



MINERALS COUNCIL OF AUSTRALIA - VICTORIAN DIVISION

**Submission to the Department of Primary Industries on the
State Services Authority Report:**

REVIEW OF THE OFFICE OF THE MINING WARDEN

JANUARY 29, 2010

TABLE OF CONTENTS

REVIEW OF THE OFFICE OF THE MINING WARDEN

INTRODUCTION	1
BACKGROUND	1
INTERPRETATION OF CURRENT AND PROPOSED DISPUTE SETTLEMENT PROCESSES	3
Current.....	3
State Services Authority Proposal	3
MCA PREFERRED DISPUTE SETTLEMENT ARRANGEMENTS	4
MCA Preferred Arrangement for Dispute Resolution	4
Resourcing	5
SPECIFIC MATTERS WHICH THE MINISTER SEEKS SUBMISSIONS	6
Legislative Changes for Dispute Resolution.....	6
Legislative Change to Re-Assign Decision Making on Licensing Matters.....	7
CONCLUSION.....	9
ATTACHMENT	11

INTRODUCTION

The Minerals Council of Australia (MCA) welcomes the opportunity to respond to the State Services Authority (SSA) Report: Review of the Mining Warden: Objectives, functions and alternatives¹.

The MCA represents Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. MCA member companies produce more than 85 per cent of Australia's annual mineral output. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

The Victorian Division of the MCA represents the interests of member companies operating, exploring and providing services to the industry in Victoria. The minerals industry is an important contributor to Victoria's economic growth, particularly in regional and rural areas.

The regulatory framework which controls the Victorian minerals industry is a critical ingredient to the prosperity of regional and rural Victoria. It is important that regulatory framework is balanced between the sometimes competing interests of promoting investment, good environmental practice and the expectations of the community and is best achieved through efficient and effective regulatory practice. The Victorian Mining Warden has played, and continues to play, an important role in the efficient implementation of the mining laws.

BACKGROUND

In June 2009, the State Services Authority (SSA) was commissioned to undertake an independent review of the Office of the Mining Warden. The review considered the role, functions and responsibilities of the Mining Warden.

The review was undertaken in two parts. The first part considered the resourcing and facilities of the current Office of the Warden. The second part addresses objectives and functions and considers alternatives for provision of the services currently provided by the Mining Warden.

The second part of the report, Review of the Mining Warden – Objectives, functions and alternatives, was released by the Minister for Energy and Resources on 21 December 2009 as part of the broader consultation on the Government's review of the *Mineral Resources (Sustainable Development) Act 1990* (MRSDA).

As stated in the MCA's submission² to the SSA on their Review, the Victorian minerals industry has been a strong supporter of the role of the Mining Warden. The Mining Warden has had a positive functional role in supporting the Purpose and Objectives of the MRSDA, especially in the settlement of some of the disputes that arise under the Act. As such, the MCA continues to support the retention of a dedicated Mining Warden with an expansion of functions.

The SSA Report made a series of recommendations, the principle recommendation being the redirection of the Warden's functions to alternate, generally existing mechanisms.

This is contrary to the MCA's preferred outcome where the Mining Warden position is maintained to provide expert dispute resolution services to the minerals industry. Whilst the Report correctly notes that the dispute resolution case load of the Mining Warden is not great; the office does provide an efficient, effective and well respected service which is highly valued by the minerals industry. The Mining Warden is an arbiter for disputes who is familiar with the mining industry and who has a clear and unambiguous understanding of the importance of the industry; its potential for positive economic and sociological impacts and its ability to contribute positively to the environment through the management of environmental impacts, particularly where brown field sites are involved.

¹ State Services Authority; Review of the Mining Warden: Objectives, functions and alternatives; State Government of Victoria, 2009. Published on www.dpi.vic.gov.au

² Minerals Council of Australia, Victorian Division; Submission to the State Services Authority: Review of the Victorian Mining Warden, 31 July 2009. Published on www.minerals.org.au/victoria/public_submissions

Having said that, the recommendations of the SSA are essentially as had been anticipated, with the exception of the introduction of the Small Business Commissioner (SBC) as a specialist mediator of disputes before referral to arbitration rather than having Victorian Civil and Administrative Tribunal (VCAT) undertake the mediation and arbitration function.

