



# Guidance statement – Use of 'No Mining' conditions under the *Mining Act 1978*.

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## Document Hierarchy

Legislation	<i>Mining Act 1978</i>
Guidelines	This document addresses the use of 'no mining' conditions imposed on mining titles prohibiting mining activities, on certain areas within the mining tenement.

## Version History

Version	Date	Changes
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## Guidelines

### 1. Purpose

The purpose of this guideline is to address the use of 'no mining' conditions imposed on mining titles prohibiting mining activities, on certain areas within the mining tenement.

A glossary of definitions and acronyms is provided in Appendix 1.

### 2. Objectives

The objective of this guidance document is to provide applicants and objectors with information to expedite the Minister's grant of applications that have been recommended for grant through the use of standard 'no mining' conditions.

### 3. Scope

This guidance document relates to the use of standard conditions, imposed upon grant of title, which contain provisions for 'no mining' of certain land.

This guideline does not include other conditions including those imposed following approval of exploration and mining activities on a tenement under the 'conditions for preventing or reducing injury to the land' provisions of the *Mining Act 1978* (the Mining Act).<sup>1</sup>

### 4. Background

A person is entitled to apply for a mining tenement over ground which may be occupied by existing owners and occupiers of land. The application for the mining tenement might give rise to an apprehension of conflicting land uses. Such land use conflicts, whether they are real, apparent or apprehended, have been successfully managed through the use of land use agreements throughout the history of mining in Western Australia.

Since about 2007, a new practice arose to manage land use conflict. This was the use of Minutes of Programming Directions (MOPD) sought by consent of the parties for resolving objections to applications for mining tenements. In MOPDs, parties agree to specific conditions and request that the warden recommends an exploration licence for grant together with a recommendation that the agreed conditions be imposed.

Concerns have arisen whether some conditions that have been proposed through the MOPD process are compliant with the Mining Act, whether they are ultra vires and whether they are capable of being enforced.

#### 4.1 Decision maker's powers

The decision maker has the power to grant a mining tenement subject to any conditions, including conditions proposed by the parties in MOPDs. Whether the decision maker will grant the mining tenement on the terms and conditions proposed by the parties in the MOPD is a decision for the decision maker.

Subject to the conditions otherwise being validly imposed in accordance with, and for the purposes of, the Mining Act, the decision maker has the power to impose conditions which prohibit mining or exploration activities upon the grant of a mining tenement in respect of any area overlapping a miscellaneous licence or private land, or areas adjacent to the overlapping areas. These conditions are known as 'no mining' conditions.

Prior to imposing any condition to protect an existing mining tenement from the effect of a grant of another tenement, consideration should be given to section 117 of the Mining Act. Given that various mining tenements and other tenure can coexist, section 117 provides for the protection of existing mining tenements from the effects of later crown grants, transfers or conveyances of tenure.

<sup>1</sup> Sections 46A, 63AA, 70I and 84 of the *Mining Act 1978*.

## 5 Use of access agreements

It is recommended that parties give consideration to the use of Access Agreements for resolving objections to applications for mining tenements under the Mining Act as opposed to relying on the objection process and the use of MOPDs. Access Agreements provide both parties with consistency, certainty and flexibility in resolving objections.

While it is open to parties to use MOPDs to resolve objections by agreeing to specific conditions, it is ultimately the decision of the Minister to grant an application on any terms and conditions as the Minister thinks fit. That is, the Minister does not have to grant the mining tenement subject to the conditions agreed by the parties.

## 6 Exploration licences: Guidance on conditions prohibiting certain mining activities on certain areas within the licence

Subject to certain express exceptions, the Mining Act provides that an exploration licence may only be granted over a block or blocks. Unless one of the legislated exceptions applies, the Minister does not have the power to grant an exploration licence over part of a block. This is in contrast to other mining tenement types where the Mining Act provides for the decision maker to grant a lesser area than that applied for.

For exploration licences, the use of a 'no mining' condition is the mechanism by which certain discrete areas of land may be protected within a block.

### 6.1 Imposing 'no mining' conditions

The Minister may give consideration to the imposition of 'no mining' conditions discussed at 6.2 or 6.3 to protect areas of land where there is:

- significant project infrastructure;
- an existing or proposed State significant project;
- a proposal for a change of land tenure; or
- insufficient protection provided by the Mining Act or other legislation.

Any such conditions must be valid for the purposes of the Mining Act and must not lack certainty or finality<sup>2</sup>.

### 6.2 Using standard 'no mining' conditions

Aside from the use of Access Agreements, DMIRS imposes standard conditions on the grant of a mining tenement.

Private railways co-exist with other mining tenure. There is no reason why other mining tenements should not be granted if these railways are adequately protected with a standard condition. Therefore, there is no requirement for holders or operators of private railways to request the standard condition be imposed through MOPDs.

#### 6.2.1 Protection of private railways

The Minister has given consideration, and agreed to, protect private railways operating for the purposes of the mining industry by imposing a standard 'no mining' condition listed in Appendix 2. This condition will be applied on the grant of any tenement that encroaches on these railways by the Minister's delegate.

#### 6.2.2 Using standard 'no mining' conditions in other situations

The Minister may protect a certain area of land by imposing a standard 'no mining' condition over that land identified using a File Notation Area (FNA) in Tengraph. This standard 'no mining' condition is listed in Appendix 3.

#### 6.2.3 Using standard 'no mining' conditions under sections 24, 24A, and 25 of the Mining Act

It is the practice of DMIRS to impose a 'no mining' condition in respect to reserve lands where 50 per cent or less of the land applied for is affected by reserved lands, and the applicant has not specifically requested consent to undertake mining activity within the reserved land.

