

# MINISTERIAL GUIDELINES FOR NOTICES AND INJUNCTIONS RELATING TO THE REGULATION OF EARTH RESOURCES IN VICTORIA



These guidelines are issued by the Hon Russell Northe,  
Minister for Energy and Resources under section 120A of the  
Mineral Resources (Sustainable Development) Act 1990.

# RELEVANT LEGISLATION AND THE ROLE OF EARTH RESOURCES REGULATION VICTORIA

The Victorian mining industry is primarily regulated under the *Mineral Resources (Sustainable Development) Act 1990* (the Act) and the Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2013 which are administered and enforced by Earth Resources Regulation (ERR), a division of the Department of State Development and Business Innovation (DSDBI).

The purpose of the Act is to encourage economically viable mining, maximising the value of Victoria's natural resources, while providing a legal framework that minimises adverse impacts on the community and the environment arising from these activities.

These Guidelines will apply to the power of the Minister for Energy and Resources (the Minister) to:

- 1 issue a Notice requiring a holder of an authority to cease activities or to undertake remedial activities (section 110 of the Act);
- 2 apply to the Supreme Court for an Injunction to require compliance with a Notice issued under section 110 of the Act (section 110AA); and
- 3 take remedial action that is required in a Court Order or Injunction, but has not been undertaken by the Authority Holder (section 110AB).

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ERR is committed to working constructively with the mining industry to support mineral exploration and mining. ERR seeks to enable industry compliance and to develop a productive partnership with industry and stakeholders, with an open and transparent approach.

The Act is available at [www.legislation.vic.gov.au](http://www.legislation.vic.gov.au)

These Guidelines complement DSDBI's Enforcement Policy and Enforcement Procedure, and ERR's Compliance and Enforcement Policy.

Please note that any reference to the Minister within this statement is intended to also include a delegate of the Minister in ERR. ERR Inspectors are delegated the power to issue a Notice, but they do not have delegated authority to seek an injunction under section 110AA or decide to undertake remediation works under section 110AB.

# FACILITATING COMPLIANCE AND ENCOURAGING BEST PRACTICE

ERR will work with industry to build a strategic partnership in order to facilitate widespread adoption of required practices. ERR Officers will do this by building productive networks throughout the mining industry; providing consistent advice on legislation and compliance; and demonstrating an enforcement approach that is appropriate and proportional to the severity and likelihood of potential adverse impacts on communities and the environment.

ERR is guided by the following principles in fulfilling its compliance and enforcement role:



# A GRADED ENFORCEMENT APPROACH

ERR will take enforcement action when non-compliance with the Act and Regulations, or certain risks (e.g. to the environment), occur. Subject to the Minister's consideration and the urgency of the incident, ERR will implement a graded enforcement approach as illustrated below.

The graded enforcement approach is standard practice but its application may vary according to the circumstances of each case, including the severity and urgency of a particular risk to public safety, the environment, land, property or infrastructure. For example, where the related risks are significant, a higher-order enforcement action such as a Section 110 Notice may be taken in the first instance.

In determining whether to take a particular action, ERR will consider the gravity of the purported offence, the public interest, and the potential risk and immediacy of further damage or impacts to public safety. All regulatory actions in relation to offences are subject to the discretion of the relevant decision maker- the Minister or his delegate in ERR.

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## In most cases our initial approach is consultative

- > **Provision of advice:** Authority holder is advised of measures that may be taken to comply with the Act and the Regulations, the relevant licence, work authority and/or work plan.
- > **Verbal notification:** Authority holder may be verbally notified of concerns about any observed actions or omissions that may lead to a non-compliance.
- > **Written notification:** Authority holder may be issued with a written notification advising on action to remedy a non-compliance.
- > Any such 'consultative' approaches would involve discussion with the authority holder including suitable measures to address the risk or remedy the breach.

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## Where a breach of the Act or significant risk occurs and 'consultative' measures are unlikely to be effective

- > **Infringement notice:** An infringement notice may be issued (generally for specific, minor prescribed offences).
- > **Section 110 Notice:** Notice may be issued requiring remedial action or ordering the authority holder to cease work.

