Government of **Western Australia**
Department of **Mines, Industry Regulation and Safety**

RESPONSE TO SUBMISSIONS

Mining Amendment Bill 2023 Response to Submissions

10 May 2022

Contents

Introduction

The purpose of the Mining Amendment Bill 2023 (Bill) is to amend the *Mining Act 1978* (Mining Act).

The Bill amendments relate to the new section 92B(2) of the *Land Administration Act 1997* (LAA), found in the *Land and Public Works Legislation Amendment Act 2022* (LPWL), which received royal assent on 24 March 2023. That provision states that a diversification lease can be granted for any purpose. Diversification leases will provide non-exclusive broad based land tenure options for Crown land that can coexist with other land uses (multiple land uses) especially with native title and land uses by the resources industry. The interaction of that provision with the objection provisions of the Mining Act has led to the proposed amendments in the Bill.

The Bill amendments will ensure that diversification leases will be able to provide non-exclusive land tenure for large scale carbon farming projects that can coexist with the resource industry.

As outlined in the media release of 15 December 2021,[1] the McGowan government has made its policy intent clear. That is, exploration and mining is still able to occur over areas subject to carbon farming. Some policy mitigation measures have already been put in place. These include the exclusion of existing and pending mining leases and petroleum production licences (and associated tenure) from the carbon farming areas as part of the State's eligible interest-holder consent mechanism for previous carbon farming initiatives such as Human Induced Regenerative (HIR) carbon farming on pastoral leases, which was delivered by the Department of Primary Industries and Regional Development (DPIRD) and the Carbon for Country initiative. For consistency and to reduce risk, the same policy for excisions of existing and pending mining leases and petroleum production licences (and associated tenure) from the carbon abatement projects will be sought for the new diversification leases.

Carbon farming, particularly in the rangelands, can require access to very large land areas (more than three million hectares are currently proposed for the Carbon for Country initiative). Mining areas can be carved out of carbon farms with very little adverse impact and compensation paid when there is an impact. Objections by carbon farmers to applications for mining tenements would serve as a de-facto exclusion of mining activity over the ground over which there is an objection. The proposed Mining Act amendments will reduce this risk which could significantly impact resource exploration and resource projects with negative consequential effects on the economy and State budget.

Carbon abatement projects already exist on Crown land under the Mining Act, which can result in carbon farming related objections to the grant of mining tenure. This is inconsistent with the Government's policy that exploration and mining will still be able to occur over areas subject to carbon farming. While this issue predates the proposed diversification leases, this new form of tenure could lead to an increased number of carbon projects on Crown land (as defined in the Mining Act) over very large areas, placing an increased priority on confirming the Government's policy position. Carbon abatement projects are only one of a broad range of uses potentially considered under the proposed diversification leases, and it is unknown at this stage what proportion of diversification leases, or what area of the State covered by diversification leases will be used for that purpose.

Currently, no objection to a mining tenement application is available (or rather, if an objection is made, there is no opportunity to be heard[2]) on the grounds that it would affect pastoral activities. Given that a pastoral lease is granted for pastoral purposes,[3] it follows that carbon farming (currently carried out on pastoral leases) is a pastoral activity. This is the status quo for carbon farming activities currently carried out on pastoral leases. The Bill amendments therefore maintain the status quo for carbon farming activities on pastoral leases, in accordance with the consequential amendments to the Mining Act that are a part of LPWL, where diversification leases will be treated the same as pastoral leases under the Mining Act. Therefore the rights of carbon farmers located on pastoral leases are not practically affected by the Bill amendments. For them, the Bill amendments merely insert one part of the legal principle into the text of the Mining Act. That is, the Bill amendments do not go so far as saying that no objection to a mining tenement application is available on the grounds that it would affect all pastoral activities. Instead the Bill amendments provide that only the 'pastoral purpose' of carbon farming is included into the text of the Mining Act for reasons detailed in the next paragraph. The prohibition for 'all pastoral purposes' will continue to be the common law, and can be developed by the courts for other activities as necessary.

