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PRIVATE LAND PROVISIONS



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Crown ownership of minerals

Except in the case of land alienated in fee simple before the 1 January, 1899 (in which case minerals other than gold, silver and precious metals are the property of the owner), all minerals are the property of the Crown.

Section 9

The following, when they occur on private land, are not minerals – limestone, rock, gravel, shale (other than oil shale), sand (other than mineral sands, silica sand or garnet sand) and clay (other than kaolin, bentonite, attapulgite or montmorillonite).

Extraction of these minerals when on private land is not governed by the *Mining Act 1978*.

Section 8

To extract or explore for other minerals on private land a mining title must be obtained from the Department of Mines, Industry Regulation and Safety (DMIRS) before any mining operations may be undertaken.

Minerals to owner land

Meaning

Minerals to owner land refers to freehold land where the mineral rights are owned by the landowner and not the Crown, [the exception being gold, silver and precious metals (the Royal metals) which are owned by the Crown].

Minerals to owner land only applies in respect to **land which was granted prior to 1899**.

Background – History on settlement

Upon settlement the law of England, both statutory and common law, applied to the colony of Westralia Australia (WA).

On the grant of land by the Colonial Governor, the rights conferred were determined by the common law and under that law there was a presumption that the owner of the land also owned everything on or below the surface of that land, including all minerals.

There is an exception to this presumption, the Crown held exclusive reservation to the ownership of the “Royal metals” being gold, silver and precious metals; whether situated on Crown land or private land.

Grants made prior to 1899

The grant of land made prior to 1899 passed title to the minerals (except for the Royal metals) therefore the landowner has the right to exploit and deal with the minerals including the right to mine and sell them.

Over time some of these mineral rights to pre-1899 land may have become separated from the land, meaning the owner of the pre-1899 land and the owner of the minerals may be different, this separation can occur in two ways:

- the outright sale of the mineral rights, common law permitted title to land to be divided vertically or horizontally, for example a land owner could sell a strata of land beneath the surface containing minerals eg coal seam.
- profit a prendre – a separate grant of the rights to minerals, even a specific mineral carrying with it the right to mine and sell the minerals.

Statutory abolition of private mineral ownership

The enactment of the *Land Act 1898* enabled the colony of WA to depart from the common law practice of granting minerals with the grant of the land. The result is today:

- land held pursuant to a grant **made prior to 1 January 1899** still carries ownership of private minerals, except for the Royal metals,
- but, land held pursuant to a grant **made after 1 January 1899** does not carry ownership of any minerals. In this situation all the minerals are owned by the Crown.

Therefore the principle of the owner of land owning the minerals within it has been virtually abolished in WA except in the older settled areas of the State. The general rule is all grants of freehold title made after the 1 January 1899 provided a reservation that all minerals are reserved to the Crown (in the right of the State).

Mining tenements over pre-1899 land

Mining titles under the *WA Mining Act 1978* confers to the tenement holder the right to exploit all minerals, but where the land affected is pre-1899 land the Crown has rights only in respect to the Royal metals, and ownership to all other minerals will be held by the land owner (unless the mineral ownership has separated from the land ownership).

In such a situation, a mining tenement granted under the *Mining Act 1978* will confer on the tenement holder the right to explore for, or mine gold, silver and precious metals only but will not give any rights to exploit any other mineral.

Mining of minerals other than Royal metals on pre-1899 land

Past approvals for mining minerals on pre-1899 land has generally been granted by Local Government as an Extractive Industry Licence (EIL; *Local Government Act 1995*) or Development Approval (DA; *Planning and Development Act 2005*).

A miner wishing to mine minerals other than the Royal minerals located on pre-1899 land will need to negotiate an access and compensation agreement with the owner of the land (and owner of the minerals) and obtain permission either through a EIL or DA. Any significant proposal may require assessment by the Environment Protection Authority and any mining activity will be subject to the *Mines Safety and Inspection Act 1994*.

Importance of due diligence

It is most important when looking to carrying out mining on freehold land that due diligence is carried out, to not only identify the ownership of the land, but also who owns the minerals.

This due diligence should include undertaking a detailed land title search with LANDGATE to identify the owner of the land and ascertain whether the title to the land was granted before or after 1899.