The Department of Primary Industries (DPI) website clearly states that the Minister for Energy and Resources “has advised that broadly he supports the recommendations” of the SSA but seeks submissions on two relatively minor matters, namely legislative change to enable VCAT to review decisions of the internal DPI determinations and to assign decision making on licence matters to the Department Head, rather than the Minister as at present.

Therefore, this submission represents the MCA response to the suite of recommendations in the SSA Report with our prime goal to ensure a successful transition to the alternative arrangements.

INTERPRETATION OF CURRENT AND PROPOSED DISPUTE SETTLEMENT PROCESSES

The current and SSA proposed dispute settlement processes under the MRSDA can be summarised as below:

Current

DISPUTE	PROCESS
Appeal Ministerial decisions	VCAT or Supreme Court
Appeal Departmental decisions	State Mining Warden hearing and recommendation to Minister; Minister decides
Dispute between Licensees	State Mining Warden hearing and recommendation to Minister; Minister decides
Compensation dispute between Licensee and Landowner	Compensation determination by VCAT land valuation list or Supreme Court. The determination can be preceded by informal mediation by State Mining Warden
Excision of agricultural land	Statement of economic significance prepared by appointed expert followed by a determination by the President of the Australian Property Institute
Special investigations	Minister or Dept Head may request State Mining Warden to conduct an investigation of a matter and provide advice

State Services Authority Proposal

DISPUTE	PROCESS
Appeal Ministerial decisions*	VCAT or Supreme Court
Appeal Departmental decisions*	Complaints reviewed by internal DPI process and Appeal rights to VCAT
Dispute between Licensees	Mediation by SBC, unresolved disputes referred to VCAT for arbitration
Dispute between Licensee and Landowner	Mediation by SBC, unresolved cases referred to VCAT for determination of compensation
Special investigations	Minister may appoint a 'Special Investigator' or an Advisory Panel to investigate a matter and provide advice

* fewer Ministerial decisions and more Departmental decisions on Licencing matters

MCA PREFERRED DISPUTE SETTLEMENT ARRANGEMENTS

As stated above, the MCA continues to prefer the maintenance of a fully resourced State Mining Warden with powers to resolve disputes between licensees and the Department, between licensees and to mediate differences between licensees and landowners prior to referral to VCAT.

However, given the SSA recommendations and the stated intent of the Minister to accept those recommendations, MCA's preferred option is as follows:

MCA Preferred Arrangement for Dispute Resolution

DISPUTE	PROCESS
Appeal Ministerial decisions*	VCAT Earth Resources List # or Supreme Court
Appeal Departmental and Government Agency decisions*	Complaints reviewed by internal DPI process ^ and Appeal rights to VCAT Earth Resources List. In addition, complaints related to the decisions on licence matters of other Government agencies@ reviewed by the Ombudsman with Appeal rights to VCAT Earth Resources List.
Dispute between Licensees	Mediation by SBC+, unresolved disputes referred to VCAT Earth Resources List for arbitration
Dispute between Licensee and Landowner	Mediation of consent arrangements or compensation agreements by SBC. Unresolved disputes referred to VCAT Earth Resources List for determination of compensation
Excision of agricultural land	Statement of economic significance prepared by appointed expert followed by mediation by SBC; unresolved disputes referred to VCAT Earth Resources List for a determination
Special investigations	Minister may appoint a 'Mining Warden' or an Advisory Panel to investigate a particular matter and provide advice

* fewer Ministerial decisions and more Departmental decisions on Licencing matters

VCAT to establish a fully resourced and expert List to hear MRSD Act disputes. The Earth Resources List to have a nominated Legal Member assigned and at least one expert mineral industry sessional member.

^ Internal DPI complaints review process to be structured akin to the WorkSafe Victoria Internal Review Unit which is designed to provide accessible, timely and transparent decision making processes.

