Section 46 of the principal Act is amended—**

(a) by striking out from subsection (3) "subject to this Act" and substituting "subject to Part 9B and the other provisions of this Act";

(b) by inserting after subsection (3) the following subsection:

(3a) A mining registrar cannot register a precious stones claim if to do so would be inconsistent with a public undertaking by the Minister to the mining industry.;

(c) by inserting after subsection (8) the following subsection:

(8a) However, if an application for renewal of the registration of a precious stones claim is not decided before the date on which the registration is due to expire, the registration continues until the application is decided.

Substitution of s. 50**22. Section 50 of the principal Act is repealed and the following section is substituted:****Consent required for claims on freehold or native title land**

50. A precious stones claim cannot be validly pegged out on land that has been granted in fee simple, or is subject to native title conferring an exclusive right to possession of the land, except with the written consent of the owner of the land.

Amendment of s. 52—Grant of licence**23. Section 52 of the principal Act is amended by striking out subsection (7) and substituting the following subsections:**

(7) If a miscellaneous purposes licence is granted over land consisting of, or including, land subject to a relevant interest (*ie* an estate of fee simple or native title conferring a right to exclusive possession of the land), the amount paid to the Minister by way of rental under the licence must, after deduction of 5%,¹ be dealt with in accordance with the following principles—

- (a) the proportionate entitlement of each holder of a relevant interest in the land must be worked out by determining what proportion of the total area of the land subject to the licence is represented by land in which the holder holds a relevant interest; and
- (b) a proportion of the net amount available for distribution, equivalent to the holder's proportionate entitlement, must be paid to each holder of a relevant interest in land subject to the licence; and
- (c) if a balance remains after distribution under paragraph (b), the balance is to be retained by the Minister.

¹ The net amount remaining after the 5% deduction is referred to subsequently as the net amount available for distribution.

(8) If no-one is registered under the law of the State or the Commonwealth as the holder of native title in native title land over which a miscellaneous purposes licence has been granted, the Minister must establish a trust fund and pay the amount to which the holder of native title is entitled under subsection (7) into the trust fund until a determination is made of who is entitled to the payment.

(9) If no valid claim has been made on the trust fund within five years after its establishment, the Minister may dissolve the fund and pay the amount standing to its credit into the Consolidated Account but, if the fund is dissolved, any claim that might have been made against the fund assuming that it had continued in existence may be made instead against the State.

Amendment of s. 53—Application for licence

24. Section 53 of the principal Act is amended by striking out paragraph (ab) of subsection (4).

Amendment of s. 54—Compensation

25. Section 54 of the principal Act is amended by striking out "Land and Valuation Court" and substituting "appropriate court".

Amendment of s. 55—Term of licence

26. Section 55 of the principal Act is amended by inserting after subsection (3) the following subsection:

(4) If an application for the renewal of a miscellaneous purposes licence is not decided before the date of expiry, the licence continues in operation until the application is decided and, if the licence is renewed, the renewal dates from the date on which the licence would, but for this subsection, have expired.

Substitution of ss. 58 and 58A

27. Sections 58 and 58A of the principal Act are repealed and the following sections are substituted:

How entry on land may be authorised

58. A mining operator may enter land to carry out mining operations on the land—

- (a) if the mining operator has an agreement¹ with the owner of the land authorising the mining operator to enter the land to carry out mining operations on the land; or
- (b) if the mining operator is authorised by a native title mining determination to enter the land to carry out mining operations on the land; or
- (c) if—
 - (i) the mining operator has given the prescribed notice of entry; and
 - (ii) the mining operations will not affect native title in the land; and
 - (iii) the mining operator complies with any determination made on objection to entry on the land, or the use or unconditional use of the land, or portion of the land, for mining operations;² or

- (d) if the land to be entered is in a precious stones field and the mining operations will not affect native title in the land; or
- (e) if the mining operator enters the land to continue mining operations that had been lawfully commenced on the land before the commencement of this section.

Explanatory note—

A mining operator's right to enter land to carry out mining operations on the land is contingent on the operator holding the relevant mining tenement.

¹ If the land is native title land, the agreement is to be negotiated under Part 9B.

² See section 58A (5).

Notice of entry

58A. (1) A mining operator must, at least 21 days before first entering land to carry out mining operations, serve on the owner of the land notice of intention to enter the land (the "prescribed notice of entry") describing the nature of the operations to be carried out on the land.