Under LPWL, diversification leases are intended to interact with mining interests in the same way as pastoral leases do. That is, mining activity can occur over diversification leases in the same way and with the same protections as it currently occurs over pastoral leases. One point of difference is that diversification leases can be granted for any purpose, not just a pastoral purpose.[4] This severs the connection between carbon farming and pastoral purpose.

1 Media release 'Big boost for carbon farming opportunities in Western Australia' 15 December 2021, Ministers Sanderson, Dawson and Buti.
2 *Telupac Holdings Pty Ltd v Hoyer* [2022] WAMW 26.
3 *Land Administration Act 1997* section 106(1). Although a permit can be sought for purposes other than a pastoral purpose pursuant to Division 5 of Part 7 of the *Land Administration Act 1997*.
4 Proposed section 92B(2) of the *Land Administration Act 1997*.

That is, on a diversification lease, carbon farming activities are no longer 'pastoral'. The common law, which currently speaks only about pastoral activities, has nothing yet to say about 'pastoral' activities carried out on new tenure like a diversification lease. The Bill amendments therefore seek to maintain the status quo by specifying clearly that an objection to a mining tenement application is available on the grounds that it would affect offsets projects (that is carbon farming) carried out on other types of tenure.

Other types of 'pastoral' activities are not of concern at this stage due to their lesser potential impact. However, carbon farming, by its expansive land use has a significantly greater impact on the resources industry by potentially excluding exploration, discovery and recovery of critical minerals needed by the State to reach its net zero goals. The practical impact of interaction between carbon farming is also greater than for other types of 'pastoral' activities. For example, it is much easier to move livestock away from a mineralisation area rich in critical minerals than it is for trees in a carbon farm. Another concern that exists is that resources corporations could obtain vast tracts of Crown land for carbon farming for the purpose of excluding their competitors from the land.

While the introduction of the new diversification lease tenure highlights the urgent need for this legislative amendment, for the reasons detailed above, the amendments are not restricted to just this tenure. This is in line with the government's policy direction that exploration for minerals and petroleum, and by association mining operations, is still able to occur over areas subject to carbon farming irrespective of land tenure.

It is important to note, this amendment does not prevent coexistence and land being used for carbon sequestration, including carbon farming. It is simply reinforcing State Government policy (much like the State Government's net zero policy targets) to mitigate risks of adverse consequences on mining, and by extension on State budget and renewables transition.

The Bill amendments do not preclude objections on other grounds. Any other ground of objection that currently exists is still available to holders of any land tenure and third parties. This amendment in no way limits or fetters the Minister's powers including the ability to impose conditions on grant or consider refusing an application for a mining tenement in the public interest pursuant to section 111A of the Mining Act. This process is already subject to a process of procedural fairness and will not change or be limited by these amendments.

The Bill amendments in no way impact any of the current mining regulatory framework including initial approvals (native title; land tenure approvals; strict compliance checks etc.) or secondary approvals (being the legal requirement to explore or produce including programme of works; mining proposals; ministerial consents etc.) Activities on 'private land' will still be subject to the private land provisions of the Mining Act including access and to compensation provisions. The Crown land access protections of section 20(5) of the Mining Act will still apply in the same way as they do to a pastoral lease, except that the restriction for mining and access to within 100 metres of the improvements listed in section 20(5) will also include to within 100 metres of a "substantial structure" to take account of possible uses under a diversification lease. These amendments in no way remove the ability to seek compensation under the Mining Act for any loss or damage caused irrespective of land tenure affected.

Consultation

The Mining Amendment Bill 2023 was made available for public consultation between 18 January 2023 and 30 January 2023. The reason for the short time period was the intent to introduce the Bill into Parliament so that it can be considered by Parliament in a time period not too distant from LPWL, which passed through Parliament and received royal assent on 24 March 2023.

The amendments proposed in the Mining Amendment Bill 2023 were foreshadowed in the second reading speech (23 November 2023) during the passage of LPWL through Parliament. There were also informal discussions with the Association of Mining and Exploration Companies (AMEC) and the Chamber of Minerals and Energy WA (CMEWA) in October 2022.

During the consultation period, there were four external consultation sessions.