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## Where related risks are significant

- > **Application for an injunction:** An injunction compels compliance with a Notice or restrains the authority holder from contravening the Notice.

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## In very serious cases

- > **Prosecution:** Authority holder may be prosecuted.
  - > **Cancellation of the authority:** The Minister may cancel the authority.
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## The nature and purpose of Section 110 Notices, and when they can be issued

A section 110 Notice may require an Authority Holder to cease activities, undertake remedial activities, supply plans or information or undertake monitoring or audits.

The purpose of a Notice is to:

- 1 provide a legal record that ERR has required action to remedy or avoid a contravention or address a risk;
- 2 provide the Authority Holder with specific details regarding the risk and the action required to be taken by the Authority Holder to remedy the risk or contravention; and
- 3 ensure that Authority Holders are treated consistently.

The Minister may issue a Notice where the Minister reasonably believes that the Authority Holder has contravened or is likely to contravene the Act or the Regulations, or an act or omission by an Authority Holder is likely to result in significant risk to public safety, the environment, land, property or infrastructure. Where remediation work is required, a Notice usually requests that action be taken within a specific timeframe, but is not prescriptive regarding method or process. This enables the Authority Holder to determine the least costly and most effective way to meet the Notice requirements.

Some examples of circumstances of significant risk that may lead to a Notice being issued include evidence of:

- > potential slope instability or subsidence at a mine;
- > potential impact to ground and surface water from mining and quarrying activities such as illegal discharges or diversions; or
- > potential impact or damage from blasting operations from mines and quarries.

Significant penalties apply for failure to comply with a Notice and the Supreme Court also has power to order compliance with a Notice.

## Notices and the role of Earth Resources Regulation

The following steps and matters to be considered will typically be applied by ERR in issuing a section 110 Notice.

Where significant risk is identified, the Inspector will discuss the matter with the Authority Holder and provide advice on how the issue may be remedied. In certain circumstances when the risk or contravention is remedied at the time of its detection, the Inspector may decide not to issue a Notice and will instead make a record of the matter.

ERR will, consult with Authority Holders regarding the contents of the Notice, including for example the suitability and practicability of the proposed remedial actions, and the timeframe for compliance, prior to issuing a Notice. However, agreement on a timeframe is not required. In determining a date by which compliance is required, the ERR Inspector will take into consideration the nature and severity of the alleged risk or contravention.

Where the risk or the contravention identified is particularly serious or exceptional, and it is considered appropriate to depart from the general procedures outlined in these guidelines, the matter is referred to the Chief Inspector of Mines for consideration and decision. If the requirements of the Notice are likely to have severe business impacts (for example, where the Notice effectively requires the business to stop work for an extended period of time), the Inspector must consult with the Chief Inspector of Mines or the Executive Director, ERR prior to issuing the Notice.

In accordance with a standard template, Notices will state, among other things:

- > the act or omission that has created the risk or the relevant requirement under the Act or Regulations that has been breached;
- > the basis for the ERR Inspector's belief, on which the Notice is based (including reference to any relevant facts or evidential matters);
- > directions as to measures that may be taken to remedy the risk or remedy the contravention or likely contravention (while allowing, wherever possible, flexibility for the Authority Holder to determine alternative measures to achieve the required outcome);
- > an outline of the Authority Holder's statutory rights to apply to the Victorian Civil and Administrative Tribunal (VCAT) for review of the decision to issue the Notice; and
- > a date by which the Authority Holder is required to remedy the risk or remedy the contravention or likely contravention (this can be immediately, for example where the Notice requires cessation of an illegal or dangerous activity. The Authority Holder may apply to VCAT for review of the decision to issue the notice, however when immediate action is required, the notice must be complied with.)

Where possible, Inspectors will serve a Notice at the time of the relevant site visit. However, mailing a Notice by registered mail may occur where there is no relevant representative of the Authority Holder on site or the matter requires further investigation or consultation with ERR management. When issuing the Notice, the Inspector will provide verbal advice to the Authority Holder of the Notice review rights and direct them to information regarding those rights printed on the Notice.

Where a Notice has not been complied with by the compliance date, the Inspector will advise the Duty Holder of their failure to comply and this will be reported to the relevant ERR District Manager (and Chief Inspector in certain circumstances) for consideration of what further enforcement action may be warranted. It may be determined that a further Notice is appropriate.