(2) The notice must be served—

- (a) in the case of native title land—as prescribed by the *Native Title (South Australia) Act 1994*; or
- (b) in other cases—personally or by post.

(3) If the land is held under a form of title (other than a pastoral lease) that confers a right to exclusive possession of the land—

- (a) the notice must contain a statement of the owner's rights of objection and compensation under this Act; and
- (b) the owner may, within three months after service of the notice, lodge a notice of objection with the appropriate court objecting—
 - (i) to entry on the land by the mining operator; or
 - (ii) to the use, or the unconditional use, of the land, or a portion of the land, for mining operations.

(4) The court must send a copy of a notice of objection received under subsection (3) to the mining operator.

(5) If the court is satisfied on the hearing of an objection that the conduct of the mining operations on the land would be likely to result in substantial hardship or substantial damage to the land, the court may—

- (a) determine that the land, or a particular part of the land, should not be used by the mining operator for the purpose of mining operations; or

- (b) determine conditions on which operations may be carried out on the land by the mining operator with least detriment to the interests of the owner and least damage to the land.

(6) A mining operator who contravenes or fails to comply with a determination under this section is guilty of an offence.

Penalty: \$1 000.

(7) The prescribed notice of entry is not required if—

- (a) the land to be entered is in a precious stones field; or
- (b) the mining operator is authorised to enter the land by agreement with the owner of the land; or
- (c) the mining operator is authorised to enter the land under a native title mining determination; or
- (d) the mining operator enters the land to continue mining operations that had been lawfully commenced on the land before the commencement of this section.

Amendment of s. 59—Use of declared equipment

28. Section 59 of the principal Act is amended—

- (a) by inserting in subsection (6) "or substantial damage to the land" after "hardship";
- (b) by striking out subsection (8) and substituting the following subsection:

(8) Subsections (2) to (7) do not apply to the use of declared equipment on land if—

- (a) the land is a precious stones field; or
- (b) there is an agreement between the mining operator and the owner of the land about the use of declared equipment on the land and the mining operator complies with the terms of the agreement; or
- (c) the Warden's Court or the ERD Court has determined conditions on which declared equipment may be used on the land and the mining operator complies with the terms of the determination.

Amendment of s. 60—Restoration of land

29. Section 60 of the principal Act is amended by striking out subsection (1) and substituting the following subsection:

(1) Subject to the terms and conditions of any relevant lease, licence, authorisation, agreement or determination under this Act, where a mining operator uses declared equipment in the course of mining operations, an inspector or authorised person may direct the operator, in writing, to restore the ground disturbed by the operations to a condition that is, in the opinion of the inspector or authorised person, satisfactory.

Amendment of s. 61—Compensation

30. Section 61 of the principal Act is amended by striking out from subsection (1) "financial" and substituting "economic".

Amendment of s. 63E—Term, etc., of access claim

31. Section 63E of the principal Act is amended by striking out subsection (1) and substituting the following subsections:

(1) An access claim has a renewable term of 12 months.

(1a) If an application is made in accordance with the regulations for renewal of an access claim, the owner of the claim is entitled to renewal of the claim for a further term of 12 months.

Insertion of Part 9B

32. The following Part is inserted after Part 9A of the principal Act:

**PART 9B
NATIVE TITLE LAND**

DIVISION 1—EXPLORATION

Qualification of rights conferred by exploration authority

63F. (1) An exploration authority confers no right to carry out mining operations on native title land unless—

(a) the mining operations do not affect native title (*ie* they are not wholly or partly inconsistent with the continued existence, enjoyment or exercise of rights deriving from native title¹); or

(b) a declaration is made under the law of the State or the Commonwealth to the effect that the land is not subject to native title.²

(2) However, a person who holds an exploration authority that would, if land were not native title land, authorise mining operations on the land may acquire the right to carry out mining operations on the land (that affect native title) from an agreement or determination authorising the operations under this Part.

(3) An agreement or determination under this Part need not be related to a particular exploration authority.

(4) However, a mining operator's right to carry on mining operations that affect native title is contingent on the existence of an exploration authority that would, if the land were not native title land, authorise the mining operator to carry out the mining operations on the land.

¹ Cf. *Native Title Act 1993* (Cwth), s. 227.

