

MINING AND ACCESS TO PRIVATE LAND IN TASMANIA

INTRODUCTION

This fact sheet explains the rights of private landowners (and occupiers, such as tenants) in Tasmania, with respect to mining companies accessing their land.

In short, private property owners do not have a clear right under the mining law to refuse to allow mining companies access to their land for the purpose of exploration or mining.

If a private landowner wants mining to occur on their land, they should get legal advice to ensure they understand all the implications. If a private landowner does not want exploration or mining to occur on their land, there are several avenues open to them to achieve this.

In particular, landowners can:

- Object to an exploration licence or mining lease and seek to have their land removed from the licence or lease area.
- Refuse to allow drilling on their land for the purpose of exploration for oil, gas or geothermal resources.
- Refuse to allow a mining company onto their land if they have not negotiated a compensation agreement with the mining company.
- Refuse to give consent to a mining company to apply for a planning permit to extract oil, gas or geothermal resources under a production licence.

For private landowners to understand their rights in relation to mining, it is important to know something about the approvals that mining companies must get before exploring for minerals or mining, and how they can have a say in whether these approvals are granted.

MINING LAW and MINERAL RESOURCES IN TASMANIA

The main law in Tasmania about mining is the *Mineral Resources Development Act 1995*. The Minister of Resources (the **Minister**) makes most of the important decisions under this law.

The Minister is advised by the Director of Mines, who is also the head of Mineral Resources Tasmania (**MRT**). MRT is the government department that processes applications for mining leases and licences, regulates the conduct of mining and manages the Tasmanian government's information about mineral resources in the state.

DISCLAIMER

This fact sheet is for information purposes only and is not legal advice. For advice about a specific issue, please contact EDO Tasmania on 6223 2770 or edotas@edo.org.au.

Information current as at 2 April 2014.

Mining Law definitions:

Compensation Agreement:

An agreement between a landowner and a mining company which describes the compensation the landowner is entitled to. Compensation relates to damage to land or restrictions on access, rather than any payment for the value of the minerals extracted.

Exploration Licence:

A permit allowing a mining company to explore for minerals. Generally, once a licence has been granted, no other planning or environmental approval is required for exploration activities (although "works approval" from MRT will be required). Exploration can involve desktop research, surface and aerial surveys, digging trenches and drilling test wells.

Mining Lease:

A permit to extract minerals and sell them. A company will also need a planning permit to mine and, in most cases, an environmental approval from the Environment Protection Authority (this depends on the scale of the operation).

Mining Tribunal:

Tribunal presided over by a Magistrate which makes decisions in relation to disputes arising under mining laws.

EXPLORATION

Application Process

Exploration is the first stage of mining. Before a company will invest money to extract minerals they do research and testing, often for many years. Exploration licences can be granted for up to 5 years and extended indefinitely.

The process of getting an exploration licence begins with an application to MRT. Following assessment by MRT, the Director of Mines makes a decision about whether to recommend to the Minister that the licence be granted. If the Director decides to recommend that the licence be granted, s/he must place a notice in the newspaper.

Any person with "an interest or estate in the land" within the proposed exploration area can object to the licence being granted. The objection must be sent to MRT within **28 days** of the notice. There is some difference of opinion as to how far the term "interest or estate" stretches. A person who owns or leases land in the exploration licence area definitely has an estate or interest. Anyone else who thinks they may have an 'interest' should seek legal advice.

If a landowner objects to an exploration licence, they will be given an opportunity to discuss their concerns with MRT and the mining company. In some cases, their land will be removed from the exploration area. If no agreement can be reached, the Mining Tribunal will hold a hearing and determine the objection. The Minister ultimately decides whether to grant the exploration licence, but s/he can only make a decision after the Mining Tribunal has made a determination.

Rights and Responsibilities

If the Minister decides to grant an exploration licence, s/he can impose any conditions the Minister considers appropriate.

An exploration licence authorises the holder to enter on, or pass over and explore on private land, subject to the following restrictions:

- before a licence holder enters private property, the landowner must be given at least 14 days written notice (unless the owner has agreed to allow earlier access); and
- no exploration activities can occur within 100 metres of any dwelling, substantial building, well or water body without the consent of the landowner.

Provided those conditions are complied with, it is an offence to obstruct or hinder a mining company from carrying out exploration activities under an exploration licence. Anyone who obstructs exploration could be fined up to \$5,000.

