



Department of **Energy, Mines,  
Industry Regulation and Safety**

Response to submissions

# Guidance statement – Excision of areas of land upon the grant of an application for exploration licence

December 2024



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## Introduction

The 'Guidance statement - Excision of areas of land upon the grant of an application for exploration licence' was prepared to state the position of the Department of Energy, Mines, Industry Regulation and Safety (DEMIRS) with regard to the decision in *Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd [2022] WASC 362 (Blue Ribbon)*.

The guidance statement advised applicants and objectors that the Minister does not have the power to:

- excise areas of land from a block; or
- excise whole blocks

from the grant of an application for an exploration licence.

The Minister does not have the power to excise areas of land the subject of a miscellaneous licence or private land from the grant of an application for an exploration licence, in the sense that the Minister may not grant an exploration licence over part of a block.

It is the position of DEMIRS that the Minister may only grant an exploration licence over an area that consists of an entire block or blocks, unless an exception under the *Mining Act 1978 (Mining Act) applies*<sup>1</sup>.

There are no general powers in the Mining Act which allow for an exploration licence to be granted for a lesser number of blocks than applied for in the original application. The only exceptions are specific circumstance provided for in subsections 57(2b)-(2d) of the Mining Act.

Section 57(2b) applies where an application is made for an exploration licence (Second in time) in respect of three or more blocks, another mining tenement is granted (priority) after an application for an exploration licence is made, but before the licence is granted.

Section 57(2c) applies where an application for an exploration licence is made with respect to one block and the land in respect of which the licence is granted may comprise part of the block if the rest of the block consists of land that is unavailable for exploration.

Section 57(2d) applies where an application for an exploration licence is made with respect to two or more blocks and the land in respect of which the licence is granted may include part of a block if the rest of the block consists of land that is unavailable for exploration.

Only exploration licences are based on graticular blocks. Other tenement types are not based on graticular blocks, the boundaries of other tenement types are delineated through marking out; and the Minister has power to grant mining tenements for lesser areas (see ss 44, 70B, 73, 92 of the MA). Only exploration licences are based on blocks.

## Consultation

The review of the 'Guidance statement - Excision of areas of land upon the grant of an application for exploration licence under the *Mining Act 1978*' was made available for public consultation between 17 November 2023 and 9 February 2024. (Together with the 'Review of Standard Conditions for Mining Tenements' and 'Guidance statement – Use of 'No Mining' conditions under the *Mining Act 1978*').

DEMIRS proactively contacted a range of stakeholders to encourage them to provide submissions to the consultation on the review of standard conditions and guidance statements at the start of the consultation period and also undertook information sessions.

An in-person information session was held on Wednesday 6 December 2023 and an online information session was held on Thursday 7 December 2023.

Consultation was targeted through the Resources Industry Consultative Committee (RICC), key industry bodies, specialist tenement consultant firms, legal representatives, companies, government agencies and other resources industry stakeholders including private railway holders.

At the closure of the public consultation process on 9 February 2024, DEMIRS has received five submissions.

<sup>1</sup> Under section 57 of the Mining Act

## Key themes

### 1. Clarity on DEMIRS policy position

Two out of five submission received requested clarification from DEMIRS on its policy position around whether the Minister has or does not have powers to grant an exploration licence for fewer blocks than has been applied for.

Fortescue Ltd has requested that DEMIRS confirm the position it has set out in paragraph 5.2 of the guidance statement and explain why its views are at odds with the Blue Ribbon decision.

In his decision, Chief Justice Quinlan has stated that *"It may therefore be accepted that there is such a power in the Minister, so long as the requirements of s 57 are otherwise complied with"...*<sup>2</sup>*Section 57(2)(b) in no way contemplates the grant of an exploration licence over part of a block*<sup>2</sup>.

In line with Chief Justice Quinlan decision, DEMIRS policy position is that the Minister does not have power to grant an exploration licence for fewer blocks than applied for except in the specific circumstances provided for in subsection 57(2b)-(2e) of the Mining Act.

DEMIRS policy position remains as stated in the 'Guidance statement - Excision of areas of land upon the grant of an application for exploration licence' under the *Mining Act 1978*.