² A declaration to this effect may be made under Part 4 of the *Native Title (South Australia) Act 1994* or the *Native Title Act 1993* (Cwth). The effect of such a declaration is that the land ceases to be native title land.

Exploration rights to be held in escrow in certain circumstances

63G. (1) If an exploration authority is granted in respect of native title land, and the holder of the authority has no right or no substantial right to explore for minerals on the land because of the absence of an agreement or determination authorising mining operations on the land, the exploration authority does nevertheless, while it remains in force, prevent the grant of registration of another exploration authority for exploring for minerals of the same class within the area to which the authority relates.

(2) The Minister may revoke an exploration authority that is granted entirely or substantially in respect of native title land if it appears to the Minister that the holder of the authority is not proceeding with reasonable diligence to obtain the agreement or determination necessary to authorise the effective conduct of mining operations on the land to which the authority relates.

DIVISION 2—PRODUCTION**Limits on grant of production tenement**

63H. A production tenement may not be granted or registered over native title land unless—

- (a) the mining operations to be carried out under the tenement are authorised by a pre-existing agreement or determination registered under this Part; or
- (b) a declaration is made under the law of the State or the Commonwealth to the effect that the land is not subject to native title.¹

¹ A declaration to this effect may be made under Part 4 of the *Native Title (South Australia) Act 1994* or the *Native Title Act 1993* (Cwth). The effect of the declaration is that the land ceases to be native title land.

Applications for production tenements

63I. (1) The Minister may agree with an applicant for a production tenement over native title land that the tenement will be granted or registered contingent on the registration of an agreement or determination under this Part.

(2) The Minister may refuse an application for a production tenement over native title land if it appears to the Minister that the applicant is not proceeding with reasonable diligence to obtain the agreement or determination necessary to the grant or registration of the tenement to which the application relates (and if the application is refused, the applicant's claim lapses).

DIVISION 3—APPLICATION FOR DECLARATION**Application for declaration**

63J. A person who seeks to carry out mining operations on native title land may apply to the ERD Court for a declaration that the land is not subject to native title.¹

¹ The application is to be made under the *Native Title (South Australia) Act 1994*.

DIVISION 4—NEGOTIATING PROCEDURE

Types of agreement authorising mining operations on native title land

63K. (1) An agreement authorising mining operations on native title land (a "native title mining agreement") may—

- (a) authorise mining operations by a particular mining operator; or
- (b) authorise mining operations of a specified class within a defined area by mining operators of a specified class who comply with the terms of the agreement.

Explanatory note—

If the authorisation relates to a particular mining operator it is referred to as an **individual authorisation**. Such an authorisation is not necessarily limited to mining operations under a particular exploration authority or production tenement but may extend also to future exploration authorities or production tenements. If the authorisation does extend to future exploration authorities or production tenements it is referred to as a **conjunctive authorisation**. An authorisation that extends to a specified class of mining operators is referred to as an **umbrella authorisation**.

(2) If a native title mining agreement is negotiated between a mining operator who does not hold a production tenement for the relevant land, and native title parties who are claimants to (rather than registered holders of) native title land, the agreement cannot extend to mining operations conducted on the land under a future production tenement.

(3) An umbrella authorisation can only relate to prospecting or mining for precious stones over an area of 200 square kilometres or less.

(4) If the native title parties with whom a native title mining agreement conferring an umbrella authorisation is negotiated are claimants to (rather than registered holders of) native title land, the term of the agreement cannot exceed 10 years.

(5) The existence of an umbrella authorisation does not preclude a native title mining agreement between a mining operator and the relevant native title parties relating to the same land, and if an individual agreement is negotiated, the agreement regulates mining operations by a mining operator who is bound by the agreement to the exclusion of the umbrella authorisation.

Negotiation of agreements

63L. (1) A person (the "proponent") who seeks a native title mining agreement may negotiate the agreement with the native title parties.

Explanatory note—

The **native title parties** are the persons who are, at the end of the period of two months from when notice is given under section 63M, registered under the law of the State or the Commonwealth as holders of, or claimants to, native title in the land. A person who negotiates with the registered representative of those persons will be taken to have negotiated with the native title parties. Negotiations with other persons are not precluded but any agreement reached must be signed by the registered representative on behalf of the native title parties.

