

LEGISLATIVE COUNCIL

Mining and Petroleum Legislation Amendment (Harmonisation) Bill 2015

First print

Proposed amendments

No. 1 **Responsible prospecting and mining**

Page 99. Insert after line 34:

**Schedule 3 Responsible prospecting and mining—
protecting land, water and communities**

Part 1 Preliminary

1 Definitions

(1) In this Schedule:

authorised mining or petroleum activity means any of the following:

- (a) prospecting for minerals in accordance with a mining authorisation,
- (b) mining in accordance with a mining authorisation,
- (c) carrying out primary treatment operations necessary to separate minerals from the material from which they are recovered in accordance with a mining authorisation,
- (d) carrying out any other mining purpose in accordance with a mining authorisation,
- (e) prospecting for petroleum in accordance with a petroleum title,
- (f) assessing any petroleum deposit on land in accordance with a petroleum title,
- (g) conducting petroleum mining operations in accordance with a petroleum title,
- (h) conducting speculative geological, geophysical or geochemical surveys or scientific investigations in relation to petroleum in accordance with a petroleum title.

critical industry cluster land means land that has been declared to be critical industry cluster land under clause 22.

Department means the Department of Industry, Skills and Regional Development.

development has the same meaning as in the *Environmental Planning and Assessment Act 1979*.

gateway certificate means a certificate issued by the Gateway Panel under clause 14.

Gateway Panel means the Mining and Petroleum Gateway Panel established under clause 19.

mine means to extract material from land for the purpose of recovering minerals or petroleum from the material so extracted or to rehabilitate land (other than a derelict mine site) from which material has been extracted.

mineral means any substance prescribed by the regulations under the *Mining Act 1992*, and includes coal and oil shale, but does not include uranium or petroleum.

mining authorisation means an authorisation within the meaning of the *Mining Act 1992*.

petroleum has the same meaning as in the *Petroleum (Onshore) Act 1991*.

petroleum mining operations means operations carried out in the course of mining for petroleum.

petroleum prospecting operations means operations carried out in the course of prospecting for petroleum.

petroleum title has the same meaning as in the *Petroleum (Onshore) Act 1991*.

planning approval means any of the following:

- (a) development consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (including consent for State significant development) or the modification of any such development consent,
- (b) the modification of an approval given (before the commencement of this Schedule) under Part 3A of that Act to carry out a project,
- (c) an approval within the meaning of Part 5 of that Act or the modification of such an approval,
- (d) an approval of State significant infrastructure under Part 5.1 of that Act or the modification of such an approval.

prospecting for minerals means carrying out works on, or removing samples from, land for the purpose of testing the mineral bearing qualities of the land.

prospecting for petroleum means carrying out works on, or removing samples from, land for the purpose of testing the quality and quantity of petroleum in the land and the potential to recover petroleum from the land.

protected land has the meaning given by clause 2.

relevant criteria—see clause 13.

Secretary means the Secretary of the Department.

- (2) Notes included in this Schedule do not form part of this Schedule.

Part 2 Protected land

2 Meaning of “protected land”

In this Schedule:

protected land means any of the following:

- (a) land reserved as a national park or state conservation area under the *National Parks and Wildlife Act 1974* and land within 2 kilometres of such land,
- (b) land dedicated as a State forest under the *Forestry Act 2012* and land within 2 kilometres of such land,
- (c) land within the Sydney catchment area (within the meaning of the *Water NSW Act 2014*) and land within 2 kilometres of such land,
- (d) land within any of the following zones under a local environmental plan that adopts the standard instrument prescribed by the *Standard*

Instrument (Local Environmental Plans) Order 2006 and land within 5 kilometres of such land:

- (i) Zone R1 General Residential, Zone R2 Low Density Residential, Zone R3 Medium Density Residential, Zone R4 High Density Residential, Zone R5 Large Lot Residential or another residential zone (however described),
 - (ii) Zone B1 Neighbourhood Centre, Zone B2 Local Centre, Zone B3 Commercial Core, Zone B4 Mixed Use, Zone B5 Business Development, Zone B6 Enterprise Corridor, Zone B7 Business Park, Zone B8 Metropolitan Centre or another business zone (however described),
 - (iii) Zone IN1 General Industrial, Zone IN2 Light Industrial, Zone IN3 Heavy Industrial, Zone IN4 Working Waterfront or another industrial zone (however described),
- (e) land within any of the following zones under a local environmental plan that does not adopt that standard instrument and land within 5 kilometres of such land:
- (i) a residential zone (however described),
 - (ii) a business zone (however described),
 - (iii) an industrial zone (however described),
- (f) strategic agricultural land, being land that has high quality soil and water resources capable of sustaining high levels of agricultural productivity identified as such under a scientifically-based land classification system declared by the Minister for Primary Industries by notice published in the Gazette, but not including any land of a kind excluded by the regulations, and land within 2 kilometres of such land,
- (g) land within a protected catchment area declared under clause 3,
- (h) land that has been declared to be Tier 1 Biodiversity land under clause 4 and land within 2 kilometres of such land,
- (i) land described as one of the following on the Strategic Agricultural Land Map within the meaning of the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* and land within 2 kilometres of such land:
- (i) biophysical strategic agricultural land,
 - (ii) critical industry cluster land (equine),
 - (iii) critical industry cluster land (viticulture),
- (j) land within the Liverpool Plains (being the low-lying depositional areas of soil accumulation such as alluvial plains, footslopes and fans that are contained within the Liverpool Plains water catchment, as shown on the Soil and Land Resources of the Liverpool Plains Catchment Map deposited in the office of the Department) and land within 2 kilometres of such land.

3 Declaration of protected catchment areas

- (1) The Minister administering the *Water Management Act 2000* must, within 3 months after the commencement of this Schedule, recommend to the Governor the making of regulations declaring areas to be protected catchment areas.
- (2) A protected catchment area declared under this clause must not be reduced in size, and a regulation declaring an area of land to be a protected catchment area must not be repealed, unless authorised by an Act of Parliament.
- (3) A regulation made under this clause is not subject to staged repeal by section 10 of the *Subordinate Legislation Act 1989*.

4 Declaration of Tier 1 Biodiversity land

The Minister administering the *Threatened Species Conservation Act 1995* may, by notice published in the Gazette, declare land to be Tier 1 Biodiversity after taking into account the following:

- (a) the need for the protection of vegetation in threatened and over-cleared landscapes,
- (b) the need for the protection of poorly reserved and severely depleted landscapes,
- (c) the need for the protection of source habitats for native fauna,
- (d) the need for the protection of critical landscape corridors and landscape connectivity.

5 Inventory of protected land

- (1) The Secretary is to maintain an inventory of protected land.
- (2) The inventory is to contain maps that enable protected land to be identified and must be made available for public inspection on the Department's website.

6 Disputes in relation to protected land

If any dispute arises as to whether or not any particular land is protected land, any party to the dispute may apply to the Land and Environment Court for a determination of the matter (in which case the Court has jurisdiction to hear and determine the matter).

Part 3 Prohibition on new prospecting or mining on protected land

7 Prohibition on granting of mining authorisations relating to protected land

The Minister administering the *Mining Act 1992*, and the Secretary, must not invite applications for, or grant, any mining authorisation in relation to protected land.

8 Prohibition on granting of petroleum titles relating to protected land

The Minister administering the *Petroleum (Onshore) Act 1991* must not invite applications for, or grant, any petroleum title in relation to protected land.

9 No compensation

Compensation is not payable by or on behalf of the State:

- (a) because of the enactment or operation of this Part, or
- (b) because of any direct or indirect consequence of any such enactment or operation (including any conduct under the authority of any such enactment), or
- (c) because of any conduct relating to any such enactment or operation.

10 Part extends to pending applications

This Part extends to require the refusal of an application or tender for a mining authorisation or petroleum title made but not decided before the commencement of this Part.

Part 4 Restrictions on mining and prospecting operations on protected land

11 Regard must be had to gateway certificate before giving planning approval in relation to protected land

- (1) Planning approval cannot be given or granted under the *Environmental Planning and Assessment Act 1979* for development for any of the following purposes unless a gateway certificate has been issued in relation to the development and the person or authority responsible for giving or granting the approval has had regard to the gateway certificate:
 - (a) prospecting for any mineral on, over or beneath the surface of protected land,
 - (b) mining for any mineral on, over or beneath the surface of protected land,
 - (c) petroleum prospecting operations on, over or beneath the surface of protected land,
 - (d) petroleum mining operations on, over or beneath the surface of protected land.
- (2) Any planning approval that is given or granted in contravention of this clause after the commencement of this Schedule has no effect.