Land grants post 1899 the Crown will own all the minerals and **land grants prior to 1899** the Crown will have rights to gold, silver and precious metals only.

It should also be noted that this department's spatial map (TENGRAPH) does not identify the location of pre-1899 land but there is a general disclaimer alerting users to the possibility of pre-1899 land existing in certain areas of the State and therefore due diligence must be exercised.

These pre-1899 lands are concentrated in the region around Perth, extending from Busselton to Geraldton, including the former Peel Estate lands in the Mandurah-Rockingham district, another area is the Hampton Lands or East District, between Coolgardie, Kalgoorlie and Kambalda.

Bringing “mineral owned” land back under the Mining Act

There is a process in the *Mining Act 1978* (section 37) for a person to have any private land granted before 1899 brought within the operation of the Act for the purpose of mining minerals.

In summary the process will include:

- A person lodging a section 37 application with the department setting out why the minerals are in payable quantities on that land.
- The Minister may obtain a report from a geologist.
- If the Minister believes the land contains minerals in payable quantities, with the approval of the Governor by notice in the Government Gazette, he declares at the expiration of a certain period the private land shall come within the operation of the Mining Act.
- The private land owner may at any time within a specified period apply for a mining tenement over their land and the Minister may grant that tenement.
- If the land owner fails to apply for a mining tenement then the Minister may grant the person who made the section 37 application a mining tenement.

The following process chart provides more detail about this section 37 process in respect to bringing “mineral owned land” back under the *Mining Act 1978*.

Entry onto private land

Application for permit to enter

No person (except the owner in occupation of the land) may search for minerals on private land without a permit to enter which is issued by a Mining Warden.

Section 28

Form 2 is used to apply for a Permit to Enter and shall be lodged together with a map on which the private land is clearly shown and the prescribed fee per lot or location affected with a prescribed minimum.

Sections 30(1) to (4), regulation 5

Rights of permit holder

The term of a permit to enter shall not exceed 30 days, and the permit only authorises the holder (or his agent) to:

Section 30(3)

- a. enter on private land; Section 32
- b. search for minerals;
- c. detach and remove from the land samples of any vein or lode out-cropping on the surface up to an aggregate weight of 13 kilograms, unless the taking of additional samples is authorised by the owner or occupier of the land; and
- d. mark out a mining tenement, but not mine or otherwise disturb the surface.

Where the holder of a permit to enter marks out and applies for a mining tenement on the private land concerned, the permit shall be deemed to continue in force, for the purpose only of repairing or maintaining the marks so set up and the notices posted thereon, until the application for the mining tenement is determined.

Section 30(3)

Service of permit on owner and occupier

The permit holder (or his agent) shall, on the first occasion that he enters the land after the issue of the permit, hand a copy of the permit to the occupier of the land. If the occupier is not present, the permit holder shall:

Section 31

- a. place a copy of the permit in a prominent position on the occupier's dwelling, or at the main entrance to the land if there is no dwelling; and
- b. in any event, within 48 hours of his entering the land, send a copy of the permit by registered post to the occupier.

Where none of the owners of the land is also in occupation of the land, a copy of the permit must also be sent, within 48 hours of first entering the land after issue of the permit, by prepaid registered post to one of the owners at the registered office in the case of a body corporate, or in other cases to the last known place of abode or business.

Section 31(3)

Mining tenements on private land

Consent of owner and occupier to grant in respect of surface land

Section 29

A mining tenement in respect of the natural surface and to within a depth of 30 metres thereof shall not be granted in respect of private land which is:

- in bona fide and regular use as a yard, stockyard, garden, orchard, vineyard, plant nursery or plantation;
- under cultivation (ie. used for agricultural purposes including cropping or pasturing; whether cleared or uncleared, used for grazing stock in the ordinary course of management of the land);
- the site of a cemetery, burial ground or reservoir (ie. a dam, bore, well or spring)
- land on which there is erected a substantial improvement (as adjudged by the Warden);
- within 100 metres of any private land referred to above;
- a separate parcel of land having an area of 2000 square metres or less;

except with the written consent of the owner and occupier of that land.

Grant of tenement at depth

Where the owner and occupier do not consent; a mining tenement may only be granted in respect of land below a depth of 30 metres from the natural surface.

