



**INQUIRY INTO SECTIONS 45 AND 46
of the
MINERAL RESOURCES DEVELOPMENT ACT 1990**

Response by:

Minerals Council of Australia, Victorian Division

to the

ISSUES PAPER FOR CONSULTATION

prepared by Martin & McLean Lawyers

10 August 2005

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EXECUTIVE SUMMARY

The Minerals Council of Australia is pleased to formally respond to the Issues Paper for Consultation prepared by Martin and McLean Lawyers for the Inquiry into sections 45 and 46 of the *Mineral Resources Development Act 1990 (MRDA)*.

The MCA submission focuses upon the intersection of the Inquiry's terms of reference and the minerals industry's strong commitment to the social licence to operate. The submission also refers to the specific questions and issues raised in the Issues Paper and proposes a conceptual solution.

The MCA has identified that the VCAT determination in the case of Tech-Sol Resources has created significant sovereign risk issues for the minerals industry in Victoria.

Prior to the VCAT determination, exploration and mining companies and many in Government believed that section 45 landowner consents for work within the 100 metre buffer were valid for the duration of the project. The VCAT determination, whilst only applying to the Tech-Sol case, has created a serious uncertainty.

It is now possible that as a result of the Tech-Sol case:

- consents do not pass from one owner to the next;
- consents can be withdrawn; and
- a new broad definition of "work" applies,

meaning that most, if not all, mining projects in Victoria could technically be in breach of the *MRDA*.

MCA engaged Freehills lawyers to provide advice on the options for resolving the uncertainty created by the VCAT decision. Freehills recommended streamlining the *MRDA* to ensure the protection of objects listed in section 45(1) are considered during the work plan assessment process. They also examined a package of amendments which retain section 45, but with a number of exemptions and clarifications.

The MCA has proposed a conceptual solution based on the package of amendments approach rather than the streamlining approach recommended by Freehills as this more accurately meets the MCA's social licence to operate criteria.

The conceptual solution proposed requires minimal change to the *MRDA* and the maintenance of the section 45 and 46 provisions for exploration work only. For mining projects the approval of work within 100m is moved into the planning permit approvals process as is already the case for projects approved via the EES process.

If the conceptual solution proposed by the MCA is implemented the principles upon which it is based will also be achieved, that is:

- minimum amendments to the *MRDA*;
- prior informed consultation with neighbours;

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- maintenance and clarification of the rights of neighbours; and
- creation of certainty for investors in mining projects.

The submission has considered all of the questions posed by the Issues Paper and provided the minerals industry position. However, it is noted that the questions presented in the Issues paper fail to present a balanced approach and miss the key issue of concern to mining companies; that of sovereign risk.

The origins of the 100 metre rule from the old *Mines Act 1958* and the understandings of the time the *MRDA* was proclaimed related to the intent of the section 45 and 46 provisions are also presented.

INTRODUCTION

The Minerals Council of Australia (MCA) is pleased to formally respond to the Issues Paper for Consultation prepared by Martin and McLean Lawyers for the Inquiry into sections 45 and 46 of the *Mineral Resources Development Act 1990 (MRDA)*.

The MCA is the peak industry association that represents the corporate minerals companies in Australia. The members of the Council are engaged in mineral processing, mining, exploration, or the provision of services to the industry and account for more than 85 percent of mineral industry output in Australia. The Victorian Division of the MCA is a fully integrated part of the MCA responsible for representing the interests of members operating in Victoria.

This MCA submission focuses upon the intersection of the Inquiry's terms of reference and the minerals industry's strong commitment to the social licence to operate. The submission also refers to the specific questions and issues raised in the Issues Paper and proposes a conceptual solution that requires minimal amendments to the *MRDA* whilst at the same time protecting the rights of neighbours and creating the certainty that mining project investors require before committing to a project.

UNCERTAINTIES CREATED BY THE TECH-SOL DECISION

As previously advised to the Victorian Competition and Efficiency Commission (VCEC) by MCA¹ the VCAT determination in the case of Tech-Sol Resources has created significant sovereign risk issues for the minerals industry in Victoria.

Prior to the VCAT determination, exploration and mining companies and many in Government believed that section 45 landowner consents for work within the 100 metre exclusion zone were valid for the duration of the project. The VCAT determination, whilst only applying to the Tech-Sol case, has created a serious uncertainty.

It is now possible that as a result of the Tech-Sol case:

- consents do not pass from one owner to the next;
- consents can be withdrawn; and
- a new broad definition of "work" applies,

meaning that most, if not all, mining projects in Victoria could technically be in breach of the *MRDA*.

We are aware of ten significant projects that are at risk. These are:

¹ Minerals Industry Issues: Submission to the Victorian Competition and Efficiency Commission Inquiry into Regulatory Barriers to Regional Economic Development, Minerals Council of Australia, 10 September 2004.

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- Alliance Resources' Maldon project;
- Alexander Resources' Wattle Gully and Tarnagulla projects;
- Ballarat Goldfields' Ballarat East project;
- Bendigo Mining's' Bendigo Project;
- HRL exploration project;
- Iluka's Douglas project;
- Leviathan Resources' Stawell Gold Mine;
- Loy Yang Power exploration project;
- Monash Energy exploration project; and
- Perseverance Corporation's Fosterville project.

The impact of the VCAT determination on each of these projects varies as each is in a different stage of their investment cycle. Five of the projects are at the exploration stage; others are currently under development with capital already committed; whilst others are operational. We estimate that there is about \$1 billion worth of investments at risk (without consideration of the huge investments being investigated in the Latrobe Valley that could amount to more than \$5 billion). All of this investment is in regional Victoria.

Urgent action is required by Government to remedy the uncertainty caused to these investments by the Tech-Sol decision.

In its draft report of January 2005 the VCEC² recommended that "The Department of Primary Industries review s.45 of the *Mineral Resources Development Act 1990* to provide for a reasonable balancing of the respective interests of licence holders, and existing and future owners and occupiers of adjacent land, and the holders of other interests now protected by s.45."

The Government is yet to respond to the draft recommendations of the VCEC.

The minerals industry has been provided with some assurance that there would be no investments at risk by the Minister for Energy Industries and Resources, the Hon. Theo Theophanous. The Minister, when responding to a question without notice in the Legislative Council on 6 October 2004³ regarding mining investment, made the statement that "There are certain issues that emanate from that in relation to certainty around the 100-metre rule, which is an issue that will be addressed by me. It is certainly the case that in addressing that issue on behalf of the government let me make this point absolutely clear; there is no risk whatsoever to any existing mine or any other investment that has taken place in this state."

Apart from that public statement there have been no actions from Government to resolve the uncertainty apart from a stalled attempt to reconvene the Mining Environmental Advisory Committee and the current Inquiry.

² Victorian Competition and Efficiency Commission, Regulation and Regional Victoria; Challenges and Opportunities, Draft Report, January 2005.

³ VICHANSARD, Whole Speech, Mining: Investment, Legislative Council, 6 October 2004.

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Now is the time to make the legislative changes required to ensure that mining investment in Victoria is not jeopardised.

