

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

At present under section 62 of the Mining Act 1992 (the Act), a mining lease may not be granted over the surface of any land on which is situated any improvement (which covers things such as substantial buildings or dams or other valuable works or structures) except with the consent of the owner of the improvement. Section 63 of the Act also provides that a mining lease may not be granted otherwise than in accordance with Part 2 of Schedule 1 to the Act (which contains provisions requiring the relevant landholder to be notified about the application for the lease). Once notified of the application, the landholder may claim that a work or structure on the land is an improvement for the purposes of section 62 of the Act. Anything identified in such a claim is taken to be an improvement unless the applicant for the mining lease objects (in which case the dispute as to whether the thing is an improvement is to be decided by a mining warden).

In *Ulan Coal Mines v Minister for Mineral Resources and Anor* [2008] NSWCA 174, the NSW Court of Appeal held that the claim process is optional for landholders and the fact that a claim is not made within the required 28-day period after the landholder is notified is not determinative as to whether the owner of the improvement has consented to the granting of the mining lease.

The object of this Bill is to amend the Mining Act 1992 to clarify the circumstances in which consent is required under section 62 of the Act to a mining lease over land on which an improvement is situated. As a result of the proposed Act, the consent of the owner of an improvement will only be required if the improvement is one that is taken to be an improvement in accordance with the existing notification and claims procedures set out in Part 2 of Schedule 1 to the Act.

The Bill also makes a number of minor and consequential amendments, including transitional provisions that deal with pending applications for mining leases and that validate existing mining leases granted on the basis that the consent of the owner of an improvement was given because the owner did not make a claim.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the Mining Act 1992 set out in Schedule 1.

Clause 4 amends the Mining Amendment Act 2008 to repeal an uncommenced amendment to section 62 of the Mining Act 1992. The amendment is to be re-inserted in a modified form as a consequence of the amendments made by the proposed Act (see Schedule 1 [5]).

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Schedule 1 [4] and [6] amend section 62 of the Act so that the consent of the owner of an improvement on land to a mining lease being granted over the land will only be required if the improvement has been identified by the landholder in a claim made in accordance with the existing notification and claims procedures. If the improvement is declared not to be an improvement for the purposes of section 62 by a mining warden as the result of an objection by the applicant for the mining lease, the consent of the owner will not be required.

Schedule 1 [5] replicates an uncommenced amendment in the Mining Amendment Act 2008 which makes it clear that an applicant for a mining lease (or a related

corporation of the applicant) who is the owner of a dwelling-house, garden or improvement situated on land over which the lease is sought is not required to consent to the lease. The amendment also confers on the Warden's Court, rather than a warden and the Minister, jurisdiction relating to disputes under section 62 of the Act, but only in relation to matters concerning the consent of owners of dwelling-houses or gardens. Disputes relating to improvements on land will be dealt with in accordance with the existing notification and claims procedures which enable the applicant for the mining lease to object to the landholder's claim that something on the land is a significant improvement.

Schedule 1 [14] inserts a new definition of significant improvement in the Dictionary to the Act. The definition uses essentially the same wording that is currently used in various provisions of the Act (including section 62) to define those things that are improvements on land for the purposes of the Act. The amendments made by Schedule 1 [1]–[3] and [7]–[11] are consequential on the consolidation of these various provisions into the new definition.

Schedule 1 [12] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Schedule 1 [13] inserts savings and transitional provisions as a consequence of the enactment of the proposed Act. The amendments made by the proposed Act will extend to applications for mining leases lodged, but not determined, before the commencement of the proposed Act. Special provision is also made in the case of any application lodged before the commencement of the proposed Act where the 28-day period in which the owner was entitled to make a claim ended on or before 7 August 2008 (the day before the decision in Ulan). Regardless of whether the mining lease has been granted, the owner's consent will be taken to have been given to the lease if a claim was not made within the 28-day period. Any existing mining lease granted on this basis (including any lease that was the subject of the decision in Ulan) is validated by the proposed Act. In the case of other pending applications, the 28-day period in which the owner can make a claim will run from the commencement of the proposed Act.