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Alexandra Blood  
Executive Director, Mining  
Minerals Resource Division  
Department for Energy and Mining  
11 Waymouth Street  
ADELAIDE SA 5000

19 November 2018

Dear Ms Blood

**Draft Mining Regulations 2018 (land access framework)**

Thank you for attending the meeting of the joint Mining Act Review Taskforce convened by Grain Producers SA (GPSA), comprised of representatives of GPSA, Primary Producers SA (PPSA), Livestock SA and the South Australian Dairyfarmers Association (SADA), held on Thursday, 15 November. The Taskforce was established by GPSA following the tabling of the *Statutes (Mineral Resources) Amendment Bill 2018* to amend the *Mining Act 1971*, to inform its policy deliberations on mining on agricultural land.

GPSA notes that the Department of Energy and Mining (DEM) engagement was at the direction of the Minister for Energy and Mining (the Minister), and that you were seeking to 'inform agricultural representative bodies of the proposed regulations and framework in respect to land access'. We note the draft Mining Regulations 2018 were provided to agricultural representative bodies for this purpose on Tuesday, 16 October 2018.

This limited approach to engagement with agricultural representative bodies is of great concern to the Taskforce, noting the commitments made on behalf of the Minister prior to the March election, to undertake 'thorough and meaningful consultation' on the legislative process in reforming the Mining Act.

From your presentation, we understand that package of documents represents the first 'module' of the consolidated regulations to be drafted, and the likely timeframe for the development of the full suite of modules that will make up the mining regulations is likely to take at least 18 months. The land access framework was prioritised at the direction of the Minister at this time, despite the timing of harvest across South Australia.

We note that substantive detail is deferred to Ministerial Directions (MDs) and information in forms in Schedule 1 of the draft regulations, and this information is yet to be prepared. GPSA contends that this information is critical to the effective operation of the land access framework and must be made available for consultation prior to this coming into force.

Notwithstanding these genuine concerns, I attach for your consideration a submission by GPSA in response to the draft Mining Regulations 2018. This document was informed by the deliberations of the Taskforce.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Caroline Rhodes', enclosed in a hand-drawn oval. A small dot is visible to the right of the signature.

**Caroline Rhodes**

Chief Executive Officer

**Submission by Grain Producers SA (“GPSA”) to the Department of Energy and Mining (“DEM”) on the proposed draft land access regulations arising from the *Statutes (Mineral Resources) Amendment Bill 2018*, with specific reference to the draft Mining Regulations 2018 (GP 351 CW/CW 9.10.2018 1:34 PM) prepared by Parliamentary Counsel.**

## **Introduction**

Grain Producers SA (GPSA) is the peak industry body for South Australian grain growers. GPSA is non-political and represents producers to government, the community and industry, including grain marketers, exporters, storage and handlers, researchers and farm input suppliers. We develop and implement policies and projects that promote the economic and environmental sustainability of South Australian grain growing businesses.

### **1.0 GPSA recommendations on the draft Mining Regulations 2018**

1. The core content of entry on land notices and consultation requirements needs to be extensive and regulated.
2. The Regulations should expressly require the Minister to consult on new and amended MD’s.
3. Notices of Entry should require the tenement holder to provide detail on plans in relation to landholder engagement and proposed work programs.
4. A compensation framework should be developed in Schedule 1 of the Regulations to provide information that must be given to land owners.
5. The Regulations should require tenement holders to provide a bond related to their compensation obligations to land owners.
6. The threshold for impact as a result of a change of operations (Regulation 7) is such that public consultation is standard.
7. The establishment of a mandatory Code of Conduct prescribed in a schedule to the Regulations.

### **2.0 Overview of the Proposed Regulations**

The proposed regulations are administrative in nature and are devoid of substantial and specific provisions of the sort contained in the current regulations. The information and content required for notices (including entry on land, public consultation on lease proposals, PEPRs, and change of operation proposals) is proposed to be dealt with through to-be-drafted regulations and Ministerial Directions (“MDs”). These MDs have not been provided to GPSA for consideration.

### **3.0 Ministerial Directions**

The Background Paper states that MDs “*enable the Act and Regulations to adapt and develop alongside social, economic, environmental and regulatory issues relating to the Mining Act.*”

This is a matter of substantial concern for GPSA and we do not accept the view outlined by the Background Paper. It is the firm view of GPSA that matters of substance should be incorporated either by amendments to the Bill or by being incorporated into the draft Regulations. Matters of substance include those issues raised in relation to section 61 (Agreement and Collaboration) and section 92 (Code of Conduct) below.