LEGAL ADVICE

The MCA engaged Freehills lawyers to provide advice on the options for resolving the uncertainty created by the VCAT decision. A summary of the Freehills advice is included as **Attachment A**

Freehills recommended streamlining the *MRDA* to ensure the protection of objects listed in section 45(1) are considered during the work plan assessment process.

Freehills also examined a package of amendments which retain section 45, but with a number of exemptions and clarifications.

Streamlining the MRDA Option

The streamlining or significant amendments option would ensure the current 100 metre buffer zone requirements are considered and established as part of the work plan approvals process. This would ensure that all consent requirements are considered before commencement of works, with no ongoing consent obligations. To achieve this, the following amendments would be made:

- repeal of sections 45 and 46 of the MRD Act;
- amendment to *MRDA* (or MRD Regulations) to require a licensee to include performance-based buffer controls in any work plan lodged for approval; and
- amendment to *MRDA* to include an opportunity for third parties (limited to parties whose consent is presently required under section 45) to lodge submissions and/or be heard in the process of deciding whether or not to approve a work plan.

The rationale for the above recommendation is based on the following:

- The principle of ‘prior informed consultation’.
- The definition of ‘works’ adopted by VCAT is broader than necessary and leads to an impractical operation of the 100 metre rule.
- It is unreasonable to give a veto power to land owners/occupiers over works, especially where those works are subject to public scrutiny under either the EES or planning permit process.
- Ministerial authorisation of works under section 46 is not a sufficient safeguard to situations where section 45 consents cannot be obtained.
- Consideration of buffer zone requirements are more appropriately dealt with in the original approvals process. It is unreasonable to require a licence holder to go

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through two (or more) processes (approval of work plan AND requirement to obtain consents every time there is a change of landowner/occupier).

Package of Amendments to Section 45 and 46 Option

Freehills identified a number of amendments that could be made to the *MRDA* which would make the 100 metre rule more workable. The suggested amendments discussed in this section are not mutually exclusive.

(a) Amend *MRDA* to exempt planning permit holders from 100 metre rule

The exemption to the 100 metre rule currently given under section 45(1A) (to licensees who do work under an approved EES) could be extended to licensees who undertake works pursuant to a planning permit.

The rationale for this recommendation is as follows:

- It is not clear why the section 45(1A) exemption to the 100 metre rule should only apply to licence holders who have a work authority to do works under an approved EES.
- A licence holder who is required to obtain a planning permit goes through a planning assessment process that, in most cases, will afford land owners/occupiers an opportunity to object to the works or request buffers or controls on the works.
- Planning permits are not required for exploration licences, and therefore the 100 metre rule (with the suggested amendments) would continue to apply to activities pursuant to exploration licences.

(b) Amend section 45 to ensure consent runs with the land

Option A: Amendments could be made to the *MRDA* to allow section 45 consents to bind successors in title. Whilst there is no legislative precedent in Victoria, South Australia's mining legislation contains a provision which states that any consent agreement or court determination is binding on successors in title (section 9(3)(c) *Mining Act 1971*).

In Victoria, amendment would be needed to section 32 of the *Sale of Land Act 1962* to require disclosure by vendors under contracts of sale of any consents given under the *MRDA*. This would ensure future land owners are informed of any section 45 consents given by previous landowner.

Option B: Alternatively, consents could potentially be registered on title. There is, however, a degree of legal uncertainty with this approach. The *Transfer of Land Act 1958* regulates the registration of interests in land. Section 27 provides that the Registrar must keep a register of land. Land includes any estate or interest in land (but does not include an interest in land arising under the *MRDA*). The *Transfer of Land Act 1958* may need to be amended to ensure a consent granted under section 45 of the *MRDA* can be included in the register. Option B, consents would have to be written, and lodged with

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the Land Titles Office in a form that it accepts for registration. Verbal consents could not be recorded on the register.

(c) Exempt certain works from section 45 consent requirements

This could be achieved through amending the *MRDA* to exempt ‘low impact mining works’ and ‘low impact exploration works’ from the 100 metre rule.

“Low impact exploration” is defined in section 4 of the *MRDA* – such works are exempt by section 40(1A) from the need to lodge a works plan for approval.

(d) Amend MRDA to ensure that consents cannot be withdrawn

This could be achieved through amending section 45 to prohibit a person who consents under section 45(2) from withdrawing that consent. This approach is taken in Queensland – section 51 *Mineral Resources Act 1989* (Qld) provides that the owner of the land cannot withdraw his or her consent once it has been lodged with the mining registrar.

(e) Amend MRDA to clarify where the 100 metres is measured from

Amendments could be made to *MRDA* to clarify measurement of the 100 metre buffer zone.

Although there is no defined measurement mechanism in other jurisdictions, in New South Wales there is an appeal right to the Minister in a case of a dispute over whether land is within the buffer zone (section 31(4) *Mining Act 1992* (NSW)).

SOCIAL LICENCE TO OPERATE

The future of the Australian minerals industry is inseparable from the global pursuit of sustainable development. Through the integration of economic progress, responsible social development and effective environmental management, the industry is committed to contributing to the sustained growth and prosperity of current and future generations.

The foundation of the industry’s commitment is the concept of a ‘social licence to operate’. Simply defined, the ‘social licence to operate’ is an unwritten social contract. Unless a company earns that licence, and maintains it on the basis of good performance on the ground, there will undoubtedly be negative implications.

The Australian minerals industry strongly supports the role of a ‘social licence to operate’ as a complement to a regulatory licence issued by Government. To the minerals industry ‘social licence to operate’ is about operating in a manner that is attuned to community expectations and which acknowledges that businesses have a shared responsibility with

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Government, and more broadly society, to help facilitate the development of strong and sustainable communities.

To harness the industry's commitment within a strategic framework, the International Council on Mining and Metals (ICMM) adopted a set of sustainable development principles in May 2003 (**Attachment B**). This is the global industry's commitment to manage social, health, safety, environmental and economic issues in order to deliver sustainable shareholder value; and to both improve its performance in managing these issues and to publicly report industry's progress in doing so.

*Enduring Value*⁴ is the Framework within which the Australian minerals industry can operationalise its commitment to sustainable development.

Specifically *Enduring Value* provides a public demonstration of due diligence to the community, external investors and internal acquisition, and it can drive real change in an organisation through highlighting the importance of the combined impacts of social, environmental and economic performance in improving the bottom line.

It is a condition of MCA Membership that companies become signatories to *Enduring Value*.

The principles of Sustainable Development and *Enduring Value* in particular have guided the MCA to propose the following conceptual solution to the current dilemma.

CONCEPTUAL SOLUTION

In framing a solution to the uncertainties created by the VCAT decision the MCA and its Members have developed a principles based conceptual solution

Principles:

- Minimum amendment to MRD Act;
- Prior informed consultation;
- Maintain and clarify the rights of neighbours; and
- Create certainty for investments in mining projects.

The conceptual solution proposed by the MCA is as follows:

Mining – Given that projects approved under the *Environmental Effects Study Act* (EES) are exempt from the section 45 provisions it is proposed to amend the *MRDA* for mining projects approved via the planning permit procedures of the *Planning and Environment Act* to incorporate the 100 metre consents into that

⁴ Enduring Value, The Australian Minerals Industry Framework for Sustainable Development, Minerals Council of Australia, October 2004.