(2) The proponent must be—

- (a) if an agreement conferring an individual authorisation¹ is sought—the mining operator who seeks the authorisation;

- (b) if an agreement conferring an umbrella authorisation¹ is sought—the Minister or an association representing the interests of mining operators approved by regulation for the purposes of this section.

¹. See the explanatory note to section 63K(1).

Notification of parties affected

63M. (1) The proponent initiates negotiations by giving notice under this section.

(2) The notice must—

- (a) identify the land on which the proposed mining operations are to be carried out; and
- (b) describe the general nature of the proposed mining operations that are to be carried out on the land.

(3) The notice must be given to—

- (a) the relevant native title parties; and
- (b) the ERD Court; and
- (c) the Minister.

(4) Notice is given to the relevant native title parties as follows:

- (a) if a native title declaration establishes who are the holders of native title in the land—the notice must be given to the registered representative of the native title holders and the relevant representative Aboriginal body for the land;
- (b) if there is no native title declaration establishing who are the holders of native title in the land—the notice must be given to all who hold or may hold native title in the land in accordance with the method prescribed by Part 5 of the *Native Title (South Australia) Act 1994*.

What happens when there are no registered native title parties with whom to negotiate

63N. (1) If, two months after the notice is given to all who hold or may hold native title in the land, there are no native title parties in relation to the land to which the notice relates, the proponent may apply *ex parte* to the ERD Court for a summary determination.

(2) On an application under subsection (1), the ERD Court must make a determination authorising entry to the land for the purpose of carrying out mining operations on the land, and the conduct of mining operations on the land.

(3) The determination may be made on conditions the Court considers appropriate and specifies in the determination.

(4) The determination cannot confer a conjunctive or umbrella authorisation.¹

¹. See the explanatory note to section 63K(1).

Expedited procedure where impact of operations is minimal**63O.** (1) This section applies to mining operations that—

- (a) will not directly interfere with the community life of the holders of native title in the land on which the operations are to be carried out; and
- (b) will not interfere with areas or sites of particular significance, in accordance with their traditions, to the holders of native title in the land on which the operations are to be carried out; and
- (c) will not involve major disturbance to the land on which the operations are to be carried out.

(2) If the proponent states in the notice given under this Division that the mining operations to which the notice relates are operations to which this section applies and that the proponent proposes to rely on this section, the proponent may apply *ex parte* to the ERD Court for a summary determination authorising mining operations in accordance with the proposals made in the notice.

(3) On an application under subsection (2), the ERD Court may make a summary determination authorising mining operations in accordance with the proposals contained in the notice.

(4) However, if within two months after notice is given, a written objection to the proponent's reliance on this section is given by the Minister, or a person who holds, or claims to hold, native title in the land, the Court must not make a summary determination under this section unless the Court is satisfied after giving the objectors an opportunity to be heard that the operations are in fact operations to which this section applies.

Negotiating procedure

63P. (1) The proponent and native title parties must negotiate in good faith and accordingly explore the possibility of reaching an agreement.

(2) However, the obligation to negotiate does not arise if the case is one where a summary determination may be made.

(3) If any of the negotiating parties requests the ERD Court to do so, the Court must mediate among the parties to assist in obtaining their agreement.

(4) The Minister may (personally or by representative) intervene in negotiations under this Division.

Agreement

63Q. (1) An agreement negotiated under this Division may provide for payment to the native title parties based on profits or income derived from mining operations on the land or the quantity of minerals produced.

(2) The basis of the payment may be fixed in the agreement or left to be decided by the ERD Court or some other nominated arbitrator.

(3) An agreement must deal with—

- (a) notices to be given or other conditions to be met before the land is entered for the purposes of carrying out mining operations; and
- (b) principles governing the rehabilitation of the land on completion of the mining operations.

(4) If agreement is reached between the proponent and the native title parties authorising mining operations on the native title land, the proponent must lodge a copy of the agreement with a mining registrar and the mining registrar will, subject to this section, register the agreement.

(5) If the Minister is of the opinion that there is reason to believe that the agreement may not have been negotiated in good faith, the Minister may, within two months after the copy of the agreement is lodged for registration with the mining registrar, make an order prohibiting registration of the agreement.

(6) A party to an agreement may appeal against an order under subsection (5) to the ERD Court and the Court may, on appeal—

- (a) confirm or revoke the Minister's order; and
- (b) if the Court considers it appropriate, make a determination authorising entry on the land to carry out mining operations, and the conduct of mining operations on the land, on conditions determined by the Court.