+ The Small Business Commissioner to establish a fully resourced mediation service for the earth resources sector with access to expert advice on the sector.

@ Whilst the Ombudsman already has the power to review complaints by licensees to the decisions or failure to make decisions of any Government agency it is recommended that the avenue of complaint is expressly included in the new process and those licensees unhappy with the outcome of the review would have the right to refer the matter to VCAT for a determination. The inclusion of the review of complaints with other agencies (other than DPI) is seen as remedying a critical failing of the current system. As detailed in the MCA's submission to the Review, inter-agency referrals represent a significant delay to project development and approval, through tardy decision making, no decisions and constant re-referral between agencies. Whilst Memorandums of Understanding exist between agencies, experience shows that these are ineffective in that the proponent has no role.

MCA has had a very positive meeting with Mr Mark Brennan, the Small Business Commissioner and gained an appreciation of the services and modus operandi of the SBC.

MCA has attempted to meet with Mr Jim Nelms, the Principal Registrar of VCAT without success. Consequently, MCA is unable to form a view on the ability of VCAT to service the additional specialist cases that would result

from the proposed changes. Advice to MCA from mining industry lawyers is for the industry to be very wary of assigning too much reliance on VCAT resolving disputes expeditiously.

The MCA preferred process for dispute resolution includes VCAT but this involvement is limited to the determination of disputes following failed mediation by the SBC or failed resolution by the DPI internal review unit. It is expected that the number of cases to be referred to VCAT will be limited given the formal mediation step and the incentive to avoid this cumbersome institution.

The establishment of an internal review unit in DPI to review complaints regarding administrative decisions has merit, although MCA has difficulty identifying how such a unit could be established within the current DPI resources. MCA recommends that the Victorian Ombudsman be actively involved in the establishment and ongoing operation of the proposed unit.

Resourcing

For a significant restructure of a role that has existed in large part for 150 years, resourcing will be critical to not only establish the new governance arrangements but provide for ongoing support to ensure a robust, credible and timely process. Resources will also be required for the transition from the current arrangement to the new. MCA recommends that Government make the following resources available to support the new arrangements:

- SBC:
 - Inclusion of powers in the MRSDA will bring to three the number of Acts the SBC has a role in administering. The new Act will bring additional workload and a new industry that has a significant public profile, a range of stakeholder expectations and an extremely technical regulatory process.
 - Access to expert advice is critical. While there is capacity within the SBC to establish expertise on the legal framework established by the MRSDA, an understanding of the complex tenement and regulatory processes and industry custom and practice, not to mention the industry jargon, is currently lacking.
 - Additional funds to cover the mediation cost to landowners.
- VCAT:
 - An Earth Resources List to hear MRSDA disputes should be established with a nominated Legal Member assigned to oversight the List with a part-time registrar engaged to maintain the List.
 - An appropriately qualified sessional member with mining expertise should be retained.
- DPI Internal Review Unit:
 - It is difficult to see the existing resources of the DPI Earth Resources Division having the appropriate skills and independence to establish a competent and respected internal review process.
 - The State Ombudsman should assist DPI with the establishment of a trusted internal review process and further the Ombudsman should continue to provide an ongoing review and advisory service to DPI.
 - It is also expected that the State Ombudsman will be required to assist with the complaints associated with referral agency decisions on licence matters under the MRSDA.

SPECIFIC MATTERS WHICH THE MINISTER SEEKS SUBMISSIONS

As previously stated, the Minister for Energy and Resources has advised that broadly he supports the recommendations of the SSA Report. The Minister is however seeking further advice regarding the following recommendations:

- Recommendation 2.3: That the MRSDA be amended to provide specifically for licence applicants and licensees to have a review of licence determinations by the Victorian Civil and Administrative Tribunal.
- Recommendation 8: That the MRSDA be amended to assign decision-making on licensing matters to the Secretary of DPI, with the Minister retaining responsibility for determining the regulatory framework for resource allocation and power to intervene in and ultimately determine important licensing matters.