Details of the consultations sessions are:

- 23 January 2023: face-to-face and Microsoft meeting with industry representatives attended by nine industry representative body participants.
- 24 January 2023: Microsoft Teams meeting with Pastoralists & Graziers Association of Western Australia.
- 24 January 2023: Microsoft Teams meeting with Government agencies. Attended by eight representatives from four agencies: Department of Planning, Lands and Heritage, Department of Water and Environmental Regulation, Department of Biodiversity, Conservation and Attractions and Department of Primary Industries and Regional Development.

- 25 January 2023: Microsoft Teams meeting with Carbon Market Institute.

A total of six written submissions were received.

Key themes

In general, the submissions from the resource industry stakeholders supported the proposed amendments, while those from the pastoralist industry representatives were more reserved. There was significant discussion on the kinds of objections and objectors affected by the amendments, as well as the numbers of cases before the warden. The topic of the State's aspirations to reach net zero emissions by 2050 was also raised in the written submissions.

The key themes that arose from stakeholder feedback are set out in the nine points below. The responses to stakeholder feedback are provided at pages 8-14 of this report.

1. **Resource industry feedback supports the Bill amendment, pastoralists express concern**

   The amendments to the Mining Act were supported by the resource industry representative bodies. The amendments strike the appropriate balance and make clear the Government's position.

   On the other hand, PGA, the organisation representing primary producers of wool, grain and meat & livestock, expressed its concern at any "move to limit the rights of pastoral lease holders to the advantage of the mining industry".

2. **Neither opposition nor support for the amendment**

   One consultation response received indicated neither opposition nor support. This was the response received from ER Law, the peak body for energy, resources and renewables lawyers. The organisation's interest is more broadly about the operation of the law and regulation, not representing a particular sectoral interest.

3. **More information is required in the second reading speech and explanatory memorandum to the Bill around the reasons for amendment**

   DMIRS accepts that more information will be included in the accompanying materials to the Bill when it is introduced into Parliament. This was a theme echoed in two submissions.

4. **'Public interest' objections**

   One consultation response suggested that if the Bill amendments are passed to codify the position that no objection to a mining tenement application is available on the grounds that it would affect carbon farming projects, it could lead to arguments in court that all other grounds of objecting on areas of public interest are open.

   The relevant court authority here is the *Warden French case*[5] which held that the warden may hear matters on what is broadly termed public interest grounds, that is grounds such as alleged risks to the environment voiced in the *Warden French case*.

   DMIRS considers that on the plain reading of the words of the Mining Act, there is no distinction or dichotomy between objections rooted in 'public interest' as opposed to some other ground of objection. The right to object in the Mining Act is provided for without any additional qualifications as to the grounds or nature of the right. This is something that the Supreme Court has mentioned in the *Warden French case*.

   Kennedy J in the *Warden French case* considered that it is common for legislation to provide limitations to objection rights. The right to object can be limited by express wording of the Act, as for example in the current section 75(1a) – and is proposed to be done by the Bill amendments – or by common law as developed by the courts and policies and practices of the relevant decision makers (wardens and mining registrars).

   As an example, Warden Cleary held in a recent case before her that objectors should not be given the opportunity to be heard on the objections because "while they may be of broad 'public interest' they are mostly in truth matters of broad and competing public policy over which the warden cannot make any recommendation or determination."[6]

   It is outside the scope of the Bill amendments to seek to revisit the *Warden French case*, a Supreme Court decision of almost 30 years standing. The Bill amendments are of a more focussed nature. The threshold question is whether an objection against an application is on the grounds that the mining tenement, or activities authorised by the mining tenement would affect an offsets project as defined in the

5 *Re Warden French; Ex Parte Serpentine-Jarrahdale Ratepayers and Residents Association* (1994) 11 WAR 315.
6 *Telupac Holdings Pty Ltd v Hoyer* [2022] WAMW 26, paragraph 152.

Commonwealth's *Carbon Credits (Carbon Farming Initiative) Act 2011*. Objections considered in the *Warden French case* are not affected by the Bill amendments; such objections are not about an offsets project.

5. **Kinds of objectors affected by the Bill amendments**

   One submission suggested that the Bill amendments be limited to holders of a diversification lease only. DMIRS considers that limiting the objection rights of diversification lease holders only would lead to integrity issues. Such a limitation would enable another entity, especially a company related to the diversification lease holder, to make an objection on the grounds that a mining tenement, or activities authorised by the mining tenement would affect an offsets project.