All exploration must be carried out in accordance with the *Minerals Exploration Code of Practice* (the **MECOP**), which says:

Once an exploration licence has been granted the holder must apply for approval to conduct exploration works. No work (ground or air) may be undertaken without written approval.

Therefore, a company needs a works approval from MRT before on-ground exploration can start.

The MECOP also requires a company to get landowner consent before drilling to explore for petroleum, gas or geothermal resources (including shale gas). Landowners are **not** obliged to give this consent, it is their decision.

Summary

The law does not require landowner consent for an exploration licence to be issued. However, in practice, many landowners who object will have their properties removed from the exploration area. If a licence has been granted over private land and the landowner does not want mining on their land, they should seek urgent legal advice as time limits apply to challenging the decision.

On **28 August 2013**, the House of Assembly passed a motion which included the following commitment:

"access to private land for oil or gas exploration will be dependent on landowner permission."

This is **not** currently the legal situation. However, with amendments the law could reflect this.

MINING LEASES AND PRODUCTION LICENCES

Application Process

If exploration finds a viable resource, the mining company may apply for a mining lease or production licence. These give the company authority to extract and sell the resource. It is unlawful to extract minerals and sell them without a mining lease or production licence.

Before making an application for a **mining lease**, the company must mark out the area (that is, install markers showing the proposed lease area). The law allows a person who "intends to apply" for a lease to enter on and pass over land (including private property) for the purpose of marking out.

The company does not need to give the landowner prior warning, but must notify the landowner when, and where, marking out has occurred within 7 days.

It is not an offence to obstruct marking out. However, if a landowner or tenant obstructed a person marking out a lease area, the mining company could apply for a court order preventing further obstruction. There would be legal costs associated with this, which the company might seek to recover from the landowner or tenant. Landowners may make a claim to the Mining Tribunal for damage to their land or property caused during marking out.

After the lease area is marked out, the mining company can apply for a mining lease. A company can apply for a production licence without marking out the area. The Director of Mines will consider the application and decide whether to recommend to the Minister that the lease / licence be granted. If the Director intends to recommend that a production licence be granted, s/he must place a notice in the newspaper. In contrast, there is no requirement to give public notice of the recommendation to grant a mining lease.

Any person with "an estate or interest in the land" can object to the granting of a mining lease or production licence. For a production licence, the objection must be lodged within **28 days** of the date the newspaper notice is published. For a mining lease, the objection must be lodged within **28 days** of the lease being marked out. There is some difference of opinion as to how far the term "interest or estate" stretches. A person who owns or leases land in the lease / licence area definitely has an interest or estate. Anyone else who thinks they may have an 'interest' should seek legal advice.

If a landowner objects, they will be given an opportunity to discuss their concerns with MRT and the company. In some cases their land will be removed from the mining lease or production licence area. If no agreement can be reached, the Mining Tribunal will hold a hearing and make a determination about the objection. If the Mining Tribunal upholds a landowner's objection, the mining company will be given a further opportunity to exclude that landowner's property from the lease / licence area.

The Minister ultimately decides whether to grant a mining lease or production licence, but can only make a decision after the Mining Tribunal has heard the objection.

The Minister cannot grant a mining lease or production licence over private land unless:

- a compensation agreement has been made between the mining company and the landowner; or
- the Mining Tribunal has determined the rate of payment to the private landowner.

A private landowner cannot veto the granting of a mining lease or production licence. If a compensation agreement has been entered into, the landowner cannot subsequently refuse access to their land. If the landowner refuses to negotiate a compensation agreement, the Mining Tribunal will decide what amount of compensation must be paid. However, EDO Tasmania believes that, unless a negotiated compensation agreement is in place, a mining company is not authorised to enter private land without landowner consent (see below).

A **mining lease** applies to solid minerals such as gold, copper, tin and coal.

A **production licence** applies to oil, gas and geothermal energy.

Mining Lease

A mining lease authorises the mining company to enter private land covered by the lease without giving the property owner notice (other than within 100m of a residence – see below). However, the law only authorises mining companies to enter private land under a mining lease if there is a negotiated compensation agreement in force.

Arguably, if a landowner refused to negotiate a compensation agreement and a mining lease was granted only after the Tribunal made a compensation determination, the lease does not authorise the company to enter their land. This position has yet to be tested.

Regardless of whether a compensation agreement has been entered into, a mining company must obtain consent before carrying out any mining operations on private land within 100 metres of any dwelling, substantial building, well or body of water.