12 Applications for gateway certificates

- (1) An application for a gateway certificate in respect of proposed development for any of the following purposes must be made to the Gateway Panel:
 - (a) prospecting for any mineral on, over or beneath the surface of protected land,
 - (b) mining for any mineral on, over or beneath the surface of protected land,
 - (c) petroleum prospecting operations on, over or beneath the surface of protected land,
 - (d) petroleum mining operations on, over or beneath the surface of protected land.
- (2) An application may be made only by the person who proposes to carry out the proposed development.
- (3) The application may be made only if notice of the application is given:
 - (a) by advertisement published in a newspaper circulating in the area in which the development is to be carried out no later than 60 days before the application is made, and
 - (b) by written notice to the owners and occupants of land within 5 kilometres of the proposed development no later than 60 days before the application is made, and
 - (c) if the applicant is not the owner of the land concerned—by written notice to the owner of the land no later than 60 days before the application is made.
- (4) An application must be in writing in the form (if any) approved by the Gateway Panel from time to time and must include the following information:
 - (a) the name and address of the applicant,
 - (b) the address, and particulars of title, of the subject land,
 - (c) a description of the proposed development that involves an authorised mining or petroleum activity,
 - (d) whether the land is critical industry cluster land.

13 Relevant criteria for determining applications

- (1) The Gateway Panel must determine whether development that is the subject of an application for a gateway certificate meets the following criteria (the *relevant criteria*):
 - (a) in relation to agricultural land—that the proposed development will not significantly reduce the agricultural productivity of any agricultural land, based on a consideration of the following:
 - (i) any impact on the land through surface area disturbance and subsidence,
 - (ii) any reduced access to, or any impact on, water resources,
 - (iii) any impact on soil fertility, effective rooting depth or soil drainage,
 - (iv) any increase in land surface micro-relief, soil salinity, rock outcrop, slope and surface rockiness or any significant changes to soil acidity or alkalinity,
 - (v) any fragmentation of agricultural land uses,
 - (vi) any reduction in the area of biophysical strategic agricultural land,
 - (b) in relation to critical industry cluster land—that the proposed development will not have a significant impact on critical industry cluster land based on a consideration of the following:
 - (i) any impact on the land through surface area disturbance and subsidence,
 - (ii) any reduced access to, or any impact on, water resources and agricultural resources,
 - (iii) any reduced access to, or any impact on, support services and infrastructure,
 - (iv) any reduced access to transport routes,
 - (v) any loss of scenic, cultural and landscape values,
 - (vi) any significant fragmentation of the critical industry cluster land,
 - (c) in relation to water resources—that the proposed development will not have a significant impact on a water resource based on a consideration of the following:
 - (i) any impact on the hydrology of a water resource,
 - (ii) any impact on the water quality of a water resource,
 - (iii) any reduction, or material risk of a reduction, in the current or future utility of the water resource for third-party users, including environmental and other public benefit outcomes,
 - (iv) any significant impact on an aquifer through the penetration of an aquifer, the interference with water in an aquifer or the obstruction of the flow of water in an aquifer,
 - (d) in relation to ecological communities—that the proposed development will not have a significant impact on a species, population or ecological community listed under the *Threatened Species Conservation Act 1995* as critically endangered, endangered or vulnerable based on a consideration of the following:
 - (i) any reduced access to, or impact on, water resources,
 - (ii) any significant change in community structure,
 - (iii) any significant change in species composition,
 - (iv) any significant disruption of ecological processes,
 - (v) any significant invasion and establishment of exotic species,
 - (vi) any significant habitat degradation or fragmentation,

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- (e) that the proposed development will not make a significant contribution to climate change based on consideration of the following:
 - (i) the total greenhouse gas emissions directly attributable to the development,
 - (ii) the life cycle greenhouse gas emissions associated with the processing, transport and primary use, including combustion, of any mined mineral or petroleum,
 - (iii) any reduction in greenhouse gas emissions made elsewhere to offset the emissions attributable to matters in subparagraphs (i) and (ii),
 - (f) that the proposed development will not have a significant impact on Aboriginal cultural heritage based on a consideration of the following:
 - (i) any impact on places, objects and features (including biological diversity) of significance to Aboriginal people,
 - (ii) any impact on the remains of the bodies of deceased Aboriginal persons (other than those remains buried in a cemetery in which non-Aboriginal persons are also buried),
 - (iii) any impact on any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction,
 - (iv) any impact on any area associated with a person, event or historical theme, or containing a building, place, object, feature or landscape of natural or cultural significance to Aboriginal people or of importance in improving public understanding of Aboriginal culture and its development and transitions.