Effect of registered agreement

63R. (1) A registered agreement negotiated under this Division is (subject to its terms) binding on, and enforceable by or against the original parties to the agreement and—

- (a) the holders from time to time of native title in the land to which the agreement relates; and
- (b) the holders from time to time of any exploration authority or production tenement under which mining operations to which the agreement relates are carried out.

(2) If a native title declaration establishes that the native title parties with whom an agreement was negotiated are not the holders of native title in the land or are not the only holders of native title in the land, the agreement continues in operation (subject to its terms) until a fresh agreement is negotiated under this Part with the holders of native title in the land, or for 2 years after the date of the declaration (whichever is the lesser).

(3) Either the holders of native title in the land or the mining operator may initiate negotiations for a fresh agreement by giving notice to the other.

(4) A registered agreement that authorises mining operations to be conducted under a future mining tenement is contingent on the tenement being granted or registered.

Application for determination

63S. (1) If agreement between the proponent and the native title parties is not reached within the relevant period, any party to the negotiations or the Minister may apply to the ERD Court for a determination.

[In this subsection the "relevant period" is—

- (a) if the mining operations to which the negotiations relate are merely of an exploratory nature—four months from when the negotiations were initiated; or
- (b) in any other case—six months from when the negotiations were initiated.]

(2) On an application under this section, the ERD Court may determine—

- (a) that mining operations may not be conducted on the native title land; or
- (b) that mining operations may be conducted on the native title land subject to conditions determined by the Court.

(3) If the ERD Court determines that mining operations may be conducted on native title land, the determination—

- (a) must deal with the notices to be given or other conditions to be met before the land is entered for the purposes of mining operations; but
- (b) cannot provide for payment to the native title parties based on profits or income derived from mining operations on the land or the quantity of minerals produced.

(4) The ERD Court must make its determination on an application under this section within the relevant period unless there are special reasons why it cannot do so.

[In this subsection, the "relevant period" is—

- (a) if a determination is sought only for exploring—four months from when the application is made; or
- (b) in any other case—six months from when the application is made.]

(5) The representative Aboriginal body for the area in which the land is situated is entitled to be heard in proceedings under this section.

Criteria for making determination

63T. (1) In making its determination, the ERD Court must take into account the following:

- (a) the effect of the proposed mining operations on—
 - (i) native title in the land; and
 - (ii) the way of life, culture and traditions of any of the native title parties; and

- (iii) the development of the social, cultural and economic structures of any of those parties; and
 - (iv) the freedom of access by any of those parties to the land concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land in accordance with their traditions; and
 - (v) any area or site, on the land concerned, of particular significance to the native title parties in accordance with their traditions; and
 - (vi) the natural environment of the land concerned;
- (b) any assessment of the effect of the proposed mining operations on the natural environment of the land concerned—
- (i) made by a court or tribunal; or
 - (ii) made, or commissioned, by the Crown in any capacity or by a statutory authority;
- (c) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the land concerned;
- (d) the economic or other significance of the proposed mining operations to Australia and to the State;
- (e) any public interest in the mining operations proceeding;
- (f) any other matter the ERD Court considers relevant.

(2) This section does not affect the operation of another law of the State or the Commonwealth for the preservation or protection of areas or sites of particular significance to Aboriginal people.

Limitation on powers of Court

63U. (1) The ERD Court cannot make a determination conferring a conjunctive or umbrella authorisation¹ unless the native title parties² are represented in the proceedings and agree to the authorisation.

(2) A conjunctive authorisation¹ conferred by determination cannot authorise mining operations under both an exploration authority and a production tenement unless the native title parties¹ are the registered holders of (rather than claimants to) native title land.³

(3) An umbrella authorisation¹ conferred by determination—

- (a) can only relate to prospecting or mining for precious stones over an area of 200 square kilometres or less; and
- (b) cannot authorise mining operations for a period exceeding 10 years unless the native title parties² are registered holders of (rather than claimants to) native title land.⁴

¹ See explanatory note to section 63K(1).

² See explanatory note to section 63L(1).

³ Section 63K(2) is of similar effect in relation to native title mining agreements.

⁴ Section 63K(3) and (4) are of similar effect in relation to native title mining agreements.