Section 29

In the case of a mining tenement granted in respect to land below a depth of 30 metres from the natural surface the mining tenement holder may subsequently, should the owner and occupier of the land subsequently consent, apply to have the remaining portion of the land (from the surface to a depth of 30 metres) included in the mining tenement.

Whilst the right to so apply exists, the land from the surface to a depth of 30 metres is not open for mining to any other person.

Section 29(5)

Revestment of private land

Where private land, situated within a current mining tenement, ceases to be private land and reverts to the Crown, that land will automatically be included into any underlying mining tenement.

Section 29

Compensation

No surface mining before compensation agreed/determined

The holder of a mining tenement shall not commence any mining on the surface (or to a depth of 30 metres) unless and until he has paid, or tendered to the owner and occupier the amount of compensation required under the Act, or has made an agreement as to the amount; times and mode of compensation, if any.

Section 35

Basis of compensation

The compensation shall include compensation for being deprived of the possession of the surface or any part of the surface of the private land, and for damage thereon to the surface or the part, and to any improvements thereon, that may arise from the exercise of the rights conferred by the mining tenement, and for the severance of such land from other land of the owner and occupier, and for rights of way and for consequential damages.

Compensation is not payable in any case in respect of the value of any mineral known or supposed to be in, on or under the surface of any land to which a claim for compensation under this Act relates.

Sections 123 and 124

How compensation determined

The amount of compensation shall be determined by agreement between the holder of the mining tenement and the owner and occupier, or in default of agreement, an amount determined by the Warden's Court upon the application of the owner, the occupier or the holder of the mining tenement.

If access is agreed but compensation is not, the holder of a mining tenement and the owner of private land or occupier of Crown land or private land may, consent to have the matter determined by the Warden without requiring any formal proceedings to be taken.

Section 123(3)

Compensation in respect to adjoining land, etc.

Compensation is also payable in respect to adjoining or nearby land injured or depreciated in value by mining operations on a mining tenement.

Section 123(5)

Warden's Court Plaintiff

Actions may be commenced by way of Warden's Court plaintiff relating to the determination of compensation where agreement cannot be reached.

Section 123

Application for mining tenements

Copies to be served

An application for a mining tenement on private land must, within 14 days of the date of application serve a copy of the application (ie. Form 21) together with a map or plan on which the boundaries of the land comprising the proposed mining tenement are clearly defined, on the:

Section 33(1) regulation 7(1)

- a. clerk of the council of the municipality;
- b. the owner and occupier of the private land, (but if there is no occupier the copy shall be affixed in some conspicuous place on the land); and
- c. each mortgagee of the land.

If the time prescribed to serve such copies of the application and map is extended by the Warden, the applicant must then, along with the application and map, serve the affected parties with a written notice that the period for lodging objections is within 21 days of the date of service.

Regulation 7(2)

In cases of sub-surface applications for mining tenements on private land (ie. only for land below a depth of 30 metres from the lowest part of the natural surface), it is not necessary to serve a copy of the application on the:

- i. owner and occupier of the land; or
- ii. each mortgagee of the land.

Section 33(1a)

Sub-surface conditions also apply to reserved land but not vacant Crown land.

Objections

An objection (in the Form No. 16) to the granting of an application that relates to private land shall be made within:

- a. 21 days of the date on which the person was served with a copy of notice required to be given under section 33(1); or
- b. 35 days of the date of the application,

whichever period ends later, or such further period as the Warden considers reasonable.

Regulation 146

Objection (in the Form No 16) can be lodged at any Mining Registrar's office, or electronically (eLodgement) using the department's website.

The owner and occupier of the land and any mortgagee are entitled to be heard before the application is determined.

The Warden may, if in the circumstances of the case warrant, and irrespective of the manner in which the application for the mining tenement is disposed of, order that the applicant pay to the objector or objectors, such sum by way of costs as the Warden orders.