6. **Delays due to objections before the wardens**

   The Bill amendments are intended to decrease the number of cases going to the Warden at the application stage, and to encourage parties to reach a negotiated outcome outside the warden's court system. They send a clear message that the Government policy is for mining titles and other broad based non-exclusive tenure to coexist.

   One submission considered that there would be more claims before the warden's court relating to compensation if the Bill amendments go through. DMIRS has considers that most claims lead to a negotiated outcome and very few go to a hearing, whether they are lodged before the warden as an objection to a tenement application or as a plaint to the warden's court.

7. **State zero net emissions aspirations**

   Two submissions have considered that the Bill amendments are at odds with the State's aspirations to reach net zero emissions by 2050. However, the State recognises multiple ways of achieving net zero emissions by 2050. The resource industry has the biggest role to play in achieving this target.

   The Bill amendments are very much aligned with the State's aspirations to reach net zero emissions by 2050. Western Australian Climate Policy provides the Government's vision "to harness Western Australia's innovation and wealth of natural and mineral resources to achieve net zero emissions and ensure a prosperous, resilient future for all Western Australians."

   Current research shows that the global mineral reserves are not adequate to build even one generation – the first generation – of renewable infrastructure that will allow the transition away from fossil fuels and reach net zero by 2050. And even if there were minerals, at the current production rates it will take 190 years to produce enough copper and 7000 years to produce enough vanadium to build even the first generation of renewable infrastructure. More mining and exploration is required than ever before to meet these obligations and this will require access to land. At present it takes 10-20 years to convert from a discovery to a mine – ease of land access is a very important future consideration for government.

8. **Length of the consultation period**

   One submission considered that the consultation period was inadequate.

   The reason for the short consultation time period was explained at the consultation sessions. The changes were first publicised in 2022 when the LPWL bill was introduced into Parliament.

   Ideally, consultation processes would be longer. In this case, the intent to introduce the Bill into Parliament so that it can be considered by Parliament in a time period not too distant from LPWL, has led to the shorter consultation.

9. **Freehold land**

   One submission did not support the application of amendments to agricultural freehold land. DMIRS has accepted the recommendation and will proceed with the Bill amendments on that basis.

Ref	Stakeholder	Comment	DMIRS response/action
1	**Association of Mining and Exploration Companies (AMEC)**	AMEC is supportive of this reform and that the Government is inscribing this clear intent in the legislative framework. **General Comments** The legislated reforms are reflective of the broader Government policy intent that mining tenure should retain its primacy. This intent is particularly important for the Western Australian mineral exploration sector, which relies on the ability to access land to search for commercially viable geological deposits. **Second reading speech** The Government needs to be clear in the second reading speech to reinforce the intent of this legislation. … The brevity of the legislative reforms, and the format, do not allow for a fulsome explanation as to why these amendments are proposed. A greater explanation should include: • Primacy of mineral exploration tenure to discover the critical minerals of the future. • Australia needs to find more mines of the future. Geoscience Australia states that 4 out of 5 mines were originally discovered in the 1980s. To meet the world's critical minerals demand, more minerals need to be found, and Western Australia is best placed globally to mine them in a socially responsible manner. • Western Australia is chronically underexplored and the opportunity cost of excluding mineral exploration from areas of the State is large. • The proposed amendments align with the Governments' commitment as detailed on the Department of Primary Industry and Regional Development's website to "pay compensation a carbon farming proponent would ordinarily seek under the Mining Act (WA) should permanent loss of carbon stocks result from low-impact mining and exploration activities." **Offset projects** The use of the term "offset project" to define carbon farming activity could lead to potential confusion with its use by environmental regulators. However, despite this concern, it is broad enough to allow for future amendments to include other types of environmental non-carbon credit. … **Consider a Multiple Land Use Framework (MLUF)** These amendments underscore the need for a wider consideration of establishing a clear Government policy on sequential land use. … [AMEC added: This submission should be considered in the context of AMEC's previous submissions regarding carbon farming, with a reference to https://www.amec.org.au/wpcontent/uploads/2022/04/0203-Carbon-farming-on-unallocated-crown-land.pdf] --- While carbon farming schemes are already in place in other jurisdictions, it should be recognised that unlike Western Australia, there is insignificant overlap between proposed carbon farming areas, and mining and exploration activity in these jurisdictions. … … the State only consent to carbon farming projects once… It is ensured that carbon farming cannot be used as a valid reason to object to the grant, or activities on, of mining or mineral exploration tenure. … At the moment pastoral lease holders nearly always lodge objections against mining leases so that they can secure an access compensation agreement before the activities could impact their income. This then avoids the plaint process. … Currently it is very unusual for exploration activities to lead to compensation to be payable under section 123 of the Mining Act. However, it is clear that there would be real risk that activities in excess of exploration and low impact mining could damage HIR areas on an exploration/prospecting licence.	Support noted. The explanatory memorandum will provide more detail as to the intent of the legislation.