Effect of determination

63V. (1) A determination under this Division—

- (a) must be lodged with a mining registrar; and
- (b) must be registered two months after it was lodged for registration unless it has in the meantime been overruled by the Minister;¹ and
- (c) takes effect on registration.

(2) A determination registered under this Division has effect as if it were a contract between the proponent and the native title parties.

(3) A registered determination is (subject to its terms) binding on, and enforceable by or against the original parties to the proceedings in which the determination was made and—

- (a) the holders from time to time of native title in the land to which the determination relates; and
- (b) the holders from time to time of any exploration authority or production tenement under which mining operations to which the determination relates are carried out.

(4) If a native title declaration establishes that the native title parties to whom the determination relates are not the holders of native title in the land or are not the only holders of native title in the land, the determination continues in operation (subject to its terms) until a fresh determination is made, or for 2 years after the date of the declaration (whichever is the lesser).

(5) A determination under this Part that authorises mining operations to be conducted under a future mining tenement is contingent on the tenement being granted or registered.

¹ See section 63W.

Ministerial power to overrule determinations

63W. (1) If the Minister considers it to be in the interests of the State to overrule a determination of the ERD Court under this Part, the Minister may, by notice in writing given to the ERD Court and the parties to the proceedings before the Court, overrule the determination and substitute another determination that might have been made by the Court.

(2) However—

- (a) the Minister cannot overrule a determination—
 - (i) if more than two months have elapsed since the date of the determination; or
 - (ii) if the Minister was the proponent of the negotiations leading to the determination; and
- (b) the substituted determination cannot create a conjunctive or umbrella authorisation¹ if there was no such authorisation in the original determination nor can the substituted determination extend the scope of a conjunctive or umbrella authorisation.

Explanatory note—

The scope of an authorisation is extended if the period of its operation is lengthened, the area to which it applies is increased, or the class of mining operations to which it applies is expanded in any way.

¹ See the explanatory note to section 63K(1).

No re-opening of issues

63X. If an issue is decided by determination under this Part, the parties to the proceedings in which the determination was made cannot make an agreement that is inconsistent with the terms of the determination unless the ERD Court authorises the agreement.

DIVISION 5—MISCELLANEOUS**Non-application of this Part to Pitjantjatjara and Maralinga lands**

63Y. Nothing in this Part affects the operation of—

- (a) the *Pitjantjatjara Land Rights Act 1981*; or
- (b) the *Maralinga Tjarutja Land Rights Act 1984*.

Compensation to be held on trust in certain cases

63Z. (1) If a determination under this Part authorises mining operations on conditions requiring payment of compensation—

- (a) the ERD Court must decide the amount of the compensation; and
- (b) the compensation must be paid into the ERD Court to be held on trust and applied as required by this section.

(2) Compensation paid into the ERD Court under this section—

- (a) must, on application by the registered representative of the native title holders, be paid out to the registered representative; or
- (b) if the Court, on application by an interested person, is satisfied that it is just and equitable to pay the compensation in some other way—must be paid out as directed by the Court.

(3) However, if compensation is held on trust by the ERD Court under this section and—

- (a) a native title declaration is made to the effect that no part of the land is subject to native title; or
- (b) the proponent abandons the proposal to carry out mining operations on the land before exercising the right to do so and, by notice to the Minister, relinquishes the right to do so,

the compensation must be repaid to the person who paid it.

Non-monetary compensation

63ZA. (1) Compensation under this Part is to be given in the form of monetary compensation.

(2) However—

- (a) if, during negotiations under this Part, a person who may be entitled to compensation requests that the whole or part of the compensation be in a form other than money,¹ the other person who may be liable to pay compensation—
 - (i) must consider the request; and

- (ii) must negotiate in good faith on the subject; and
- (b) the ERD Court may, at the request of a person entitled to compensation, order non-monetary compensation.¹

¹ *Example*—The non-monetary compensation might take the form of a transfer of property or the provision of goods or services.

Review of compensation

63ZB. (1) If—

- (a) mining operations are authorised by determination under this Part on conditions requiring the payment of compensation; and
- (b) a native title declaration is later made establishing who are the holders of native title in the land,

the ERD Court may, on application by the registered representative of the holders of native title in the land, or on the application of a person who is liable to pay compensation under the determination, review the provisions of the determination providing for the payment of compensation.