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process. Parties within the 100 metre are to be invited to be heard during the planning approval process as they are with the EES process. Once planning approval is granted it can no longer be revoked or removed on change of ownership or occupancy of neighbouring land. However, applications from mining companies to vary the planning permit would assure further opportunity for consultation with neighbours.

Exploration – As exploration does not require planning approval the solution for mining cannot be applied to exploration. Also, as exploration is generally a short term activity at any particular site it is far less likely to suffer from concerns that consents once given can be revoked or that the consents lapse when ownership of the land concerned changes hands. It is therefore recommended that consents for exploration continue to be handled under section 45 and 46 but with amendments to ensure, ‘low impact’ exploration work is exempt; there is clarity as to where the 100 metres is measured; and work not requiring approval for other industry developments, or work approved by third parties is exempt.

The EES procedures are a rigorous environmental and community based planning approval processes. The planning permit process is the alternative to the EES approval process under the *MRDA*.

ISSUES PAPER

The Issues Paper for Consultation prepared by Martin and McLean presents an excellent summary of the features of the *MRDA* related to the section 45 and 46 provisions.

The paper also presents an exhaustive consideration of the community and landowner issues that may be associated with the section 45 provisions. However, the Questions posed by the Issues Paper fail to present or appreciate the key fundamental issue of concern to minerals companies. This is the issue of sovereign risk to mining project investments raised by the VCAT decision. There are numerous questions and consequences that the VCAT decision raises for mining companies that are simply not posed. The Issues Paper would be far more balanced had these been included.

MCA also makes the observation that the Issues Paper makes minimal differentiation between exploration and mining activities. This could suggest that exploration and mining are one and the same, and therefore require the same degree of regulatory control. Exploration activities are, by their very nature, less intrusive both in terms of their scope and their sporadic nature. The fact that exploration does not require planning approval whilst mining projects do is a recognition of this fundamental difference.

SPECIFIC QUESTIONS RAISED IN THE ISSUES PAPER

QUESTION 1. There is uncertainty in aspects of the interpretation of section 45. Are there aspects of section 45 that are sufficiently uncertain as to warrant legislative reform and/or policy or guideline formulation?

Yes, the Tech-Sol case has created uncertainty for mining project investors because it suggests that:

- consents do not pass from one owner to the next;
- consents can be withdrawn; and
- a new broad definition of “work” applies,

meaning that most, if not all, mining projects in Victoria could technically be in breach of the *MRDA*. The uncertainty is a risk to investors and requires the urgent attention of Government to remedy via legislative reform.

QUESTION 2. There is no public record of consents which have been obtained by a licensee, and no system of registration of such consents. Would greater certainty be achieved with a consent registration procedure? What are the options which might be considered to better place consents on the public record?

Currently, consents are not required to be registered. The explorer or miner is simply required to advise the Department Head that consents have been obtained. In many cases consents are verbal as land owners do not wish to enter into legal arrangements. To require written consents that are registered in some way will create delays, confusion and additional costs for all parties (land owners may wish to refer any consent document to their lawyers).

By moving the consent arrangements for mining projects into the planning permit process the arrangements are “locked” into the planning permit conditions thereby providing all parties with certainty and transparency. It is noted that mining projects approved under the EES procedure are already exempt from the section 45 provisions.

The current arrangement for exploration under the section 45 provisions are adequate as exploration activities are of very short duration and often the activity will take less time than the time taken to enter into legally binding consent agreements.

QUESTION 3. Are there known instances of licensees not obtaining consents, when consent is required?

The MCA has no recent record (8 years) of any members requesting the Minister to provide authorisation under the section 46 powers apart from a current instance in Bendigo. The over-riding preference of MCA members is to reach agreement with the owner/occupiers or find an alternative plan.

QUESTION 4. Are there non-compliances with section 45 which have occurred and remained unnoticed by regulatory agencies; and, if noticed, have there been enforcement steps implemented which were sufficiently rigorous?

The only enforcement steps that the MCA is aware of relate to the Tech-Sol case.

Given the recent interpretation of section 45 by VCAT in the Tech-Sol decision it must be assumed that land ownership or occupancy changes have occurred and therefore earlier consents may not be valid. It must therefore be presumed that companies may be technically non-compliant by reason of the new interpretation by VCAT.

QUESTION 5. The Tech-Sol Case confirmed that a licensee is required to negotiate new consents each time there is a change of landowner or occupier. Is this a reasonable requirement? What process or procedure would be desirable to give better effect to this requirement?

It is not reasonable to require a mining company to renegotiate consents each time a landowner or occupier changes. This would expose the companies to significant sovereign risk and could possibly cause all future investments in Victorian mining projects to cease. The risk being that if consent were declined the existing investment of the company (and the jobs of its employees and livelihood of its suppliers) would be at risk as it would need to cease operation to avoid being in breach of the MRDA. The only avenue available in such a situation is for the company to seek section 46 respite from the Minister and this could take some time.

Taken to an extreme the situation could arise where there was a steady flow (possibly monthly) of referrals to the Minister from existing mining companies seeking respite under the section 46 provisions.

QUESTION 6. Are there related definitional issues regarding either “owner” or “occupier” which impact upon the consent process under section 45?

MCA Members have experienced instances in the past where it has been difficult to identify the landowner or occupier. The question raises more questions. For example, if consent is gained from a landowner, is consent also required from the tenant? Who has precedence, the landowner or the tenant?

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Where consents are required, the *MRDA* must clearly set out whose consent is required, and in what circumstances.

QUESTION 7. There may be difficulties for licensees in proving that they have in fact obtained the necessary consents to do work within the 100 metre zone, as the *MRDA* does not require the consent of owners to be in writing. Apart from a registration procedure foreshadowed above, at what stage should a consent be deemed to be a legally binding consent? What should be the standard of proof for such consents?

As stated above, many landowners do not wish to provide written consents. Consents should be legally binding whether they are written or oral, provided that such consents are informed consents.

The question implies that written consents are necessary. The practice in the field is that explorers (more particularly than mining companies) reach mutually acceptable undertakings and arrangements that are not documented but managed on a personal relationship basis. It would be wrong to impose a compulsory legal framework to a process that works very effectively for exploration. For mining projects, where long term investments are planned it is appropriate for a more rigorous legal arrangement that provides certainty, to prevail.

Ultimately it should be up to the mining companies or explorers to gauge the situation or scope of the project and decide what level of formality is required, because ultimately they bear the burden of proof if the issue of whether consents have been obtained arises.

QUESTION 8. Are amenity issues that may arise at the exploration phase satisfactorily dealt with by section 45? If this is a problem, how might it be addressed?

The MCA is alarmed that amenity issues have been included in the inquiry. Amenity is not included in the inquiry terms of reference.

Amenity issues are dealt with under sections 85 to 89 of the *MRDA* which deals with compensation to landowners or occupiers for the impacts of exploration as well as mining projects. The *MRDA* requires explorers and miners to treat the section 45 consents completely separately to the compensation provisions of the Act.