As MDs are made at the discretion of the Minister, they are, of their very nature, outside the direct control and concern of the Parliament. While regulations may not require legislative change, they do attract a level of scrutiny and consideration by their enacting process, including the Legislative Review Committee of Parliament. MDs are thus liable to change and are easily influenced by the views and position of the relevant Minister of the day. Future changes of government or ministerial reshuffles may bring about a substantial change in policy.

The flexible and evolving nature of MDs does not provide the level of certainty or surety for either the agricultural or mineral resources industries.

### **4.0 Consultation**

The Background Paper details that the information and content required for notices such as entry on land under s58A, public consultation on lease proposals, PEPR’s and change of operation proposals are all to be enforced through MD’s. The core content of these documents needs to be extensive and regulated, not subject to a MD. In any case, the agricultural sector seeks assurances that any review/amendment to these MD’s will be subject to an extensive consultation process prior to Ministerial authorisation. GPSA recommends that the Regulations expressly require the Minister to consult on any review/amendment to MD’s whether they are generic or project specific.

Further, the content of the other modules of the regulations, other than Schedule 1 basic guidelines and information sheets, are still to be clarified and will be consulted on at a later date. GPSA seeks clarification on the timelines for the consultation process in developing these regulations.

### **5.0 Response to Key Land Access Provisions**

#### **5.1 Entry on land**

The method of service of documents contemplated in clause 9(b) of the Regulations by way of post should be strengthened to mandate registered post as a minimum. There are two

reasons in particular for this. The first is that there are practical limitations in serving notice to landowners in regional South Australia. The second corollary reason is that service by ordinary pre-paid post creates uncertainty with time limits as it will be assumed that documents are served a certain number of days after they are posted. This may not be the reality at all and will create uncertainty for all involved in the process. Registered post provides certainty to document receipt and provides all parties with a precise date from which any time limits will run, namely the 28 days and the 3 months (notice of objection).

GPSA believes that notice of entry requirements should be strengthened in the proposed regulations to provide clearer detail to the landholder. This should include the requirement of tenement holders to provide further detail on the plans in relation to-

1. Engagement with landholder, and
2. The proposed work program, including the timing, extent and location of the works, and those conducting the work plan.

## **5.2 Special Protection of Exempt Land**

Draft Regulation 4(2) requires an agreement to waive the benefit of an exemption under section 9AA of the Act to be served to the Mining Registrar. Failure to do so attracts an expiation fee. The reference to “A party” at the start of this regulation is of concern to GPSA in that it may be interpreted as requiring a landholder to serve the notice to the Mining Registrar and failing to do so will incur the expiation fee. GPSA understands that this is not the intent, however to avoid any doubt, the Regulation should be amended to make it absolutely clear that a landholder is not subject to this requirement. The Regulation should be amended to start with ‘*A tenement holder who is a .....’* as used in draft Regulation 4(3).

## **6.0 Agreement and Collaboration**

### *Compensation payable*

The proposed regulations provide the administrative detail in relation to the forms that must be given to affected landholders detailing their rights. However, no specific detail is provided in the Act, the present regulations or the proposed regulations.

Whilst Regulation 4 deals with the waiver of an exemption and the information to be provided, GPSA considers that the draft Regulations have missed an opportunity to provide further detail and information in relation to compensation for both sections 9AA and 61 of the current and proposed Acts.

Section 61 sets out the general provisions related to compensation, including a general right of compensation. Section 61(1) specifies that the owner of land upon which mining operations are carried out will be entitled to compensation for any economic loss, hardship and inconvenience suffered. This is arguably more limited than, for example, the entitlements

under section 25(1)(a) the *Land Acquisition Act 1969*, which entitles a person whose land has been acquired be compensated for any loss suffered.

Section 61(2a) of the Mining Act sets out that in determining compensation payable that the following items should be considered:

- (a) any damage caused to the land by the person carrying out the mining operations;
- (b) any loss of productivity or profits as a result of the mining operations; and
- (c) any other relevant matters.

This can be compared with the manner of determining compensation payable under section 25(1)(b) of the *Land Acquisition Act 1969* which sets out that the following should be considered when assessing compensation:

- (a) the actual value of the subject land;
- (b) the loss occasioned by reasons of severance, disturbance or injurious affection and
- (c) any other relevant matters.

Whether by way of amendment to the Bill or the addition of further Regulations, GPSA believes that there should be a broader entitlement to compensation 'for any losses suffered' and the development of a detailed compensation framework. It should be identified in the Regulations what the entitlement to compensation will include. By way of example, the Regulation could specify that an entitlement to compensation will include compensation for the following matters:

- (a) the actual value of the subject land;
- (b) any loss occasioned by reasons of severance, disturbance or injurious affection;
- (c) maintenance and repair of access roads, fences and other infrastructure;
- (d) the relocation of dams, water points, fences and other infrastructure;
- (e) impact of any remaining farming activities, including productivity loss, impacts on whole farm operations/rotations and yield loss;
- (f) stock impacts (including consequential losses);
- (g) biosecurity control matters;
- (h) time spent by the landowner;
- (i) professional fees; and
- (j) any other relevant matters.