The legislative change to accommodate the review of licence determinations by VCAT is seen as only part of the legislative change that will be required to ensure the proposed dispute settlement process is enabled. The following two sections explore the extent of the legislative changes required. These are by no means exhaustive or technically refined.

Legislative Changes for Dispute Resolution

Disputes over Ministerial Decisions

No legislative change is warranted.

Complaints over Departmental Decisions

The MRSDA regulations will require specific reference to the establishment of an internal review unit that has the power to review decisions of the Department. It is important that the review unit is appropriately resourced, operates in a transparent manner and independent from the Regulator, is consistent with Parts III, IIIA and IV of the Ombudsman Act 1973, and that a statement of responsibilities and accountabilities be included on the DPI website³.

The regulations should also ensure that the decisions of other Government agencies that are referral agencies under the MRSDA, such as DSE and EPA, can be challenged through a complaints system dealt with by the Ombudsman. These decisions could include decisions that require DPI to include specific conditions on licences or specific conditions in approved work plans etc.

Licensees unhappy with the review outcome by the DPI internal review unit, or the Ombudsman if involved, should have the right to refer the matter to VCAT for a determination.

Disputes Between Licensees

Part 11 (Section 96 to 105) of the MRSDA should be repealed and a new Part 11 included entitled 'DISPUTE SETTLEMENT'.

The new Part 11 should include a section on 'Disputes between licensees including license applicants'. This section should detail the process for dealing with these disputes.

³ Similar to that at <http://www.ombudsman.vic.gov.au/www/html/120-our-responsibilities.asp>

Disputes between licensees should in the first instance be referred to the Small Business Commissioner for mediation with the costs of mediation to be borne by both parties. Either party can refer a dispute to the SBC. Agreements reached at mediation to be enforced by VCAT or the Supreme Court.

Disputes that are not resolved at mediation can be referred to VCAT for a determination by either party and must be accompanied by a mediation certificate issued by the SBC.

As most disputes between licensees result from s25A of the MRSDA (consent for a small miner to operate on an exploration licence) it will be necessary to vary s25A to introduce a mediation step by the SBC prior to referral to VCAT for a determination. Currently the section is very technical and adversarial.

Disputes Between Licensees and Landowners

The new Part 11 should include a section on 'Disputes between licensees and landowners'.

Disputes between licensees and landowners should in the first instance be referred to the Small Business Commissioner for mediation. The new section should clearly state that the SBC has powers to mediate cases involving landowners, including where the landowner does not operate as a small business.

Either party can refer a dispute to the SBC or if no agreement within 30 days the matter is automatically referred to the SBC to avoid any concerns over either party bullying or frustrating the other. That is, no blame referral to mediation.

It is considered reasonable that the cost of the SBC mediation service to landowners be borne by the Government as the dispute is a direct result of the issuing of the licence. However, SBC should be able to reserve this waiver in the case of vexatious litigants.

The structure of a mediated agreement for consent for access may be any agreed legal commercial undertaking or may be a compensation agreement as described in s87 of the MRSDA and informed by s85. Agreements reached at mediation can be registered as consents under s43 of the MRSDA and can be enforced by VCAT or the Supreme Court.

S 43 of the MRSDA to be amended to enable landowner consents to be mediated and commercial agreements reached as part of consent, and that any commercial agreement is deemed a condition of consent.

S26C of the MRSDA details a dispute resolution process related to the excision of agricultural land from a licence. This process, whilst seldom, if ever, used should be amended to bring it into conformity with the proposed new process of mediation by SBC and determination by VCAT. Reference to the Australian Property Institute should be removed.

Disputes that are not resolved at mediation can be referred to VCAT for a determination by either party and must be accompanied by a mediation certificate issued by the SBC. VCAT to determine compensation in accordance with s88 and s89 with reference to s85.

Legislative Change to Re-Assign Decision Making on Licensing Matters

MCA supports the recommendation to move decision-making powers from the Minister to the Department Secretary on licensing and licence operational matters. In many ways this makes sense as most of the functions are delegated anyway.