#### *Section 110 Notices and the role of the Minister*

In determining levels of risk, the Minister considers a variety of information. For example, relevant industry codes of practice, guidelines and standards, advice from ERR and other technical specialists, and any relevant information provided by the Authority Holder. The Minister also takes into account the potential impacts and constraints that may be imposed on an Authority Holder in the event of a Notice being issued.

For there to be a "reasonable" belief that a significant risk exists or contravention has occurred, there has to be facts or plausible evidence to which attention can be drawn, and which would be sufficient to induce that belief in a reasonable person. A Notice would not, for example, be issued in relation to a mere "suspicion" of a risk or contravention. The grounds and supporting evidence for issuing the Notice must be considered defensible in a Tribunal or Court. To ensure that the Notice is issued on appropriate grounds, the Inspector's investigations may include consulting with the work site operators, considering relevant documentation located at the tenement site, and considering relevant sampling or monitoring results.

## **Management Review**

If an Authority Holder is not satisfied with a Notice issued by an Inspector, the Authority Holder may request (by telephone call) 'management review' of the Notice by the Chief Inspector of Mines and/or the Executive Director of ERR. This process is an informal non-statutory review process offered by ERR to assist early resolution of issues where possible, and seeks to avoid unnecessary and costly VCAT or other Court review processes.

If the management review process identifies a deficiency in the Notice, for example, that the measures required by the Notice are unsuitable to remedy the risk or purported breach, the Chief Inspector or Executive Director may decide to amend, or depending on the circumstances, withdraw the Notice.

Management review does not displace any rights of the Authority Holder to seek review by VCAT or other judicial review rights that may apply. The Authority Holder should note that as it is an informal non-statutory process, there is no ability to “stop the clock” on other statutory review timeframes (e.g. 28 day time limits for application to VCAT). As such, it is recommended that, if the Authority Holder has concerns with the Notice, the request for a management review be made as early as possible following issue of the Notice. ERR will seek to complete a management review of a Notice within 5 working days.

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DSDBI considers Ministerial Injunctions to be an enforcement tool  
that is to be used only in exceptional circumstances.

## Injunctions

Section 110AA of the Act provides that the Minister may apply to the Supreme Court for an Injunction, provided that a section 110 Notice has been issued. An Injunction is an order of the Court that either compels an Authority Holder to comply with a Section 110 Notice, or restrains the Authority Holder from contravening the Notice.

The MRSDA does not limit Injunctions to urgent circumstances, or circumstances where the recipient of the Notice has contravened, or is likely to contravene the Notice. However, in practice, the Minister is unlikely to apply for an Injunction unless there is deemed to be a serious risk to public safety, environment, property, land or infrastructure, where there is a need for remedial action to be taken without delay, and there is evidence to indicate that the Authority Holder does not intend to take measures to address the risks. Such issues will likely also be considered by the Court in assessing an Injunction application.

While the Minister can apply for an Injunction whether or not a prosecution has taken place, Injunction applications, like prosecutions, must meet a strict evidence test and are costly and resource-intensive. Injunctions are sought when other enforcement measures have not been effective and are used only in exceptional circumstances.

Circumstances that may lead to Injunctions could include, for example, a collapse of a tailings storage facility resulting in large amounts of tailings escaping into waterways and/or onto land and posing a serious risk to the environment and property. Depending on the circumstances, such risks may also be considered of such a serious nature that the Minister determines it appropriate to seek an Injunction.

## Remedial action by the Minister

The Minister will undertake such remedial action very rarely and only as a last resort, after all alternative and appropriate enforcement measures have been explored and exhausted. The Minister may decide to undertake remedial action, where there is a serious risk to public safety, the environment, infrastructure, land or property, and where the Authority Holder has not undertaken remedial work within the required timeframe, as specified in a Court order or Injunction. The Minister may consider exercising this power, for example, where the Authority Holder is insolvent and is unable to undertake the necessary remedial works.

The Chief Inspector will consult with WorkSafe Victoria to ensure that any remedial action undertaken does not compromise the ability of the Authority Holder to comply with OHS legislative requirements.

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