(2) In this clause:

agricultural land means any of the following:

- (a) land that has been sown with not less than 2 crops of an annual species during the period of 10 years immediately preceding the date on which the application for a gateway certificate was made,
- (b) land that has been sown with 1 crop of an annual species during the period of 10 years immediately preceding the date on which the application for a gateway certificate was made if the Secretary is satisfied that:
 - (i) having regard to the date on which the land was brought under cultivation, it would not be reasonable to expect more than one such crop to have been sown, and
 - (ii) there was a sufficient reason for not having brought the land under cultivation at an earlier date,
- (c) land on which:
 - (i) at the date on which the application for a gateway certificate is made, shade, shelter or windbreak trees are growing, or
 - (ii) at any time during the period of 10 years immediately preceding that date, edible fruit or nut bearing trees, vines or any other perennial crop approved by the Secretary have or has been growing,
- (d) pastures:
 - (i) that are sown with seed of a species and at a rate of application, or treated with fertiliser of a composition and at a rate of application, satisfactory to the Secretary, and

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- (ii) that have, as a result of that sowing or treatment, maintained a level of pasture production that is substantially above that which might be expected of natural pastures,
 - (e) land that is used, to an extent acceptable to the Secretary, for the production of grass seed, pasture legume seed, hay or silage,
 - (f) land that has a preponderance of improved species of pasture grasses.

14 Determination of applications

- (1) The Gateway Panel must determine whether development that is the subject of an application for a gateway certificate meets the relevant criteria.
- (2) In forming an opinion as to whether proposed development meets the relevant criteria, the Gateway Panel is to have regard to:
 - (a) whether or not there is a real or not remote chance or possibility that an impact referred to in clause 13 will directly or indirectly occur as a result, and
 - (b) the duration, extent and intensity of any impact referred to in clause 13, and
 - (c) any proposed avoidance, mitigation, offset or rehabilitation measures in respect of any such impact, and
 - (d) the cumulative impact of the proposed development in addition to existing development.
- (3) If the Gateway Panel determines that development that is the subject of an application for a gateway certificate does meet the relevant criteria the Panel must issue a gateway certificate in accordance with this Part.
- (4) A gateway certificate must state that the Gateway Panel is of the opinion that the proposed development meets the relevant criteria.
- (5) If the Gateway Panel determines that development that is the subject of an application does not meet the relevant criteria then the Panel must refuse to issue a gateway certificate.
- (6) The Gateway Panel may, in refusing an application:
 - (a) include recommendations to address the failure of the proposed development to meet the relevant criteria, and
 - (b) include recommendations that specified studies or further studies be undertaken by the applicant regarding the proposed development.
- (7) If the Gateway Panel determines that development that is the subject of an application does not meet the relevant criteria:
 - (a) the applicant may resubmit a modified application within 6 months of that determination, and
 - (b) if the modified application is refused, a new application must be made if a gateway certificate is still required.

15 Time for determination of applications

- (1) The Gateway Panel must determine an application for a gateway certificate within 180 days of the application being made.
- (2) If the Gateway Panel does not determine an application before the expiry of that period, the Secretary is, by order in writing, to direct the Panel to make a determination in respect of the proposed development within 30 days of the direction or within such longer period as is specified in the direction.
- (3) If the Gateway Panel does not issue a gateway certificate within the period required by such a direction, the Panel must, immediately after the expiry of that period, issue a gateway certificate in respect of the proposed development.

16 Gateway Panel may request further information before determining application

- (1) The Gateway Panel may request that the applicant for a gateway certificate provide the Panel with further information. No more than one such request may be made in respect of an application.
- (2) The applicant must provide that information within 30 days of the request being notified to the applicant.
- (3) During the period beginning on the notification of the request and ending on the provision of the relevant information or the expiry of the 30-day period (whichever occurs first), time ceases to run for the purpose of calculating the time periods referred to in clause 15.
- (4) If an applicant fails to provide the Gateway Panel with the requested information within the 30-day period, the Panel must refuse the application for a gateway certificate.
- (5) For the avoidance of doubt, the Gateway Panel:
 - (a) may not make a request under this clause after the expiry of the 180-day period referred to in clause 15, and
 - (b) may, in determining an application, have regard to any requested information provided after the expiry of the 30-day period referred to in subclause (2).