Production Licences

Unlike mining leases, a production licence holder must give the landowner at least 14 days written notice before entering their property (unless the owner has agreed to allow earlier access). There is no requirement for a compensation agreement to be in force before a mining company can access private land under a production licence.

Unlike mining leases, under a production licence consent is not required to extract gas, oil or geothermal energy near dwellings, buildings, wells or water bodies.

General Obligations

- It is an offence to obstruct activities being lawfully carried out under a mining lease or production licence. The offence carries a maximum penalty of \$10,000.
- The Minister can impose conditions on production licences and mining leases. These could include restrictions on the type of activities allowed in certain parts of the lease area, such as where those activities will negatively impact on private property owners.
- Once a mining lease or production licence has been obtained the mining company may also need to get a planning permit and environmental approval (see below).

Summary

In most circumstances, mining leases and production licences can be granted over private land without the landowner's consent. Strict time limits apply to challenging decisions to grant a lease / licence, so seek urgent legal advice if you have concerns.

A mining lease does not authorise the mining company to enter private land if there is not a compensation agreement between the company and landowner. If a compensation agreement has been entered into, no further consent is required to enter private land. A production licence authorises the mining company to enter private land without landowner consent.

For mining leases, consent is required at all times for activities within 100m of significant buildings and water supplies. This restriction does not apply to production licences.

PLANNING PERMITS

A planning permit is not required for exploration, but will generally be required for mining. Whether a planning permit is required will depend on the planning scheme that applies to the land.

Generally, landowner consent is required before any company can apply for a planning permit over private land. However, if a mining company already holds a mining lease, the company can apply for a planning permit over private land without getting further consent from the landowner. This exception does not apply to production licences. Therefore, even if a production licence has been granted, the mining company will still need to get landowner consent to apply for a planning permit (if one is required) to conduct their operations.

In many situations, landowners (and any other interested persons) will be able to make a representation to Council in relation to the application for a planning permit for mining activities. Council will consider all representations and any recommendations of the EPA (see below) before determining the application.

Any person who made a representation has a right to appeal against the Council's decision to the Resource Management and Planning Appeal Tribunal.

ENVIRONMENTAL APPROVALS

Most mining operations will be referred to the EPA for assessment (this depends on production volumes). Private landowners are not directly involved in the assessment process, although any representation they make to Council in relation to the planning permit will also be considered by the EPA. In many cases the EPA will require a mining company to employ experts to examine the land in the course of conducting the assessment. Landowners do not have to consent to these experts entering their property.

After assessing the impacts of a proposal, the EPA makes a recommendation to Council regarding granting the planning permit. The EPA can also impose conditions on any permit that is issued.

WHAT ABOUT THE "Lock the Gate" SIGNS?

Many people will have heard of, or seen; the signs produced by the Lock the Gate group which says "by order of the High Court" or have a reference to a High Court case (such as the sign pictured). This refers to the High Court case of *Plenty v Dillon*, where two police officers entered private property to serve a summons for a criminal offence. The court decided the police were trespassing even though they were there on official duty.

This decision does not provide a basis to refuse a mining company access if they have the right to do so under Tasmanian law. Mining companies are not relying on any common law right to enter – they are relying on the explicit provisions in the *Mineral Resources Development Act 1995* which allow access and make it an offence to obstruct lawful exploration or mining activities on private land in Tasmania.



CONCLUSION

Under current Tasmanian law, private landowners do not have a right of veto for mining operations on their land. Landowners can object to mining proposals and request that their land be excluded from lease / licence areas. However, the Minister has power to authorise mining on their property despite their objection.

Landowners can:

- refuse access to a mining company to drill wells to explore for petroleum products, coal seam gas and geothermal energy;
- refuse to allow a mining company access to their land, under a mining lease, if they have not signed a compensation agreement;
- withhold their consent to a mining company that needs to apply for a planning permit to conduct production operations for oil, gas or geothermal resources.

These rights provide a form of veto for most mining operations for landowners who do not want mining on their land. Outside of these situations, mining companies have rights to access private land and any person who obstructs them from carrying out lawful activities may face a large fine. EDO Tasmania recommends private landowners seek independent legal advice and discuss their concerns with MRT prior to refusing to give consent to a mining company to enter or conduct works on their land.

FOR MORE INFORMATION: Contact EDO Tasmania on 6223 2770, via email edotas@edo.org.au or visit our website www.edotas.org.au.