This applies to any land not just excisions of miscellaneous licences and leases issued under the *Land Administration Act 1997* as in Blue Ribbon.

### 2. Legislative change

Association of Mining and Exploration Companies (AMEC) has suggested another method in which excisions can be dealt with and that is by legislative change.

Currently, the Mining Act is silent on whether the area of land (to be identified by a block or blocks) in respect of which an exploration licence if granted may be less than the area of land in respect of which the exploration licence is sought. The Mining Act does not explicitly allow the grant of fewer blocks than applied for (as stated in Key Theme 1).

During the public consultation presentation, DEMIRS noted that it previously proposed an amendment to s 57(2e) which would have allowed excisions from exploration licences as part of the measures proposed in the *Mining Amendment Bill (No 2) 2022*.

The proposed amendment was to allow the Minister to grant a lesser area than applied for, however, this was removed following industry consultation at the time the *Mining Amendment Bill (No 2) 2022* was being consulted on.

DEMIRS notes that there is now interest in proposed legislative amendments to the Mining Act to allow the Minister explicit powers to grant fewer blocks, similar to that found in section 73 of the Mining Act.

DEMIRS will consider legislative amendments and commence relevant consultation in due course.

<sup>2</sup> Blue Ribbon decision, Paragraph 189

## Response to submissions

Please see Annexure A

Annexure A			
Ref#	Stakeholder	Comment	DEMIRS Response
1	McMahon Mining Title Services Pty Ltd	<p>We understand from meetings with DEMIRS, that based on DEMIRS view that the Minister does not have power to grant an exploration licence for fewer blocks, DEMIRS does not intend to allow applicants to request the excision/exclusion of whole blocks from the grant of an application for an exploration licence for any reason.</p> <p>We understand that DEMIRS also intends to delay processing any exploration licence applications that include a block that is the subject of an earlier application, until the earlier application has been determined (suspending processing of successive applications).</p> <p>Since the introduction of the Successive Pegging Policy – (SP Policy) on 24 November 2003 it has been DEMIRS practice that SP applications where the encroachment is less than 50%, be processed on the basis of excision of the earlier in time application/s still awaiting determination.</p> <p>Prior to Blue Ribbon, it has also been longstanding practice that applicants after application, have been able to apply to the Minister for the excision of whole blocks from exploration licences on grant, as a means to progress or expedite grant where a complicating issue affecting a minority of blocks was delaying grant of the remainder of the application.</p> <p>The approach proposed by DEMIRS is a reversal of the SP policy and return to backlog and delays.</p> <p>The question of the Minister’s power to excise whole blocks from the grant of an exploration licence application (section 5.2 of the Guidance Note) did not properly arise on the special case and Quinlan CJ express no concluded view about it.</p>	<p>DEMIRS’ successive pegging Policy has been redacted from its website for some time now with DEMIRS policy position being that the Minister does not have power to grant an exploration licence over fewer blocks (whole or part).</p> <p>The successive pegging policy is out of scope for the purpose of this public consultation.</p> <p>Please refer to Key Theme 1 at page 4 of the <i>Response to submissions</i> for further information.</p>

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		<p>At this time, the path remains open to DEMIRS to continue to apply the SP Policy and to allow excisions of whole blocks. Given the adverse practical implications, MMTS proposes this is a reasonable and expedient path to choose, unless and until the issue is squarely determined in court in the negative.</p> <p>We propose the current SP policy and ability to excise whole blocks continue until the matter is squarely raised and conclusively determined in court or amended by legislation.</p>	
2	Fortescue Ltd	<p>Paragraph 5.2 of the Guidance Statement states that 'the Minister does not have the power to grant an exploration licence for fewer blocks than have been applied for, other than in circumstances where an application for an exploration licence is made over an area which includes land that is not open for mining'.</p> <p>It is Fortescue's understanding that section 57(2b) of the <i>Mining Act 1978</i> (WA) does give the Minister power to grant an exploration licence for fewer blocks than have been applied for and not just in the circumstances referred to above. In particular, we draw your attention to paragraph 189 of the judgement in <i>Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd [2022] WASC 362</i> (Blue Ribbon decision) that reads:</p>	<p>DEMIRS acknowledges that Fortescue's view in relation to excisions is the same as per FMG Magnetite Pty Ltd and Pilbara Gas Pipeline Pty Ltd comments in the Supreme Court Case <i>Blue Ribbon Mines Pty Ltd v Roy Hill Infrastructure Pty Ltd {2022} WASC 362</i>.</p> <p>Please see Key Theme 1 at page 4 of the <i>Response to submissions</i> for further information.</p>