Where encroachment is greater than 50 per cent then referrals under section 24 and 25 are generally made prior to the application being determined. See information pamphlet [Grant of mining tenements involving reserved lands](#).

<sup>2</sup> Blue Ribbon decision [9]

### 6.3 Using non-standard 'no mining' conditions in MOPDs

Parties may request the Minister to impose non-standard conditions (through the use of MOPDs) if it is considered that access agreements or standard conditions do not adequately protect their interests.

Any request for the Minister to impose:

- a variation to a standard 'no mining' condition;
- a variation to any other approved DMIRS standard condition; or
- any other non-standard condition;

must be supported by a submission for the Minister's consideration.

The submission must be provided to the Warden for consideration when making a recommendation to the Minister.

The submission should provide all relevant information to enable the Minister to consider if the proposed variation to a standard condition or non-standard condition should be applied.

#### 6.3.1 Grounds to justify using a non-standard 'no mining' condition

The Minister may impose a non-standard 'no-mining' condition upon the submission of sufficient information. In each situation, the parties should provide the decision maker with the following:

- a) The purpose of the condition and how the proposed condition meets that purpose.
- b) Information on whether the proposed condition can be validly imposed.
- c) Information on whether the proposed condition lacks certainty or finality and is for the purpose of the Mining Act.

For example, the condition –

"The holder must maintain pastoral access roads on the pastoral lease that are used by the holder, at the holder's cost, to the satisfaction of the pastoral lease holder."

requires the holder to meet the costs of maintaining access roads to the satisfaction of the pastoral lease holder. In effect, it purports to require the holder to meet the cost of the maintenance of the roads on the pastoral lease, to an unknown standard determined by the pastoral lease holder, without any limitations. The condition could empower the pastoral lease holder to set a requirement which is not commercially reasonable, nor able to be met. Such a condition would lead to future disputes about the holder's obligations to maintain relevant roads.

- d) Any existing DMIRS standard conditions for that purpose and why it does not provide sufficient protection.
- e) Current legislative protections for that purpose and why it is considered these protections are inadequate.

For example, the *Dangerous Goods Safety Act 2004* regulates the storage, transport and use of explosives including the imposition of penalties for failure to take all reasonably practicable measures to minimise the risk to people, property and the environment.<sup>3</sup>

- f) If the purpose of the proposed condition could and should be addressed in the Programme of Work required prior to any ground disturbances.
- g) If a safety or exclusion zone is requested, the justification for that zone and the distances proposed.
- h) Any other relevant information specific to the situation.

All requests for a non-standard condition must include this information before they are considered by the decision maker on a case by case basis. Requests will not be progressed until this information is provided.

The Minister may impose a non-standard condition where it is considered that the circumstances for the non-standard condition are reasonable, and the proposed condition has been justified using the above criteria.

<sup>3</sup> Section 8 of the *Dangerous Goods Safety Act 2004*

## **7 Requesting other non-standard conditions in MOPDs**

Any requests for the decision maker to impose conditions on the grant of a mining tenement that are not on DMIRS' list of [Standard Conditions](#), must be supported by a submission as referred to in [6.3.1].

## **8 Impacts on other tenement types**

The guidance outlined at [6] or [7] for exploration licences is also applicable to other mining tenement types.

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## Appendix 1: Glossary

<b>Access agreement</b>	A land access agreement is negotiated between an applicant for a mining tenement and a landholder or occupier (usually an objector to the application for that mining tenement) relating to access rights to the land. It can contain clauses regulating damage and compensation to the objector's land.
<b>Blue Ribbon decision</b>	<i>Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd</i> [2022] WASC 362
<b>Decision maker</b>	The Minister, Warden or Mining Registrar as the case may be
<b>DMIRS</b>	Department of Mines, Industry Regulation and Safety
<b>Mining Act</b>	<i>Mining Act 1978</i>
<b>Mining tenement</b>	Defined in section 8 of the Mining Act
<b>Minister</b>	The Minister for Mines and Petroleum
<b>MOPD</b>	Minutes of Programming Directions Sought by Consent Also known as: Minutes of Programming Directions Minutes of Proposed Orders by Consent Minutes of Consent Programming Orders Minutes of Orders Sought by Consent Minutes of Directions Sought by Consent Minutes of Proposed Directions Minutes of Consent Directions
<b>'No mining' Condition</b>	Any condition imposed on a mining tenement under the Mining Act that prohibits mining within a specific area.
<b>Non-standard Condition</b>	A condition applied by DMIRS on the grant of a mining tenement that is not a standard condition.
<b>Private land</b>	Defined in section 8 of the Mining Act
<b>Reserved lands</b>	Included reserved lands defined in section 24(1), townsites, foreshore, seabed and navigable waters.
<b>Standard Conditions</b>	A set of conditions applied by DMIRS on the grant of mining tenements. <a href="#">Link to Standard Conditions</a>
<b>Tengraph</b>	DMIRS' electronic plan

## **Appendix 2: Standard 'no mining' condition for the protection of private railways**

The following standard condition will be imposed by the Minister's delegate or the Mining Registrar as the case may be on the grant of any mining tenement that encroaches on a private railway:

No mining within 100 metres of either side and to a depth of 30 metres from the natural surface of the land (being the Consultation Area), of the centreline of <option a> (and any rail sidings) without the mining tenement holder and the holder of the railway reaching agreement on mining activities to be undertaken within the Consultation Area.

(option-a – private railway)

## **Appendix 3: Standard 'no mining' condition for the protection of 'other' discrete areas of land**

The following standard condition will be imposed by the Minister's delegate or the Mining Registrar as the case may be on the grant of any mining tenement that encroaches on an FNA identified by the Minister as land to be protected.

No mining on <option-a> without the written consent of the Minister responsible for the Mining Act 1978.

(option-a - the area of land to be protected e.g. FNA XXX)

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