The MCA has a standard compensation agreement with the Victorian Farmers Federation (VFF) for mineral exploration on private land which is used extensively throughout Victoria.

QUESTION 9. There is uncertainty about the point from which the 100 metres is measured, to ensure maintenance of the “buffer”. (For instance, does the 100 metre run from the footprint of a homestead or from the homestead yard gate or from some other objectively determined starting position?). Should there be a standard procedure established and, if so, what might such standard procedures contain?

This matter requires clarity. In 2000 a draft guidance note was prepared by the then Department of Natural Resources and Environment (DNRE) to clarify where the boundary exists. The draft was never completed (see **Attachment C**).

The assessment of the *MRDA* in Laidlaw and Sandner (1991)⁵ raises another option for the point of measurement. They suggest that it could be interpreted to be from the centre of the object concerned.

Laidlaw and Sandner also raise the uncertainty as to whether or not a bore or windmill is intended to only apply to operational bores or windmills and whether or not gardens and orchards refer only to commercial gardens and orchards.

QUESTION 10. Where does a garden start and finish? Likewise, in the case of an orchard how does one, with certainty, identify its extent within a land holding when progressive plantings may be planned? With modern agroforestry, can and ought such operations be defined as a garden or an orchard? Should the legislation provide a definition of garden, orchard or other horticultural endeavour in order to provide greater certainty?

As above, clarity is required for all concerned.

MCA believes that it is inappropriate to prescribe such variability in legislation. The MCA recommends that the guidance note drafted in 2000 be completed by the Department of Primary Industries (DPI) in consultation with MCA and VFF to provide clarity to landowners, explorers and miners and the regulators.

QUESTION 11. In determining an appropriate procedure for a consent procedure, be it under section 45 or any alternative, there needs to be a point at which the process of obtaining consent and approval can be considered at an end. Once obtained, should consents “run with the land” or should they be subject to a “sunset provision”?

⁵ Noel Laidlaw and Richard Sandner, *A Study of the Victorian Mineral Resources Development Act 1990*, published by Laidlaw and Sandner, 1991 (ISBN No. 0 646 075403).

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In the absence of a solution tied to the planning permit process, it is critically important to mining companies for consents to run with the land for mining projects. A “sunset provision” is not appropriate because it means that the issue of consent will be reopened at regular intervals, for no apparent reason other than the passing of time. Without certainty, investments will be at risk.

QUESTION 12. The absolute nature of the 100 metre requirement does not take account of or reflect performance standards. Environmental and planning requirements are increasingly rigorous, requiring a high level of compliance by licensees, so rather than adhere to a rigid 100 metre protected zone requirement, should the legislation be flexible to allow a variable protected zone depending upon the building, site or object to be protected?

The point raised in this question is very important as it questions the dated prescriptive nature of the 100 metre requirement and raises the more modern risk based clearances and buffers determined to meet the specific object to be protected, project parameters, geography and neighbourhood character.

By moving the consents for mining projects completely into the planning permit and EES approval processes the risk based impacts of individual projects are considered and amelioration systems or buffers specified in the approval conditions. This process offers greater protection for neighbours. The *MRDA* already exempts mining projects that are approved through the EES procedures as there is a clear and thorough process for informed consultation with landowners and occupiers, a similar exemption for planning permit processes is both logical and appropriate.

Laidlaw and Sandner (1991) made the point from the outset that the planning process is better able to determine appropriate land use on a case by case basis and is superior to putting an arbitrary 100 metre distance for all cases of protection. They state that in some cases this distance would be too large whilst in others too small. This observation still stands today.

QUESTION 13. If further consent is not required, and there is a significant increase in “works”, is the criticism correct that there is limited opportunity for appropriate compensation?

Compensation is not linked to consents under the *MRDA*. Compensation is dealt with under sections 85 to 89 of the Act. MCA members have, since the Act was introduced, operated under the belief that compensation cannot be linked to consent agreements. Clearly, if work plans are varied to create greater adverse impact on landowners then the compensation provisions under sections 85 to 89 will be reviewed as part of those arrangements and dealt with under the work plan approval process. This has nothing to do with section 45 consents.

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By placing the consents under the planning permit process (or EES) any variation of the work plan that requires a review of the planning approval conditions will be dealt with in the formal processes that are transparent to all parties. The criticism is therefore incorrect.

QUESTION 14. Concern has been expressed that fresh consents are not sought if there is a change to the work plan. Given the intended operation of sections 45(1A) and 42A is this concern unwarranted?

If the 100 metre rule is maintained for mining activities then if work plan changes occur within the 100 metre buffer then referral to the landowner/occupier is warranted. However, for work plan variations that occur outside of the 100 metre buffer there is no reason to seek fresh section 45 consents. In any case, most mining companies go out of their way to ensure all close neighbours are informed of any material change to plans as a matter of normal good practice.

The section 42A arrangements allow for the numerous minor work plan variations that do not impact on the planning approval conditions or create any additional environmental impacts to be approved. These variations can include a change to the safety management plan or the underground mining sequence, for example, and if this is the case fresh consents are simply not necessary.

QUESTION 15. Given that there is no process by which purchasers of land are automatically made aware of the existence of a previous consent in relation to the land, should consents given under section 45 be one of the matters which must be contained in a statement given under section 32 of the *Sale of Land Act* 1962 given to the purchasers of land?

Advice on current section 45 consents would be valuable advice to prospective purchasers of properties. However, when these issues have been raised by MCA to Government in the past it has been advised that significant hurdles in the *Transfer of Land Act* and the *Sale of Land Act* exist in making the legislative changes for such disclosure. However, these changes could be introduced as a package with the amendments to the *MRDA* that flow from this Inquiry.

QUESTION 16. Concern has been expressed that landowners and occupiers feel that their land, and amenity, would be unreasonably threatened if the section 45 consent process is reformed. If there is a greater integration of the consent process into a planning approvals process, say pursuant to the *Planning & Environment Act* 1987, would this concern be allayed?

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Amenity is a compensation issue dealt with under sections 85 to 89 of the *MRDA*. Compensation is not dealt with under the section 45 consents.

By placing the consents for mining into the planning permit processes the arrangements and conditions are included into the permit in a binding and transparent manner and monitored by the regulators. Also, the planning permit route offers landowners/occupiers access to VCAT to resolve disputes. Such referrals are not limited to an arbitrary 100 metre limit.

MCA believes that the planning permit route for mining activities affords landowners and occupiers with greater rights and certainty and the mining industry with greater certainty. This route is a workable and easily implemented solution to the current problems with the 100 metre Rule.

QUESTION 17. Given the more comprehensive application of planning provisions and environmental provisions in modern legislation (and so the capacity to have a greater integration of the *MRDA* with both planning and environmental legislation) is the whole section 45 consent procedure now redundant? If it is redundant, what policy, legislative or regulatory safeguards would be necessary to ensure that alternative processes effectively fulfil the objectives of the section 45 process?

It is the preferred option of the MCA for mining project consents under section 45 to be dealt with under the planning permit approval processes (or EES procedures).