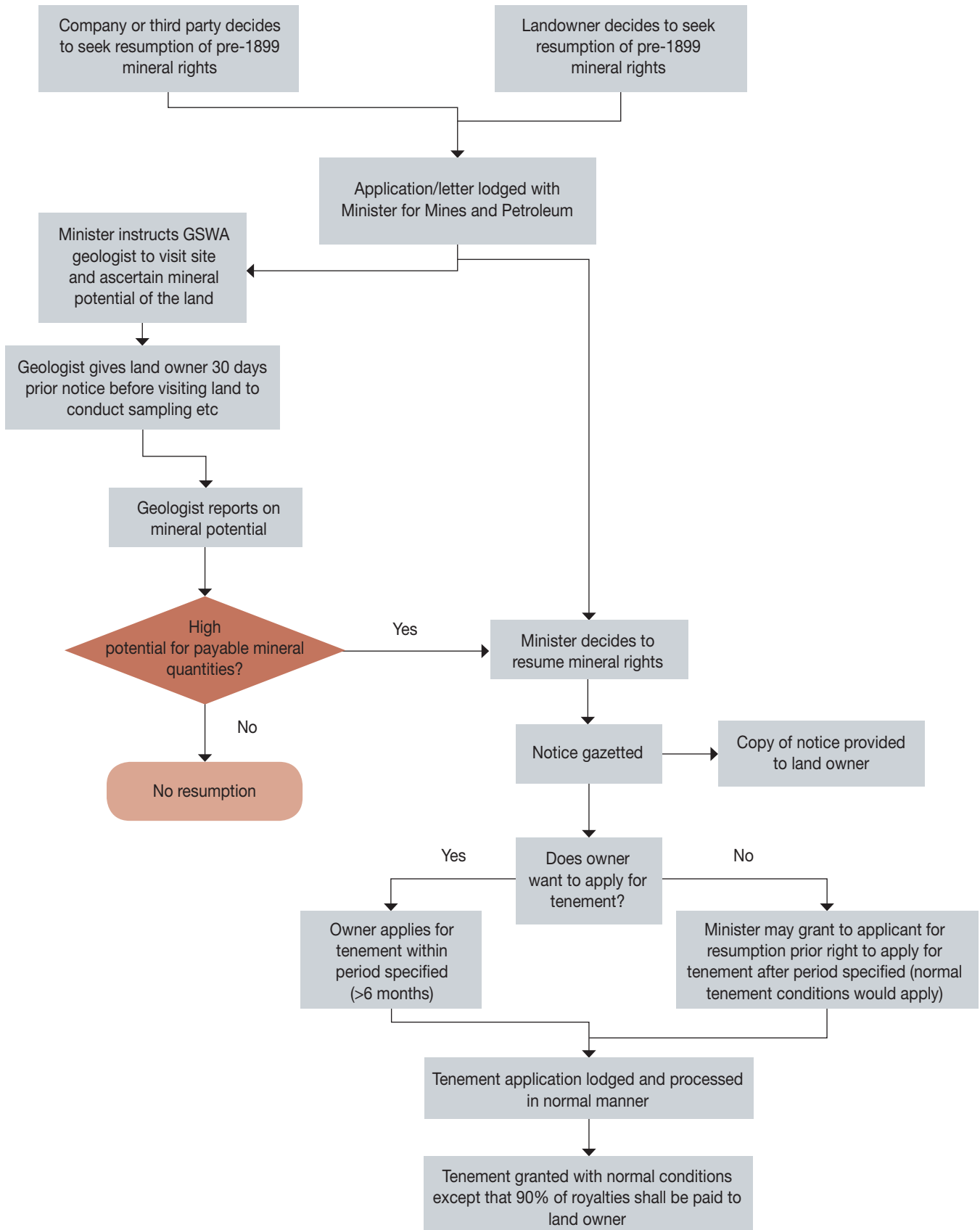
Section 33(2)

eLodgement

Prior to using the eLodgement system, parties will be required to be registered with the department's Mineral Titles Online (MTO) and be issued with the necessary logon details and also agree to the terms and conditions. This registration is free.

Note: Whilst objections to mining tenement applications can be lodged electronically outside of the department's opening hours, i.e 8.30am to 4.30pm (WST), those objections will be deemed to be received at 8.30am (WST) on the next working day.

PROCESS FOR BRINGING MINERALS-TO-OWNER LAND UNDER MINING ACT



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N.B. The information contained in this pamphlet is designed to assist in gaining a general awareness of the requirements of the *Mining Act 1978* and is not intended to be a substitute for understanding the statutory requirements of the Act and Regulations there under.