17 Duration of gateway certificates

A gateway certificate remains current for a period of 5 years (or such shorter period as is specified in the certificate) after the date on which it is issued by the Gateway Panel.

18 Notification of gateway certificates

- (1) The Gateway Panel must:
 - (a) notify the applicant in writing of its determination of the application, and
 - (b) if it issues a gateway certificate, give a copy of the gateway certificate to the applicant.
- (2) The Gateway Panel must give a copy of the following documents to the Secretary and must cause any such copy to be published on the Gateway Panel's website (or, if there is no such website, the Department's website):
 - (a) each application for a gateway certificate,
 - (b) the determination made in relation to each application,
 - (c) any written advice received by the Gateway Panel,
 - (d) each gateway certificate issued by the Gateway Panel.

Part 5 Gateway Panel

19 Constitution of Mining and Petroleum Gateway Panel

- (1) The Minister is to establish a Mining and Petroleum Gateway Panel.
- (2) The Gateway Panel is to consist of the following persons appointed by the Governor:
 - (a) a person nominated by the Minister, being a person who the Minister is satisfied has appropriate expertise in geology and geotechnical engineering,
 - (b) a person nominated by the Minister for the Environment, being a person who that Minister is satisfied has appropriate expertise in ecology and natural resource management,

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- (c) a person nominated by the Minister for the Environment, being a person who that Minister is satisfied has appropriate expertise in the impact of climate change,
 - (d) a person nominated by the Minister for Lands and Water, being a person who that Minister is satisfied has appropriate expertise in hydrology and water management,
 - (e) a person nominated by the Minister for Primary Industries, being a person who that Minister is satisfied has appropriate expertise in agriculture,
 - (f) a person nominated by the Minister for Aboriginal Affairs, being a person who that Minister is satisfied has appropriate expertise in the identification and preservation of Aboriginal cultural heritage,
 - (g) a person nominated by the Minister for Industry, Resources and Energy, being a person who that Minister is satisfied has appropriate expertise in mining and petroleum activities.
- (3) A person is ineligible to be appointed to, or hold office as a member of, the Gateway Panel if the person has entered into any contract or arrangement with a person who holds a mining authorisation or petroleum title, or with a person who is responsible for the carrying out of an authorised mining or petroleum activity.
 - (4) A member of the Gateway Panel vacates office if the member enters into any contract or arrangement with a person who holds a mining authorisation or petroleum title or with a person who is responsible for the carrying out of an authorised mining or petroleum activity.
 - (5) A member of the Gateway Panel:
 - (a) holds office for 3 years, and
 - (b) is entitled to such remuneration, if any, and to the payment of such expenses, if any, as are determined by the Minister.
 - (6) The procedure at meetings of the Gateway Panel is to be determined by the Panel.
 - (7) The quorum at a meeting of the Gateway Panel is a majority of the members.

20 Function of Gateway Panel

The function of the Gateway Panel is to consider applications for gateway certificates.

21 Gateway Panel not subject to Ministerial direction

The Panel is not subject to the direction or control of the Minister, except to the extent specifically provided for in this Schedule.

22 Declaration of critical industry cluster land

- (1) The Minister administering the *Agricultural Industry Services Act 1998* and the Minister administering the *Destination NSW Act 2011* are to develop and implement a process for accepting applications from persons for land to be declared to be critical industry cluster land.
- (2) The Minister administering the *Agricultural Industry Services Act 1998* or the Minister administering the *Destination NSW Act 2011* may, by notice published in the Gazette, declare land to be critical industry cluster land, after taking into account the following:
 - (a) whether there is a concentration of enterprises on the land that provides development and marketing advantages,
 - (b) whether the productive industries located on the land are interrelated,

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- (c) whether the land consists of a unique combination of factors such as location, infrastructure, heritage and natural resources,
 - (d) whether the land is of national or international importance (or both),
 - (e) whether the land use involves an iconic industry that contributes to the region's identity,
 - (f) whether the land is potentially substantially impacted by coal seam gas or other mining or prospecting proposals.

Part 6 Miscellaneous

23 Regulations

The Governor may make regulations, not inconsistent with this Schedule, for or with respect to any matter that by this Schedule is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Schedule.

24 Savings and transitional regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the *Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015* or any Act that amends this Schedule.
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

25 Delegation

The Secretary may delegate the exercise of any function of the Secretary under this Schedule (other than this power of delegation) to:

- (a) any member of staff of the Department, or
- (b) any person, or any class of persons, authorised for the purposes of this clause by the regulations.