However, the section 45 provisions are not redundant for exploration projects. Exploration does not require a planning permit and therefore section 45 consents are required to provide landowners and occupiers with protection for exploration work. Therefore, MCA wishes to preserve sections 45 and 46 for exploration activities, but not mining activities.

QUESTION 18. If consents were to survive changes in ownership or occupation, what process would be satisfactory in order to allow a new owner or occupier to extend an existing garden or orchard, or put in a dam, build a house or a substantial farm building without creating a new 100 metre buffer zone? What safeguards would be required in order to not fetter the rights and opportunities of both new landholders and existing miners?

Mining projects approved under the planning permit approval processes (or EES) have status under the planning schemes. Landowners with new developments are therefore able to plan their project with the mining project planning approval

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available for all to see prior to any commitments or permit applications being made. New developments by landowners should be permitted within or close to the approved boundary of mines. However, this should be done in the full knowledge of the mining company planning permit and there should be no scope to invoke a new 100 metre buffer.

The issue is not relevant to exploration as this is a short term activity that does not warrant long term management controls.

QUESTION 19. The location of the 100 metre buffer is dynamic: if activity around a residence changes (for example, an orchard is planted) this can have the effect of pushing the 100 metres further out and potentially into work done under a licence. Should this trigger a requirement for new consents or should such post-consent activity be exempted from protective provisions associated with current mining activity?

This issue will always be contentious under the current *MRDA* section 45 regime for mining projects. Clearly, MCA is of the view that post-consent activities should not trigger a requirement for a new consent. By moving the consents for mining into the planning permit approval processes the situation expressed in the question is dealt with under existing well proven and rigorous planning laws.

QUESTION 20. There is uncertainty as to the meaning of “work” for the purposes of section 45. Is there a better definition of “work” to be considered?

The *MRDA* has deliberately not defined “work” and simply refers to “work under the licence”. The definition had not been an issue except in relation to the section 45 provisions. The VCAT decision has identified this shortfall.

The Department (DNRE and now DPI) recognised this shortcoming and attempted to identify work that is not subject the section 45 provisions in the draft Guidance Note of 2000 (see **Attachment C**).

MCA is of the opinion that “work under the licence” is limited to work that is directly related to the exploration or mining project and which is not regulated or approved under other approval regimes or normally undertaken by other businesses without regulatory intervention.

QUESTION 21. If “work under the licence” has the broad meaning suggested in the Tech-Sol Case, even ancillary activities (such as the erection of a gate, fence, road or pipeline) could trigger the 100 metre rule. Is

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there a distinction that should be drawn between primary works and ancillary works and is it warranted to require consents for primary works and not ancillary works?

Taken to an extreme, workers travelling to work on a public road that separates a line of dwellings from a mining company boundary could be deemed to be “work” and require the consent of the line of home owners as the road occurs in the 100 metre buffer zone.

The question raises a number of critical issues.

Firstly, activities that could be undertaken if there were no exploration or mining Licence should be excluded as it is inappropriate for work that other citizens can undertake during the course of their normal activities to be regulated by the DPI regulators simply because it occurs on a Licence. For example, any citizen can have a telephone cable installed without requiring a permit. The same rights should apply to a mining company office.

Secondly, it would be difficult to define Work to be inclusive as there will always be activities omitted. It is far easier to identify the general activities that are excluded.

Thirdly, third party infrastructure work such as the laying of a water supply pipe line or the extension of an electricity power line is subject to regulatory approval by the appropriate agency for all developers. When such infrastructure is installed to a mining project site it should be subject to the same regulatory approval process. It should not be regulated under the *MRDA* by DPI.

Clearly clarification is required as was attempted in the draft Guidance Note (see **Attachment C**).

QUESTION 22. If the section 45 process were to be retained or alternatively replaced by an equivalent but new process, is the list of places, buildings, sites and objects which are currently found in section 45 comprehensive enough or is the list too expansive?

The MCA believes that the list is adequate and should be maintained for exploration projects and moved into the planning permit approval processes for mining projects.

QUESTION 23. In the context of archaeological areas and relics as defined in the *Archaeological and Aboriginal Relics Preservation Act 1972* and sites, places and objects on registers established under the *Heritage Act 1995* currently benefiting from particular procedures and protection under section 45, is it warranted to continue such special

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protection under either a retained section 45 process or any alternative that might be considered?

As proposed above, with mining project consents moved into the planning permit approval procedures the protection of Aboriginal sites is assured through the rigor of the process.

The current arrangement should continue to apply to exploration.

The MCA has agreed heritage management plans with native title claim groups as per the joint (Victorian Government, Native Title Services Victoria and MCA) template agreements for exploration and for mining on native title lands. These management plans fully respect the rights of indigenous Australians to protect their heritage.

QUESTION 24. Is it appropriate that the Minister under the MDRA retains the power and discretion under section 46 or are there alternative models that might be preferred? Would it be appropriate to consider a greater role for the Mining Warden, for example, with section 46 authorisations? Would it be better to assign the section 46 authorisation role to VCAT?

If the consents for mining projects were moved to the planning permit approval processes (or EES) the VCAT (or independent EES panel) are available for landowners to raise their concerns and have them considered.

With exploration remaining subject to the section 45 procedures it is very unlikely that companies would wish to refer adverse consent arrangements to the Minister as responsible companies will always wish to work with their neighbours and landowners in a positive relationship rather than an adversarial one. Commonsense means that if there is an adverse relationship at the exploration stage it will be difficult to foster a social licence to operate at the mining stage.

However, section 46 should be maintained as a 'last resort' for explorers to ensure that important prospects are not precluded from exploration because of isolated consent issues.

The Mining Warden has the skills and facilities to investigate section 46 requests by conducting inquiries that enable all Parties to be heard and then to provide expert advice to the Minister. This would be a more effective and consultative basis to investigation than the arbitrary advice of the MEAC.

THE ORIGINAL INTENT OF THE 100 METRE RULE

The origin and original intent of the 100 metre Rule is mentioned in the authoritative book prepared by Laidlaw and Sandner in 1991 on the then new *MRDA* (see **Attachment D**)

In their assessment of the then new Act they state that the 100 metre Rule originated from the protection offered in the superseded *Mines Act 1958*. Much of the protection offered by the *MRDA* to objects on private land is similar to the provisions of the *Mines Act* and clarified much of the uncertainty related to objects on Crown land.

At the time of preparing the new *MRDA* the minerals industry advocated for a “one stop shop” for mining project approvals. In this context it was considered that the section 45 provisions would serve all parties better as part of a “one stop shop” than the inclusion of planning approvals processes as these involve other agencies. However, the “one stop shop” was not adopted and planning approvals were introduced for mining projects. However, the section 45 provisions were held as stand alone provisions and not folded into the planning approvals process. Unfortunately, the authors of the new Act were unwilling to remove the 100 metre rule provisions (from the old Act) but did introduce the planning approvals process for mining. Hence, the authors state “the miner suffers the worst of both worlds of layered bureaucracy”.