It would also be beneficial to outline benchmark compensation rates as a guide to assist landholders in the event they are negotiating a land access and compensation agreement or the court in the event that an agreement cannot be reached.

This would be information that must be given to owners of land as part of the suite of documents we understand are to be included in Schedule 1 of the Regulations. GPSA considers this essential to deliver certainty and relieve angst in the agricultural sector.

In addition to the above, and further to what is contained in 62A of the Act regarding the right to acquire the acquisition of land, GPSA considers that the Regulations should specify that where a land owner requires land to be acquired, the compensation should include compensation both for the value of the land (at a value prior to the existence of the mining operations) and the value of the business, as the two are inextricably linked.

#### *Upfront payment*

In addition, GPSA also seeks the incorporation into the regulations of a requirement for tenement holders to make an upfront payment in relation to compensation obligations. There are a number of ways in which this could be done, such as a bond or a payment into court (as happens with compulsory land acquisition under the *Land Acquisition Act 1969*).

Landowners would be able to draw down on the upfront payment as compensation becomes payable in the event of non-payment by the exploration or mining company. GPSA believes that funds held in escrow would bring certainty of compensation to landholders.

GPSA is of the view that this approach should apply to any compensation which is payable, whether by agreement or by court order.

## **7.0 Public Participation**

GPSA's expectation is that the norm would be that a change of operations will meet the threshold required by proposed Regulation 7 to require consultation with the public. GPSA queries whether a change in MDs resulting in a change of operations will also require consultation. GPSA's broader concerns with MDs are specified at [4.0].

## **8.0 Conflict Resolution**

The DEM background paper refers to an explanation of rights of landholders that is to be included in Schedule 1. This detail was not available at the time of writing but is of significant interest to GPSA. GPSA seeks further information on the detail and development of this Schedule.

GPSA notes that the establishment of a dispute resolution service within the office of the Small Business Commissioner has not been provided for within the proposed Act or the proposed regulations. GPSA is eager to see this important policy commitment fulfilled through reference in the Statutes Amendment (Mineral Resources) Bill 2018 to amend the *Mining Act 1971*.<sup>1</sup> GPSA eagerly awaits ongoing consultation as this is developed.

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<sup>1</sup> CF: <https://strongplan.com.au/wp-content/uploads/2018/01/29-FARMERS-AND-RESOURCE-COMPANIES-CONTRIBUTING-TO-A-STRONG-ECONOMY.pdf>

## 9.0 Code of Conduct

Section 92 of the Act makes provisions for the making of codes or standards.

GPSA seeks to codify through regulations a code of conduct with mandatory conditions concerning the conduct of operations on land that would be attached to licences and leases. This should be established by way of Schedule annexed to the Mining Regulations and place a positive obligation on resource companies to comply when on private land to carry out authorised activities.

The code may be modelled existing regulatory Codes in operation in other jurisdictions, such as in Queensland and administered by the Department of Natural Resources and Mines (Land Access Code, September 2016)<sup>2</sup>.

The Code should:

- State best practice guidelines for communication between the holder of the mineral tenement and the owner of the land;
- Stipulate mandatory public liability insurance requirements for the holder of the tenement; and
- Impose on tenement holders' mandatory conditions concerning the conduct of authorised operations on land (including, but not limited to, non-interference with farming activities; use, maintenance and repair of access roads, fences and other infrastructure; stock or crop losses; and water points) .

The Regulations would detail specific terms providing, at least, the following:

1. That the Code of Conduct is a mandatory requirement for compliance by the tenement holder.
2. That the Code of Conduct will embody "best practice" obligations in respect of all aspects of the authorised operations as it affects landholders. This should include land access protocols to manage the inherent risk to on-farm biosecurity of undertaking authorised operations in introducing declared pests and diseases of agricultural or environmental significance.
3. That a clear link is established between the requirement of compliance with the Code of Conduct and the continuance of the authorised operations and tenement to the effect that persistent and protracted non-compliance may result not only in penalties, but in adverse consequences as regards to the continuation of the mining interest.

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<sup>2</sup> <https://www.business.qld.gov.au/industries/mining-energy-water/resources/minerals-coal/accessing-private-land/land-access-code>

4. That past compliance with the Code would be a relevant factor in any future grant of a mining interest for any body which had an involvement (whether through personnel or ownership) with a previous tenement holder.

**ENDS.**