Ref	Stakeholder	Comment	DMIRS response/action
2	**Chamber of Minerals and Energy of Western Australia (CME)**	CME is supportive of the proposed approach to the Mining Amendment Bill 2023. As outlined more fully in our submission to the Land Administration Act amendments introduced in late 2022, CME supports steps taken to provide clarity and certainty to all proponents as Diversification Leases are introduced. We consider the proposed amendments, in addition to the consequential Mining Act amendments proposed in the draft LAA Bill, strike an appropriate balance, while making clear the position of Government regarding the use of objections and Warden's Court. As a policy signal, we support this direction. CME consider the proposal to introduce these amendments to Parliament with the intention of progressing alongside the LAA Bill also makes logical sense.	Support noted.
3	**Department of Primary Industries and Regional Development**	DPIRD concurs with the information provided by DMIRS that pastoralists do not currently have a right to objection in relation to the impact of mining activities on pastoral activities, and that carbon farming should be considered in the same context when on a pastoral lease. If the intent of the Bill is to ensure that HIR carbon farming projects on pastoral lease lands do not impact mining tenement applications in the Warden's Court, then agricultural land should be excluded from the Bill. DPIRD does not support the application of the Mining Amendment Bill 2023 amendments to agricultural (freehold) land. We understand DMIRS is considering amending the Bill to remove freehold land – a position DPIRD would support. DPIRD recommends DMIRS engage in a more comprehensive consultation process to inform all relevant parties of its intent to amend the Mining Act to identify unintended consequences, particularly as the Bill affects land tenures other than Crown land. DPIRD suggests an explanation of how the amendments align with the State Government's decarbonisation and economic diversification objectives and its support for projects under the Emission Reduction Fund Human Induced Regeneration (HIR) and savanna burning methods, and Carbon for Conservation, would be beneficial.	Noted. Recommendation accepted. The reason for the short consultation time period was explained at the consultation sessions. The changes were first publicised in 2022 when LPWL was introduced into Parliament. Noted.
4	**ER Law**	ER Law neither opposes nor supports this bill. Our organisation does not represent a particular sector interest, but more broadly on the operation of the law and regulation. One observation we offer is this: the proposed law appears to limit one area of 'public interest' objection. That could lead to the argument that, given there is no other statutory specification of what are legitimate 'public interest' grounds, this will be Parliament indicating everything else is OK (and it is for the Wardens and Courts to resolve).	Noted. The explanatory memorandum will provide more detail as to the intent of the legislation.