In their assessment Laidlaw and Sandner argue that the intent of the section 45 consents is to protect the objects listed in the Act. The land in the buffer is not protected in its own right apart from the land in the curtilage of a historic building (section 45 (1)(xi) of the original version of the Act. The original section (xi) has long been removed from the Act to solve the inconsistency of the land being protected. The Act is now clear; it is the objects that are protected, not the land.

The only concept of a post consent concern identified by Laidlaw and Sandner in 1991 was that resulting from the changed status of a historic building could bring a mining operation into conflict with the Act as the land in the curtilage of the building would be protected. The authors claim (personal communication) there was no appreciation that consents once gained could be withdrawn or did not run with the land upon change of ownership or occupancy when the Act was proclaimed. The sovereign risk ramifications created by the land in the curtilage of post consent historic buildings was the only issue identified. The original section 45 (1) (xi) has since been amended to remove this sovereign risk.

Further it is important to realise that when the *MRDA* was proclaimed it contained a consequential amendment clause (Schedule 1 (24)) to the *Sale of Land Act 1962*. The amendment was to section 32 (2) of that Act and involved the addition of a new paragraph “(j) In the case of land that is within a municipal district specified for the purposes of this paragraph by the Minister administering the *Mineral Resources Development Act 1990* by notice published in the Government Gazette, a description of any mining licence granted under that Act that covers the land”. The amendment clearly

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had the intent of making sure new owners were aware of the existence of mining licences over the property they were purchasing. However, the amendment has never been enacted and so the information is not required in the section 32 vendor statements.

CONCLUSION

The VCAT decision in the Tech-Sol case has created significant uncertainty for existing and future mining project investors. Member companies have identified that the possibility of consents for work under section 45 of the *MRDA* being withdrawn or not running with the land as a significant sovereign risk. MCA believes the *MRDA* requires amendment to resolve the uncertainty.

MCA has identified solutions to resolve the uncertainty. Some of these involve significant change to the Act whilst other less so.

MCA has recommended a conceptual solution that requires minimal change to the Act. The section 45 and 46 provisions are maintained for exploration work only. For mining projects the approval of work within 100m is moved into the planning permit approvals process as is already the case for projects approved via the EES process.

If the conceptual solution proposed by the MCA is implemented the principles upon which it is based will also be achieved, that is:

- Minimum amendments to the *MRDA*
- Prior informed consultation with neighbours
- Maintenance and clarification of the rights of neighbours; and
- Creation of certainty for investors in mining projects.

A further benefit would be the minimal, if not nil requirement for the Minister to authorise projects under the section 46 powers.

The proposed solution meets the industry's social licence to operate criteria and the Inquiry's terms of reference.

ATTACHMENT A

Freehills - 100 Metre Rule - Strategic Options

Future amendments to the MRD Act

1 Major amendments

Solution	How achieved	Advantages	Limitations	Comment
Amend work plan approvals process to ensure 100m buffer zone requirements are assessed prior to approving the work plan - not separately under section 45.	<ul style="list-style-type: none"> • Repeal sections 45 and 46 of the MRD Act • amend MRD Act (or MRD Regulations) to require a licensee to include performance-based buffer controls in any work plan it lodges for approval. • amendment to the MRD Act to include an opportunity for third parties (limited to parties whose consent is presently required under section 45) to lodge submissions and/or be heard in the process of deciding whether or not to approve a work plan under section 40 of the MRD Act. 	<ul style="list-style-type: none"> • Would ensure all consent requirements are considered before commencement of works with no on-going consent obligations. • Removes current 'veto' power of affected parties over proposed works 		<ul style="list-style-type: none"> • 'streamlining' the process

2 A package of minor amendments to the MDR Act to make it ‘workable’

Solution	How achieved	Advantages	Limitations	Comment
Exempt planning permit holders from 100m rule	<ul style="list-style-type: none"> The exemption to the 100m rule currently given to licence holders who do works under an approved EES could be extended by amendment to section 45 to exempt licensees who propose to do works under a planning permit. 	<ul style="list-style-type: none"> Removes section 45 consent requirements for licence holders who go through the planning permit process. 	<ul style="list-style-type: none"> Only exempts certain works from section 45 consent requirements – would not cover works outside the scope of a planning permit area. 	
Ensure consents run with the land	<ul style="list-style-type: none"> Amend MRD Act to provide that section 45 consents will bind successors in title. Consequential amendment would be needed to section 32 of the <i>Sale of Land Act</i> 1962 – require disclosure by vendors in a contract of sale of any consents given by vendor or given by any previous owner. Consents could be potentially registered on title. Would require amendment to the MRD Act and potentially require amendment to the <i>Transfer of Land Act</i> 1958. 	<ul style="list-style-type: none"> Ensures that a licensee does not have to negotiate consents every time a land owner changes 	<ul style="list-style-type: none"> Legal uncertainty as to amendments to the <i>Sale of Land Act</i> or <i>Transfer of Land Act</i> 	<ul style="list-style-type: none"> Consents would need to be written. Verbal consents cannot be recorded on title or disclosed to future land owners under a section 32 Vendor’s statement.

2 A package of minor amendments to the MDR Act to make it 'workable' (cont.)

Exempt certain works from section 45 consent requirements	<ul style="list-style-type: none"> Amend MRD Act to exempt 'low impact mining works' and 'low impact exploration works' 	<ul style="list-style-type: none"> Narrows the scope of what works require section 45 consents 		
Ensure consents once given cannot be withdrawn	<ul style="list-style-type: none"> Amend section 45 to prohibit consents under section 45(2) from being withdrawn. 	<ul style="list-style-type: none"> Provides certainty that consents cannot be retracted after they are given – the alternative situation would amount to an absurd outcome where a land owner has a veto power even after works had commenced. 		<ul style="list-style-type: none"> Common law estoppel could currently be argued in any dispute before a Court or Tribunal
Clarify where the 100m is measured from	<ul style="list-style-type: none"> Amend MRD Act to clarify how the 100 m is to be measured. Alternative approach – amend MRD Act to include an appeal mechanism to the Minister in a case of a dispute over whether land is within the buffer zone. 	<ul style="list-style-type: none"> Provides certainty over who section 45 consent is required from. 		
Amend section 46 to allow for retrospective approval of works				Not required if consent cannot be withdrawn and consents runs with the land

ATTACHMENT B

ENDURING VALUE

INDUSTRY VISION

A valued Australian minerals industry achieving outstanding environmental, social and economic performance

INDUSTRY MISSION

To achieve continual improvement in the environmental, social and economic performance and accountability of the Australian minerals industry through implementation of the Principles and Elements of *Enduring Value*

ICMM PRINCIPLES

- 1** Implement and maintain ethical business practices and sound systems of corporate governance.
- 2** Integrate sustainable development considerations within the corporate decision-making process.
- 3** Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
- 4** Implement risk management strategies based on valid data and sound science.
- 5** Seek continual improvement of our health and safety performance.
- 6** Seek continual improvement of our environmental performance.
- 7** Contribute to conservation of biodiversity and integrated approaches to land use planning.
- 8** Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
- 9** Contribute to the social, economic and institutional development of the communities in which we operate.
- 10** Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders.