By re-assigning decisions on licencing matters to the Department Head, rather than the Minister, complaints seeking a review of those decisions by the internal DPI review unit will be facilitated. This approach would release the Minister from exposure to day to day specific licence and project matters and allow him/her to attend to policy and strategy related to the implementation of the Act.

The specific licensing decisions that are recommended to be changed from the Minister to the Secretary of the Department are as follows:

Section	Description of the decision
S13	Exploration licence duration of 5 years – CHANGE TO DEPT HEAD
S14	Mining licence conditions – CHANGE TO DEPT HEAD
S15	Licence application acceptance or non acceptance - CHANGE TO DEPT HEAD
S23	Assign order of priority to applications - CHANGE TO DEPT HEAD
S25	Grant or refuse a licence - CHANGE TO DEPT HEAD
S25A	Waiver of EL holders consent - CHANGE TO DEPT HEAD
S26	Grant of licence - CHANGE TO DEPT HEAD
S26B	Excision of agricultural land - CHANGE TO DEPT HEAD
S27	Invite tenders for a licence - CHANGE TO DEPT HEAD
S27A	Acceptance of tender - CHANGE TO DEPT HEAD
S27D	Application of provision on tenders - CHANGE TO DEPT HEAD
S27E	Minister may not accept tenders - CHANGE TO DEPT HEAD
S29	Application for renewal of licence - CHANGE TO DEPT HEAD
S31	Minister may renew or refuse to renew a licence - CHANGE TO DEPT HEAD
S32	Period of renewal - CHANGE TO DEPT HEAD
S33	Transfer of licence - CHANGE TO DEPT HEAD
S33A	Transfer of land from one mining licence to another - CHANGE TO DEPT HEAD
S33B	Mining licence may be split and transferred- CHANGE TO DEPT HEAD
S35	Combined conditions - CHANGE TO DEPT HEAD
S36	Amalgamation of licences - CHANGE TO DEPT HEAD
S36A	Expedited procedure for replacement of invalidated title - CHANGE TO DEPT HEAD
S37	Surrender of licence - CHANGE TO DEPT HEAD
S38	Cancellation of licence - CHANGE TO DEPT HEAD
S38A	Decrease in area under exploration licence - CHANGE TO DEPT HEAD
S43	Linked to S26 so CHANGE TO DEPT HEAD

Other specific decisions related to licence operational matters that are recommended to be changed from the Minister's decision to a decision of the Secretary of the Department are itemised on the attached.

CONCLUSION

MCA continues to prefer the maintenance of a fully resourced State Mining Warden with powers to resolve disputes between licensees and the Department, between licensees and to mediate differences between licensees and landowners prior to referral to VCAT. However, given the SSA recommendations and the stated intent of the Minister to accept those recommendations, MCA's preferred option is as follows:

- MRSDA to be amended to refer decision making to the Department Head where appropriate to limit the number of Ministerial decisions on licensing matters.
- DPI to establish an internal complaints review process to provide accessible, timely and transparent decision making processes related to administrative decisions under the MRSDA under the guidance of the Ombudsman. In addition, a process is also to be established to review complaints associated with the decisions or indecisions of referral agencies under the MRSDA.
- Disputes between licensees, and between licensees and landowners, are in the first instance to be referral to the SBC for mediation. The Small Business Commissioner to establish a fully resourced expert mediation service for the earth resources sector.
- Disputes between licensees, and between licensees and landowners, that are not resolved at mediation to be determined by VCAT. Also, unresolved complaints regarding administrative decisions to be determined by VCAT. VCAT to establish a fully resourced and expert Earth Resources List to hear MRSDA disputes. The Earth Resources List to have a nominated Legal Member assigned, at least one expert mineral industry sessional member, and a part-time registrar.
- To facilitate special investigations the Minister may appoint a 'Mining Warden' or an Advisory Panel to investigate a particular matter and provide advice.

Resourcing will be critical to not only establish the new dispute resolution arrangements but provide for ongoing support to ensure a robust, credible and timely process. Resources will also be required for the transition from the current arrangement to the new.