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Ref#	Stakeholder	Comment	DEMIRS Response
		<p>'Section 57(2b) is drafted upon the assumption that, properly construed, the Mining Act as a whole contemplates that the Minister may, in granting an exploration licence, grant the licence in respect of fewer blocks than were identified in the application. It may therefore be accepted that there is such a power in the Minister, so long as the requirements of s 57 are otherwise complied with. Nevertheless, the fact that even in the circumstances referred to in s 57(2b)(a), (b) and (c), the licence granted must consist of a single block or number of blocks, is consistent with and supports the construction I have reached as to the general requirement to grant exploration licences over a block or blocks. Section 57(2b) in no way contemplates the grant of an exploration licence over part of a block.'</p> <p>It is Fortescue's understanding that this confirms that the Minister has a broad power to grant an exploration licence for fewer blocks than have been applied for. The above statement of the Chief Justice of the Supreme Court of Western Australia provided clarity as to the true interpretation of the section 57(2b) of the <i>Mining Act 1978</i> (WA). The purpose of decisions of superior courts is to provide certainty as to the operation of the law. Paragraph 5.2 of the Guidance Statement is inconsistent with the views of the Chief Justice and therefore creates uncertainty noting that the views of the Supreme Court will ultimately prevail when issues arising from this inconsistency inevitably go back to the Supreme Court.</p> <p>As such, Fortescue requests DEMIRS confirm the position it has set out in paragraph 5.2 of the Guidance Statement and explain why its views are at odds with the Blue Ribbon decision.</p>	

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3	BHP Billiton Group Operations Pty Ltd.	<p><u>Excision of part block (item 5.1)</u></p> <p>The draft guidance statement provides that ‘the Minister does not have the power to excise areas of land the subject of a miscellaneous licence or private land from the grant of an application for an exploration licence, in the sense that the Minister may not grant an exploration licence over part of a block.’ This statement is consistent with the Supreme Court’s decision in Blue Ribbon.</p> <p>However, the statement at the end of item 5.1 that: ‘<i>Given the Minister cannot grant an exploration licence over part of a block, applicants should not request the excision of any land from within a block</i>’ is too broad, in our view, and goes beyond the findings of Blue Ribbon (which only considered the excision of miscellaneous licences and private land).</p> <p>This statement could be read to mean that, if an exploration licence overlaps with another mining tenement (other than a miscellaneous licence), the applicant should not request that the other mining tenement be excised from the grant of the exploration licence. On the above basis, and to accurately reflect the Supreme Court’s findings in Blue Ribbon, we recommend that DEMIRS amend this sentence to read as follows: ‘<i>Given the Minister cannot excise private land or land the subject of a miscellaneous licence from the grant of an exploration licence, applicants should not request that the Minister excise such land from the grant of an exploration licence</i>’.</p>	<p><u>Excision of part block (item 5.1)</u></p> <p>Suggested wording noted.</p> <p><u><i>Excision of whole block or blocks (item 5.2)</i></u></p> <p>Noted. DEMIRS recognise the Supreme Court didn’t make a ruling on this, but this is DEMIRS considered view.</p> <p>Please see Key Theme 1 at page 4 of the <i>Response to submissions</i> for further information.</p>