ATTACHMENT C

GUIDANCE NOTE

APPLICATION OF MINERAL RESOURCES DEVELOPMENT ACT SECTION 45 (100 metre protection rule) TO “GARDENS”

~~JANUARY~~ MARCH 2000



Natural Resources
and Environment

AGRICULTURE

RESOURCES

CONSERVATION

LAND MANAGEMENT

INTRODUCTION

section 45 of *Mineral Resources Development Act 1990* (the Act) establishes protection for a range of land uses and improvements by requiring that a licensee must not do any work within 100m laterally or below specified features except with the permission of the landowner or managing authority.

section 45 (1) (a) provides such protection for, among other things;

- (i) a dwelling house, and
- (v) a garden, an orchard or a vineyard.

There is also a requirement to specify those activities that are not deemed to be work for the purposes of this clause.

This guidance note sets out the view of the Department of Natural Resources and Environment on the application of these parts of section 45 of the Act.

DISCUSSION

section 45 Part (1)(a)(i) clearly protects any residence, however, it is less clear whether surrounding domestic gardens are protected by the section. Part (1)(a)(v) refers to gardens but no definition of the term is provided.

Three definitions of the term “garden” should be considered.

1. **Commercial Garden:** Such gardens are considered to be areas devoted to horticultural or silvicultural activities for production of food, flowers or plants for propagation. This interpretation of the term is in line with other references in part (v) to orchards and vineyards.
2. **Private Gardens:** Such gardens would be domestic gardens associated with a place of residence. The intent of section 45 is to protect gardens, structures and people in their home. It follows that residents have a right to protection of their enjoyment of the garden surrounding their home, as well as the interior of the home itself.

3. **Public Gardens:** These are formal garden areas such as public parks which are designed, constructed and maintained for the passive enjoyment of the public. Public land is provided specific protection by section 44 of the Act so it is considered that section 45 does not apply to this category of garden.

APPLICATION OF SECTION 45

Department policy with respect to application of section 45 is as follows.

- **Commercial Gardens** - Commercial gardens should be treated in a similar manner to vineyards and orchards.
- **Private Gardens** - Gardens in close association with and close proximity to a residence should be protected by section 45. In urban areas where gardens are usually clearly delineated by the property boundaries and properties are of typical (around $\frac{1}{4}$ acre) urban block size, the 100 m separation should be measured from the property boundary. In less developed areas where block sizes are large (such as in rural-residential areas) and in rural areas, the 100 m should apply from the boundary of that area around a residence which is in close association with and close proximity to the residence and can be reasonably considered to be a domestic garden. In most cases, the domestic garden area is clearly delineated by fences or other features even on large properties. Where this is not the case a judgement should be made on the basis that the private garden is that area around a residence which has been constructed and is maintained for the passive enjoyment of the residents.
- **Public Gardens** - section 45 should not be applied in relation to public gardens.

INTERPRETATION OF WORK FOR THE PURPOSES OF SECTION 45

The Act requires application of section 45 for work undertaken by the licensee. The term “work” is defined in the Act as “any work that the licensee is entitled to do under the licence”. Part 3 sets out the approval process which must be undertaken before “work” may be commenced.

The activities which could be deemed “work” are many and varied. However, if every activity undertaken by a licensee on the licence were regarded as “work” for the purposes of the Act, the licensee would be constrained to a degree not imposed on other individuals and this is considered unreasonable. Other individuals, who are not licensees and are not subject to section 45 of the Act, can undertake a number of activities undertaken by a licensee. Such activities do not require the authority of a licence and may not have any discernible impact on residents. For example, a licensee driving a vehicle used for work purposes on a public road within the licence area.

WORK NOT SUBJECT TO SECTION 45

As a general principle, ~~work activities~~ which:

- (a) could be undertaken ~~without the authority of the licensee~~ if there were no Licence, or
- (b) would ~~not only~~ have ~~any discernible~~ minimal or temporary impact on residents, should not be subject to section 45.

Such activities would generally include, but not be limited to:

- access to land, by foot or vehicle;
- track/road maintenance and minor construction;
- inspection of land, surveying, photography, collection of hand-size rock or soil samples and other similar activities;
- installation of services, including power, water, drainage and communications;
- installation and maintenance of reasonable environmental features such as screens, drainage controls, constructed wetlands etc;
- installation and maintenance of safety and public protection facilities;
- farming activities, including cultivation, running stock and farm fencing; and
- tree planting, watering and hand maintenance.

All these activities are still subject to the consent provisions of sections 42 and 43 the Act which require that operators have either consent or a compensation agreement with landowners of Land Affected before commencement of work. They may also be incorporated in work plans or require approvals under other Acts.

MEASURING THE 100 METRES

The 100 metre discretionary separation provided by the Act should be measured from the nearest point at which ~~“work”~~ work, other than the activities described above, is proposed to the corresponding nearest part of the protected feature. Where the work involves disseminated activities such as exploration drilling, the licensee should ~~exercise prudence in the determination of the 100 metre boundary to ensure that all relevant activities are encompassed~~ ensure that all activities, apart from those included above, are 100m or more from the protected features.

Further Information:

For further information on the matters discussed in this guidance note please contact Minerals & Petroleum Regulation Branch, Department of Natural Resources & Environment, Ph 03 9412 5013.

ATTACHMENT D

Extract from - "A Study of the Victorian Mineral Resources Development Act 1990" by Noel Laidlaw and Richard Sandner, 1991. pp15-20.

Protection of Buildings and Sites

The protection of buildings and sites referred to under section 45 of the Act appears to have stemmed primarily from the protection offered in Division 2 of Part 2 of the Mines Act 1958.

There are however, in accordance with the approach taken by the authors of the legislation, a number of changes.

No distinction is made between improvements or sites on either Crown or Private land. This provision appears to have consolidated a number of diverse references which were made in the Mines Act 1958.

Crown land and private land

There has been confusion as to the granting of consent to mine on or about improved Crown Land under the Mines Act 1958. In regard to improvements on Crown land, the relationship between the Crown Land (Reserves) Act, the Land Act and sections 4, 7 and 9 of the Mines Act 1958 were never clear.

Certainly in terms of their administration, the relationship between the government departments administering these Acts did not offer the miner a clear line of authority.

Under the Mineral Resources Development Act 1990, the status of improvements on Crown Land and the procedures to be adopted now leave little room for confusion.

Much of the protection which is offered to buildings and sites on private land is similar to the provisions of the Mines Act 1958¹.

One of these was that no mining could have been allowed on private land which was less than 0.2 of a hectare². It is noted that some of the provisions which are far better suited to the scope of planning legislation and are not dealt with in this Act. This land use will be administered through the planning process in the future.

It can be suggested that all of the measures which are contained in section 45 of the Act are better considered as matters relating to planning if a one stop shop approach is not adopted. At present, the miner suffers the worst of both worlds of layered bureaucracy.

¹ section 301 (6) Mines Act 1958

² section 301 Mines Act 1958

If the planning process is to be used, it is better able to determine land use on a case by case basis and is superior to putting arbitrary distances and depths which need to be observed on every occasion. In some cases they may be too large, in others too small. It would be unusual for them to be just right.