The SBC will require additional resources to accommodate the new Act and to access expert exploration and mining advice.

VCAT will require additional resources to establish an Earth Resources List and an expert sessional member and part-time registrar.

DPI will require additional resources and skills to establish an internal review unit that is both competent and respected. They will also require the assistance of the Ombudsman.

The MRSDA regulations will require specific reference to the establishment of an internal review unit that has the power to review decisions of the Department. The regulations should also ensure that the decisions of other Government agencies that are referral agencies under the MRSDA, such as DSE and EPA, can be challenged through the same or a separate complaints system involving the Ombudsman.

The MRSDA should be amended (Part 11) to include a section on 'Disputes between licensees'. Such disputes should in the first instance be referred to the SBC for mediation.

As most disputes between licensees result from s25A of the MRSDA (consent for small miner to operate on an exploration licence) it will be necessary to vary s25A to introduce a mediation step by the SBC prior to referral to VCAT for a determination.

The new Part 11 should also include a section on 'Disputes between licensees and landowners'. Again such disputes should be referred to the SBC for mediation with an automatic referral provision of 30 days to avoid any concerns over either party bullying or frustrating the other.

S 43 of the MRSDA will require amendment to enable landowner consents to be mediated and commercial agreements reached as part of consent. In addition, s26C of the MRSDA which details a dispute resolution process related to the excision of agricultural land from a licence will also require amendment.

Disputes that are not resolved at mediation can be referred to VCAT for a determination by either party. VCAT should continue to determine compensation for landowner disputes in accordance with s88 and s89 with reference to s85.

MCA supports the recommendation to move decision-making powers from the Minister to the Department Secretary on licensing and licence operational matters. In many ways this makes sense as most of the functions are delegated anyway. Making the licensing decisions Departmental decisions will also facilitate review of those decisions by the internal DPI review unit.

ENDS

ATTACHMENT**“Other” MRSDA sections for which responsibility could be changed from Minister to Department Head**

Section	Description
S40(3A)	Work plan lodgement period - CHANGE TO DEPT HEAD
S41(2C)	Variation of work plan period - CHANGE TO DEPT HEAD
41A	Impact statement - NO CHANGE WARRANTED
42A (2) & (3)	Determine if new work will cause significant environmental impacts CHANGE BUT WILL REQUIRE REVISION TO REFERENCE TO THE PLANNING MINISTER
42A(2)(b)	Approval of work plan variation post EES (in 2009 Bill) CHANGE TO DEPT. HEAD
42A(3)(d)	Form of work plan variation post EES (in 2009 Bill) CHANGE TO DEPT. HEAD
S46	Minister may authorise work near dwelling house - CHANGE TO DEPT HEAD
64	Application for TMA (if retained) CHANGE TO DEPT. HEAD
65 & 66	Grant & cancellation of TMA (if retained) CHANGE TO DEPT. HEAD
85A, 88A	Crown land compensation CHANGE TO DEPT. HEAD
113	Reporting discovery of U, Th CHANGE TO DEPT. HEAD
114	Abandoned plant CHANGE TO DEPT. HEAD
116	Reporting CHANGE TO DEPT. HEAD
116 (3)(b)	Making reporting public CHANGE TO DEPT. HEAD
79A(1)	Require licensee to assess rehabilitation liability CHANGE TO DEPT. HEAD
79A(2)	Form of rehabilitation liability assessment CHANGE TO DEPT. HEAD
79A(3)	Engagement of auditor for rehabilitation liability CHANGE TO DEPT. HEAD
80 - 84	Rehabilitation bonds in general -
80	Setting & reviewing bond amount, prohibition notice NO CHANGE WARRANTED
81A (1)	Engagement of auditor for rehabilitation completion CHANGE TO DEPT. HEAD
82	Bond return CHANGE TO DEPT. HEAD
83	Minister rehabilitates CHANGE TO DEPT. HEAD
110	Order to cease work, etc CHANGE TO INSPECTOR
112	Authorising DPI surveys MCA HAS NO OPINION