**Annexure A**

Ref#	Stakeholder	Comment	DEMIRS Response
		<p><i>Excision of whole block or blocks (item 5.2)</i></p> <p>The draft Guidance states that '[i]t is the position of DEMIRS that the Minister does not have the power to grant an exploration licence for fewer blocks that have been applied for, other than in circumstances where an application for an exploration licence is made over an area which includes land that is not open for mining'.</p> <p>This statement is likely based on statements made by the Court in Blue Ribbon, which suggested that section 57(2b) of the Mining Act is unlikely to permit the Minister to grant an exploration licence over only those blocks that do not overlap with an objector's miscellaneous licences and private land; however, we note that the Court maintained that its statements on this issue were not binding, as they did not relate to the stated case before it. In our submission, the wording of DEMIRS statement on this issue should be reviewed.</p>	
4	Eastern Goldfields Prospectors Association (EGPA)	<p>It is common practice for DEMIRS to refuse excision of land from tenements, and EGPA support the continuation of this. The WA Mining Act is very clear that the term "MINING in definitions": mining includes fossicking, prospecting and exploring for minerals, and mining operations;</p> <p>Excisions should never be imposed as it would be in contrary to the intentions of the WA mining act, as all land is open for mining. It is not uncommon in the goldfields where pipe lines, power lines, roads, gas lines, water pipelines, housing, community and commercial infrastructure are not excised from mining, as mining can be conducted below 30 meters from the natural surface.</p>	Support noted.

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5	Association of Mining and Exploration Companies (AMEC)	<p><b>Grant of fewer blocks than applied.</b></p> <p>AMEC questions why it is the position of DEMIRS that the Minister does not have the power to grant an exploration licence for fewer blocks than have been applied for. With the exception of circumstances where an application for an exploration licence is made over an area which includes land that is not open for mining.</p> <p>The position of DEMIRS is contrary to the intent of the Mining Act. The Mining Act is framed entirely to facilitate the mining and mineral exploration of Western Australia's mineral wealth. While the Mining Act does not explicitly allow the grant of fewer blocks than sought, it is silent on the matter. This position is a matter of policy and is not supported by the legislation.</p> <p>AMEC considers that to grant fewer blocks than have been applied for does not undercut the security of title, nor the framework of the graticular block system.</p> <p>Granting an exploration licence that is smaller than sought is, on one level, against the interest of the applicant. As to do so will mean the applicant will get less ground than they applied for. However, Industry feedback has suggested that if asked the majority of applicants who face objections due to overlaps with other tenure would welcome a grant of fewer blocks than sought.</p> <p>This would be in the interest of the Government as it would mean greater exploration. Earlier grant of tenure results in companies accessing the ground faster and undertake exploration quicker.</p>	<p>DEMIRS agrees that <i>Mining Act 1978</i> is silent on the matter relating to the grant of fewer blocks than sought for Exploration licence applications.</p> <p>Please refer to Key Theme 1 at page 4 of the <i>Response to Submissions</i> for further information on DEMIRS position.</p> <p>Proposed legislative amendments to the <i>Mining Act 1978</i> to allow the Minister explicit powers to grant fewer blocks (similar to Section 73) is noted. Please refer to Key Theme 2 on page 5 of the <i>Response to Submissions</i>.</p>

**Annexure A**

Ref#	Stakeholder	Comment	DEMIRS Response
		<p>Many objections could be resolved if DEMIRS position had not been taken. This would have several benefits: not only faster exploration, but a reduction of the case load in the Warden's court.</p> <p>The few paragraphs in the Guideline do not fully detail the Government's position. AMEC ask that the Government seek further consultation on this matter. And if the Government is unwilling to reverse its position, we ask that minor legislative amendments be made to the Mining Act to allow the Minister explicit powers to grant fewer blocks.</p> <p>This could be done by transposing to Exploration Licences, Section 73 as it relates to Mining Leases, which is replicated below.</p> <p><i>73 Area of mining lease may be less than area sought.</i></p> <ol style="list-style-type: none"> <li><i>1. The area of land in respect of which a mining lease is granted may be less than the area of land in respect of which the mining lease is sought.</i></li> <li><i>2. If the area of land in respect of which a mining lease is granted is as described in subsection (1), the holder of the lease shall mark out in the prescribed manner the boundaries of that area as soon as practicable after the grant of the lease.</i></li> </ol>	

Government of Western Australia

**Department of Energy, Mines, Industry Regulation  
and Safety**

8.30am – 4.30pm

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