The authors of the legislation were not prepared to remove the “100 metre rule”. In fact, additional items have been added to the list of what is protected in this manner.

Section 45 Protection - The 100 Metre Rule

Section 45 of the Act provides for the protection of buildings, improvements and sites. Section 46 limits the amount of protection available and provides a mechanism whereby the Minister may override the provisions of section 45.

Section 45 applies to improvements whether they are on private or Crown land.

A licensee must not do work within 100 metres laterally of the following buildings, sites or improvements:-

1. A dwelling House
2. A substantial farm building
3. A factory
4. A windmill, a bore spring or dam (not including a mining dam or one with a capacity of less than 0.3 megalitres)
5. A garden, orchard or vineyard
6. A reservoir or lake
7. A church
8. A hospital
9. A public building
10. A cemetery
11. A building that is specified on the Register of Historic Buildings, the Register of Government Buildings or the Register of the Nation Estate or is specified as a notable building or a building of significance in a planning scheme or any land within the curtilage of the building
12. An archaeological and Aboriginal site specified in the site register of the Victorian Archaeological survey.

As well as the prohibition of work within 100 metres laterally of the buildings or sites mentioned, no work shall be done within 100 metres below the surface of the prohibited area.

Protection of the Object

A question now arises. Does the 100 metre rule simply mean an area 100 metres from the outside boundary of the object in question; the house, the vineyard, the garden etc. or does it mean 100 metres from the centre of the object and thus include it?

If the first interpretation is preferred, then the object itself is not protected and activity is not restricted at the object, only for the buffer zone of 100 metres surrounding it. To be consistent, it would seem reasonable that the object itself was protected by the 100 metre rule.

The definitions of buildings and sites appear to be reasonably clear, however a number of questions do arise.

Does a “bore or windmill” mean an operating bore or windmill? Is a “garden, orchard or vineyard” meant to mean a commercially producing area? What is the difference between a reservoir, a lake or a dam? What is the full definition of a public building?

Initially, these questions will remain unanswered.

The specific items themselves listed in section 45 (1) may not be given the same protection. A literal interpretation of the Act is that there is no additional protection for the item itself. The protection is only for the 100 metre laterally and 100 metre below the area of the item.

The language of section 45 (1) of the Act clearly indicates the 100 metre zone is to protect the item itself, otherwise the item would have no protection and could be subject to work being carried out on it under the licence. The area of 100 metres around the item would not be available for work. This is clearly not what the legislators intended.

The 100 metre buffer zone only appears to exist around items mentioned in section 45 (1) (a) (xi) of the Act, the historic building, which specifically talks of the building and land within the curtilage of the building.

Notable buildings - planning changes

There is a degree of uncertainty generated by the provisions relating to the specification of notable or significant buildings in a planning scheme and the land adjacent to it.

An existing mining operation which is within 100 metres of buildings or sites may be put in jeopardy or otherwise disadvantaged by the change in the status of a building in the local planning scheme. Such a change may specify the notability or significance of such a building.

The ramifications to an operating mine to a change of status to a building or place should not be underestimated. Such change during the operating life of the mine has the ability to stop work within the 100 metre protection zone surrounding the building or place. Work could recommence only after appropriate consents had been obtained if they are available.

The transitional provisions offer some protection to those operations existing at the time of the proclamation of the Act.³

³ Clause 1 and 2 (12) of Schedule 2 of the Act

Work within 100 metres

Section 45 (2) of the Act provides that the licensee may obtain the consent of the owners and the occupiers of the land to do work within the 100 metre zone.

This only applies to items listed in section 45 (1) (a) (i) to (v) inclusive, namely the dwelling, the farm building, the windmill, the factory and the garden etc.

Consents made under this sub-section may be conditional on depth or distance.

Section 45 (3) of the Act provides that a licensee may do work within 100 metres of buildings including the curtilage specified in section 45 (1) (a) (xi).

Work can take place within 100 metres of the building and the curtilage with the consent of Historic Buildings Council in respect to buildings which are specified on the Register of Historic Buildings or on the Register of Government Buildings.

For buildings on the Register of the National Estate, consent may be obtained from the Australian heritage Commission.

Consent may be obtained from the Responsible Authority in respect of buildings that are specified as a notable building or a building of significance in a planning scheme.

The consents may be conditional with respect of either distance within the 100 metres or depth less than 100 metres below the surface.

Aboriginal Land

In relation to land that is an archaeological or Aboriginal site, the licensee may with the consent of any person or body nominated under section 18 (a) of this Act do work within the zone protected by the 100 metre rule. Consent may be made conditional on either distance or depth. Section 6 (c) and (d) of the Act exempts the actual site from being included in the licence.

The person or body which may consent in these cases is that which the chief administrator must give notice of an application for a licence under section 18 of the Act.

These aboriginal people are nominated by the Minister administering the Victorian Archaeological and Aboriginal Relics Preservation Act 1972 or the Federal Minister administering the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

The penalty for doing work without the appropriate consents provided for by section 45 is one hundred penalty units. Monitoring of this information by on site personnel is essential.

An inconsistency appears to have been created between section 6 (d) and section 45 (1) (xii) and 45 (4). Section 6 exempts land from being subject to a licence under this Act. No licence can, save for the exclusions in section 6 (b) (i-iii), exist on the classes of land as set out. Nor can such land be included in an application for a licence.

In section 45 (1) (xii), no work can be done laterally 100 metres from such an Aboriginal Place. Section 45 (4) provides that permission of the person or body of persons nominated in section 18 (a) can give permission to work within that area.

The problem is that under the Act no work can be carried out other than on a granted licence. Section 45 (4) of the Act indicates that with permission work can be carried out whether on a licence area or not if such land was part of the aboriginal site excluded. This would breach section 6 as the ground not part of the site is exempted from being included in the licence area.

Limit of Protection of the 100 metre Rule

Section 46 (1) of the Act allows the Minister administering this Act to authorise the licensee to work within the 100 metre zone of improvement set out in section 45 (1) (a) (i) to (x) of the Act⁴.

This procedure should not be confused with the right of the owner or occupier to grant consent to the licensee to work within 100 metres of those objects mentioned in section 45 (1) (a) (i) to (v).

Before the Minister can authorise work within 100 metres of the improvements, the Minister must take advice from the Mining and Environment Advisory Committee.

Section 46 (3) of the Act states that any damage caused in the carrying out of the work to the protected building or site must be repaired. This statutory protection is limited to those improvements mentioned section 45 (1) (a) (xi) and (xii) and where the Minister over rides the refusal of consent under section 46 (1) of the Act.

There is no statutory protection to repair any damage to an improvement mentioned in section 45 (1) (a) (i) to (x) if the work was carried out with the consent of the owner or occupier. If damage occurs to such improvements when consent has been given, only the common law remedy of negligence would be available to the owner or occupier.

This contrasts with Part II of the Mines Act 1958 which requires the miner to make good any damage caused to similar improvements.

⁴ Historic buildings and aboriginal sites are not subject to the Ministers power to allow work to take place within 100 metres.