Ref	Stakeholder	Comment	DMIRS response/action
5	**Green Collar**	**Impact of proposed diversification lease** ... As currently proposed in the Land and Public Works Legislation Amendment Bill, a diversification lease would allow carbon farming projects (amongst other things) to be established over the land subject to the lease. The material states that such projects "may significantly impact resource exploration and resource projects".... (a) Given the stated intention, it is unclear why the Bill proposes to prohibit holders of every type of land tenure from objecting to the grant of any type of mining tenement based on potential damage to an activity that is lawfully registered under Commonwealth legislation and that is endorsed by the Western Australian government. This appears to be significant overreach from the stated objectives of the Bill. (b) If it is considered that a carbon farming project being undertaken on a diversification lease may impact resource sector projects, then the proposed amendment to the Act to prohibit a landholder's right to object to the grant of any mining tenements and associated resource activities should be limited to holders of a diversification lease. (c) We note that, under the *Carbon Credits (Carbon Farming Initiative) Act 2011*, the Clean Energy Regulator (CER) has the power to require a project proponent to relinquish Australian Carbon Credit Units (ACCUs) if there is a significant reversal of carbon stored that can be attributable to someone (other than the proponent), where the conduct that causes the reversal is not within the reasonable control of the proponent and the CER is not satisfied that the proponent has taken reasonable steps to mitigate the effect of the conduct on the carbon project. Further to that, if the relinquishment obligations are not met there are penalties and the CER may impose a carbon maintenance obligation on the landholder and, in the case of land held under Crown lease, on the State. To date, the State has sought to mitigate this risk by requiring that carbon project proponents, lessees and service providers enter into a Deed of Agreement with the State that requires them to take all necessary actions to have the declaration of the carbon maintenance obligation revoked. However, if passed, the State will have introduced legislation that provides it with the power to effectively prohibit a carbon project proponent from objecting to the grant of a mining tenement, the activities of which may result in a significant reversal of stored carbon. These two things are not consistent and need to be addressed. **Mining Warden's Court delays** ...It does not appear reasonable for a small number of objections to be used as the basis for legislation which removes opportunity to ensure natural justice is applied in decision making processes. Further, State Government policy indicates that diversification leases are intended to support and enable multiple land uses – one of which is mining. The proposal that there be no indicates that mining is being prioritised over other land uses.... The ability for a carbon project proponent to be heard and to negotiate conditions of access at the outset of the grant of a tenement is much more likely to mean that the Warden's Court will be congested with managing claims related to compensation. **State net zero emissions target** ... The Bill seems to be at odds with the ambition to reach net zero emissions by 2050 by effectively limiting an industry that is sequestering carbon and contributing to the Government's stated aim.... Western Australian pastoral leases have sequestered almost 2.5 million tonnes of carbon in the last 5 years, providing an injection of around $25 million into the regional economy. While no match for the economic return to the State from the mining and resources industry, carbon farming is making a real contribution to both State and Federal net zero emissions by 2050 policies... **Inadequate consultation period** Given the significance of the impact of these amendments, a full and transparent public consultation process should be undertaken. The time allocated to provide comment was not to ensure that all impacted and interested parties are aware of the proposed changes and have the opportunity to adequately consider the proposed changes and provide their input.	The explanatory memorandum will provide more detail as to the intent of the legislation. Such a limitation would lead to integrity issues. These concerns are dealt with by compensation by the proponent. On the other hand the proposed amendments are about objections. The Bill amendments are intended to decrease the number of cases going to the Warden at the application stage, and to encourage parties to reach a negotiated outcome outside the warden's court system. The State recognises multiple ways of achieving net zero emissions by 2050. The resource industry has the biggest role to play in achieving this target. The reason for the short consultation time period was explained at the consultation sessions. The changes were first publicised in 2022 when LPWL was introduced into Parliament.
6	**Pastoralists & Graziers Association of Western Australia (PGA)**	The PGA is concerned that by not allowing an objection to a mining tenement application solely based that it may impact on carbon farming projects, carbon farming proponents, including pastoral and diversification lease holders will be disadvantaged. Carbon farming, particularly in the rangelands, can require access to very large land areas. While mining tenements can be excised from carbon farms with very little adverse impact, there are still concerns over the timing and awarding of compensation over lost earnings, as well as the delays in future restoration. Pastoral lease holders who have carbon farms have legally binding contracts with the State Government. Their rights need to be recognized. Although there is no question over the importance of the mining industry to the Western Australian economy, one cannot underestimate the value of the pastoral industry to regional and remote WA. Any move to limit the rights of pastoral lease holders to the advantage of the mining industry should be treated with concern.	The Bill amendments are intended to decrease the number of cases going to the Warden at the application stage, and to encourage parties to reach a negotiated outcome outside the warden's court system. These concerns are dealt with by compensation by the proponent. On the other hand the proposed amendments are about objections.

Government of Western Australia

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8.30am – 4.30pm

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