(2) The application must be made within three months after the date of the native title declaration.

(3) The Court may, on an application under this section—

- (a) increase or reduce the amount of the compensation payable under the determination (as from the date of application or a later date fixed by the Court); and
- (b) change the provisions of the determination for payment of compensation in some other way.

(4) In deciding whether to vary a determination and, if so, how, the Court must have regard to—

- (a) the assumptions about the existence or nature of native title on which the determination was made and the extent to which the native title declaration has confirmed or invalidated those assumptions; and
- (b) the need to ensure that the determination provides just compensation for, and only for, persons whose native title in land is affected by the mining operations; and
- (c) the interests of mining operators and investors who have relied in good faith on the assumptions on which the determination was made.

Saving of pre-1994 mining tenements

63ZC. This Part does not apply in relation to—

- (a) a claim registered before 1 January 1994; or
- (b) a lease or licence granted under this Act before 1 January 1994; or
- (c) a renewal of a lease or licence granted under this Act before 1 January 1994 in pursuance of a legally enforceable right created before that date.

Expiry of this Part

63ZD. This Part expires two years after the date of its commencement.

Amendment of s. 65—Powers, etc., of Warden's Court

33. Section 65 of the principal Act is amended by striking out from subsections (3) and (3b) "Land and Valuation Court" wherever it occurs and substituting, in each case, "ERD Court".

Amendment of s. 66A—Removal of cases to ERD Court

34. Section 66A of the principal Act is amended by striking out "Land and Valuation Court" wherever it occurs and substituting, in each case, "ERD Court".

Amendment of s. 72—Research and investigation

35. Section 72 of the principal Act is amended by striking out paragraph (a) and substituting the following paragraph:

- (a) conduct research and investigation into—
 - (i) the existence of native title on mineral land; and
 - (ii) problems affecting the conduct of mining operations or the treatment of ores; and.

Insertion of s. 74A

36. The following section is inserted after section 74 of the principal Act:

Compliance orders

74A. (1) If a person carries out mining operations without the authority required by this Act, the ERD Court may, on application by the Director or the owner of land on which the operations are carried out, make an order (a **compliance order**) requiring the person (the **respondent**)—

- (a) to stop the operations; and
- (b) if the operations have resulted in damage to land—to take specified action to rehabilitate the land.

(2) Before the Court makes a compliance order it must allow the respondent a reasonable opportunity to be heard on the application.

(3) A person against whom a compliance order is made must comply with the order.

Penalty: \$100 000.

Amendment of s. 75—Provision relating to certain minerals

37. Section 75 of the principal Act is amended by striking out subsection (1) and substituting the following subsection:

(1) No claim or lease may be pegged out or granted in respect of extractive minerals on land granted in fee simple or land in respect of which native title conferring a right to exclusive possession of land exists except with the written consent of the owner of the land.

Insertion of s. 75A

38. The following section is inserted after section 75 of the principal Act:

Avoidance of double compensation

75A. In determining compensation to be paid to a body or person under this Act, compensation that has been paid to the body or person, or to which the body or person is entitled under other laws, must be taken into account.

Amendment of s. 79—Minister may grant exemption from certain obligations

39. Section 79 of the principal Act is amended—

(a) by inserting in subsection (1)(b) "(except Part 9B)" after "Act";

(b) by inserting after subsection (2) the following subsection:

(3) An exemption may not be granted under this section so as to discriminate against the holders of native title in land.

Insertion of s. 84A

40. The following section is inserted after section 84 of the principal Act:

Safety net

84A. (1) The Minister may enter into a agreement with the holder of a mining tenement—

(a) that, if the tenement should at some future time be found to be wholly or partially invalid due to circumstances beyond the control of the holder of the tenement, the holder of the tenement will have a preferential right to the grant of a new tenement; and

(b) dealing with the terms and conditions on which the new tenement will be provided.

(2) The Minister must consider any proposal by the holder of a mining tenement for an agreement under this section.

Insertion of s. 89A

41. The following section is inserted after section 89 of the principal Act:

Immunity from liability

89A. No liability attaches to an officer or employee of the Crown or other person to whom powers or functions have been delegated under this Act for an act done, or omission made, in good faith in the course of carrying out functions related to the administration or enforcement, or purported administration or enforcement, of this Act.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor