



NSW DEPARTMENT OF
PRIMARY INDUSTRIES



**Guidance Note
GNM-01**

NSW DPI Guidance Note
Nomination of the operator
and other duties of the mine holder

Mine Health and Safety Act 2004
Mine Health and Safety Regulation 2007

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NSW DEPARTMENT OF
PRIMARY INDUSTRIES



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NSW DPI Guidance Note: Nomination of the Operator

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PREAMBLE

The concept of a Mine Holding is to be removed from the *Mine Health and Safety Act 2004* through amendments that are proposed for the *Mining Act 1992*. Schedule 1 clause 5 of the *Mine Health and Safety Act* will not be commenced and will ultimately be repealed.

Accordingly, areas within mining leases will not be able to be registered as a mine holding under the Mining Act. The duty to nominate an operator will be based upon the right to mine held by the mine holder. This guidance note has been prepared on the basis that the position outlined above will be finalised and the concept of mine holdings will be removed from the *Mine Health and Safety Act*.



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BACKGROUND

1. INTRODUCTION

The NSW government is reforming the state's mine safety legislation by making mines subject to the Occupational Health and Safety Act and Regulations where ever this is appropriate and by introducing new mining specific safety legislation, the Mine Health and Safety Act and Regulation, to regulate those aspects of mine safety which cannot be properly provided for under the Occupational Health and Safety Act.

Parts of the Mine Health and Safety Act and Regulation concerning nomination of mine operators came into effect in December 2007. These allow Mine Holders to submit nominations of Operators and for the nominations to be reviewed by Mines Inspectors.

From 1 September 2008 the remaining provisions of the Mine Health and Safety Act and Regulation will come into effect. Many of the Occupational Health and Safety Regulations will apply to mines.

The Mines Inspection Act 1901 will be repealed.

The Mines Inspection General Rule 2000 will be repealed

1.1 Changes to who has statutory responsibilities

One of the significant reforms in the Mine Health and Safety Act is to abolish the statutory position of "general manager" and transfer many of the "general managers" responsibilities to the new statutory position of "mine operator". In most cases the "mine operator" will be a company whereas under the Mines Inspection Act the "general manager" had to be an individual.

This will reduce the responsibility placed on individuals under the mining specific safety legislation.

1.2 Nomination of Mine Operator

This guidance note and the **attached nomination form** are intended to assist mining operations to nominate a "mine operator"

2. UNDERSTANDING OF THE LEGISLATION

This guidance note provides an overview of the legislation and administrative processes associated with nominating a mine operator. Mine holders should consult the relevant parts of the Mines Health and Safety Act 2004 and the Mine Health and Safety Regulation 2007 to ensure they have a full understand of their obligations.

3. DEFINITION OF TERMS

3.1 Mine

A mine is defined in Mine Health and Safety Act 2004 section 6 primarily as a place where certain mining related activities take place. These include

- The extraction of minerals and quarry products from land.
- The treatment of these products and storage of the resultant wastes, if carried out within 10 km of the place from which they were extracted.
- The manufacturing (in some circumstance) of ready-mix concrete or bitumen hot mix if carried out within 10 km. of where the aggregate or sand was quarried
- The treatment of zircon, rutile, ilmenite and associated minerals.
- Various other mining related activities

The Act applies to places where the mining activities set out in Section 6 are being undertaken, regardless of whether this occurs on land held under the Mining Act 1992 or under some other land title. Many quarries, for example, are not required to hold a mining lease or other title issued under the Mining Act 1992 to extract quarry products.

The Mine Health and Safety Act may also apply to other facilities such as treatment plants; rutile, zircon and ilmenite processing plants; ready mix concrete manufacturing plants and bitumen hot mix plants; and crushing and screening plants even though minerals or quarry products are not extracted from the place where these facilities are situated

3.2 Mine Operator

The Mine Health and Safety Act (Section 22) requires the “**employer with day to day control of the mine**” to be nominated as the “mine operator”.

To satisfy this requirement the nominated operator must be **an employer**. This means the operator must employ at least one person under a contract of employment or apprenticeship.

The operator must also have **day to day control of the mine**. Control may be achieved through **an employer’s power to direct his employees** or through **powers under a contract**, for example the powers a principal may have to direct the activities of a contractor.

The nominated operator has a number of important duties under the Mine Health and Safety Act 2004 including

- Establishing a mine safety management plan, a management structure, a contractor management plan and systems for dealing with emergencies at the mine.
- Reporting accidents and incidents which occur at the mine and making certain other notifications

Normally the “mine holder“ (see below) will nominate the “mine operator”.

Section 23, however, allows the Chief Inspector to declare a person or company to be the mine operator, if the Chief Inspector believes there is no mine operator or mine holder.

3.3 Mine Holder

The Mine Health and Safety Act 2004 uses the concept of a “Mine Holder” in much the same way as the Mines Inspection Act 1901 used the concept of a mine “Owner”. While they are similar, they are defined differently.

The term “mine holder” is defined in Section 3 of the *Mine Health and Safety Act 2004*. In summary a mine holder is

- The holder of a mining title granted under the *Mining Act 1992* or the *Offshore Minerals Act 1999*,.

- In the case of land not subject to a mining title, the holder of the right to extract minerals or quarry product from land. or
- The registered holder of a mine holding. **This part of the definition will not apply** because the concept of a mine holding will not be implemented, and sections of the legislation dealing with it will be repealed.

Mining titles issued under the Mining Act 1992 include mining leases, mineral claims and exploration licences. These titles are generally required for exploration and mining activities in relation to the minerals specified in Schedule 2 of the Mining Regulation 2003. These minerals include metallic ores and many industrial minerals. **Where such a mining title exists the holder (or holders) of the mining title is the “mine holder”**

Some earth products are not minerals as defined in Schedule 2 of the Mining Regulation 2003 and some minerals are privately owned and can be mined without a mining title. **If either of these two cases apply, the mine holder is the person (or corporation) who has the right to extract the minerals or quarry products. This section commonly applies to quarries.**

To nominate an operator, a mine holder must provide documentary evidence establishing it is in fact the mine holder.

As noted previously the Mine Health and Safety Act may apply to facilities such as treatment plants; rutile, zircon and ilmenite processing plants; ready mix concrete manufacturing plants and bitumen hot mix plants; and crushing and screening plants, even though minerals or quarry products are not extracted from the places where these facilities are situated.

In these circumstances, which will occur occasionally, there may not be a mine holder if the land is not held under a mining title and no one has a right to extract minerals or quarry products from the land.

If you believe the Mine Health and Safety Act applies to your operation, but there is no mine holder, **you should advise the your local Inspector of Mines because your operation may be subject to a declaration made by the Chief Inspector under Section 23.**

3.4 Mine Holdings

The Mine Health and Safety Act 2004 refers to “*mine holdings*” . These were to be defined areas within mining leases to which the Mine Health and Safety Act would apply automatically without consideration of the nature of the activity being carried out. Mine holdings were to be registered under the Mining Act 1992.

The concept of a mine holding will **not be implemented**. Planned amendments to the Mining Act 1992 (by way of Schedule 1 Clause 5 of the *Mine Health and Safety Act*) will not occur and therefore it will not be possible to register mine holdings.

4. NOMINATION PROCESS

4.1 Nomination of a mine operator

As noted previously the mine holder must nominate the operator of a mine. Key points concerning the nomination include:

- A mine holder may nominate itself
- A mine holder must not undertake mining nor allow any other person to undertake mining or any work directly related to mining at a mine unless an operator has been nominated and not rejected; and,
- If there is more than one separate and distinct mine at a place, the mine holder may nominate separate operators for each mine.;

The nomination must be made **in writing to the Chief Inspector, through your local Inspector of Mines.**

It must also be **in the form prescribed by the regulations**. While this does not necessarily mean the nomination must be on the form supplied, it must however contain all the information set out in Mine Health and Safety Regulation Clause 8.

If a nomination does not contain this information it is not a valid nomination.

A nomination form is attached to this guideline and it is recommended that this form be used.

The nomination should be forwarded to the local Office of the Department of Primary Industries where it will be received by the regional Inspector of Mines on behalf of the Chief Inspector. Written acknowledgement will be forwarded to the mine holder to acknowledge receipt of the nomination.

If the nomination is not valid, the person or company making the nomination will be advised of the reasons. This may be for example because the person making the nomination is not the mine holder or because all the information required by law has not been supplied.

Officers of the DPI will review the nomination to assess if it is valid and the nominated operator is an employer and has day to day control of the operation.

The Chief Inspector may reject a nomination within 28 days of its receipt if the Chief Inspector believes the nominated operator is **not** the employer with day today control over the mine.

The Chief Inspector may require the mine holder to supply additional information and may extend the 28 day period for this purpose.

The Chief Inspector will advise the mine holder in writing if the nomination has been accepted, rejected or if further information is required.

5. GUIDANCE ON COMPLETING THE NOMINATION FORM

5.1 Information required

The Regulation requires the mine holder to supply a variety of details and in some cases supporting documents. While much of this information is self explanatory, further guidance may assist mine holders in relation to what information is required to establish;

- In supplying the name of the mine please include any alternate names the mine is known by.
- The basis of the mine holders claim to be the mine holder,
- The nature of the relationship between the mine holder and the operator and

- The explanation of the basis on which the nominated operator is considered the employer with day to day control of the mine.

5.2 The basis of the mine holders claim to be the mine holder

The term “mine holder” is defined in Section 3 of the *Mine Health and Safety Act 2004*. In summary a mine holder is

- The holder of a mining title granted under the *Mining Act 1992* or the *Offshore Minerals Act 1999*,.
- In the case of land not subject to a mining title, the holder of the right to extract minerals or quarry product from the land.

5.3 Claim based on mining titles

If the mine operates on land held under a title granted under the *Mining Act 1992* or the *Offshore Minerals Act 1999*, for example a mining lease or mineral claim, the “mine holder” is the person or company which holds the mining title.

More than one person or company may hold the mining titles and a mine may operate on a number of mining titles

Where mining titles exist the mine holders should provide the details of the mining titles

Where the titles are held in joint names, or more than one title exists and these titles are held by different people, one title holder should complete the declaration and attach an agreement from the other(s).

5.4 Claim based on a right to mine

Where **no mining title exists**, the mine holder’s claim must be based on having **a right to extract minerals or quarry products** from the land.

What is meant by a “right to extract” is not defined in the MH&S Act however a person may have a “right to extract” because they

- own the land containing the quarry products or “privately owned minerals” and have not assigned this right to another person or
- have obtained the “right to extract” from the landowner by some form of agreement.

It is preferable that any such agreement for the right to mine is a written agreement or Statutory Declaration. If the agreement is currently a verbal agreement it is expected that any such verbal agreement is supported by some form of signed letter or acknowledgement from the landowner.

It is possible a person could obtain a “right to extract” in other ways.

Because the MH&S Act is concerned solely with mine safety, it is not necessary for a person or company to establish a conclusive legal right to extract minerals or quarry products to be considered the “mine holder”.

The fact that a person is operating a mine, has been doing so for some time and their right to do so has not been challenged, is in itself evidence of their right to extract.

The following questions **which are not required to be answered in the nomination application form** may assist miner holder’s to establish the basis upon which they claim to be the mine holder.

1. Do you believe you have a right to extract minerals from the land on which the mine is situated?
2. Are minerals or quarry product extracted from the land at this site?
3. As far as you know, how long has the mine or quarry been operating?
4. Who currently owns the mine or quarry?
5. Who owns the mine or quarry products after they are extracted from the ground but prior to their sale?
6. Who owns the land on which the quarrying or mining takes place?

7. If you do not own the land on which the quarry is situated.
 - A Do you have some form of agreement which authorises you to extract the minerals from the ground?
 - B If so describe the agreement
 - C Who is it with?
 - D Is it a written agreement? (if the agreement is in writing you must attach a copy to your nomination form)

8. If you own the land, but do not own and operate the quarry
 - A Do you have some form of agreement which authorises some one else to extract the minerals from the ground?
 - B If so describe the agreement.
 - C Who is it with?
 - D Is it a written agreement (If so please attach a copy of the agreement).

9. Has your right to mine or quarry on this land ever been challenged?

10. Do you have the power to prevent mining / quarrying occurring on the land?

5.5 Where there is no mining title and no right to extract minerals

In some circumstance there may not be a “mine holder” and therefore an operator cannot be nominated. In this case the Chief Inspector may declare a person or corporation to be the mine operator in accordance with s 23 of the MH&S Act.

This is particularly likely to arise in relation to facilities such as treatment plants, rutile, zircon and ilmenite processing plants, ready mix concrete manufacturing plants, bitumen hot mix plants and crushing and screening plants. These facilities

may be “mines” for the purposes of the MH&S Act, even though minerals or quarry products are not extracted from the place where the facility is situated.

If you believe there is no mine holder for the mine you operate you should advise your local Inspector of Mines.

5.6 The nature of the relationship between the mine holder and the operator

A nomination **must** include the details of the relationship between the mine holder and the mine operator.

In many cases the mine holder and mine operator will be the same person or company.

In other cases the mine holder and the mine operator will be related companies, for example they may both be wholly owned subsidiaries of another company, or members of a group of companies.

In some instances the operator may be an independent contractor engaged by the mine holder to conduct the mining operations.

While some information **must** be supplied, generally a brief description of the relationship will be sufficient. The Chief Inspector can request further information should this be necessary.

The key requirement is that the mine operator has the unquestioned authority to make decisions, allocate resources and expend funds in relation to the operator’s occupational health and safety duties, sufficient to ensure the health, safety and welfare of employees and other persons working or in attendance at the mine.

Where there is doubt about who should be nominated further more detailed information may be sought, if necessary.

5.7 The explanation of the basis on which the nominated operator is considered to be the employer with day to day control of the mine.

There are two things which must be established to satisfy this requirement

- The nominated operator is an employer and

- The nominated operator has day to day control of the mine.

5.8 Status as an employer

The operator's status as an employer can be established through a declaration completed by the nominated operator that it employs at least one person under a contract of employment or apprenticeship.

5.9 Evidence of day to day control

A series of questions in the nomination form are designed to show

- how the mine operator exercises day to day control of the mine,
- any areas where the operator does not have control and
- If another person or company could better carry out the functions of the mine operator

6. MORE THAN ONE MINE

If there is more than one separate and distinct mine at a place, the mine holder may nominate the person who is the employer with the day to day control of each mine at that place.

Clause 7(2)(a) of the Regulation requires the submission of “a *detailed explanation of the basis on which each mine is considered a separate and distinct mine*”. For the Chief Inspector to consider each case on its merits the following information should be included with the nomination of the operator form.

1. A description in general terms why each mine is considered separate and distinct.
2. A plan identifying each mine at that place.
3. Details of the manner in which the surface and, where relevant, underground boundaries of each mine are fenced or otherwise identified or segregated.
4. A checklist, as evidence, that each mine has its own health and safety management systems for the activities that it undertakes.
5. Evidence of consultation, including a risk assessment, with respect to the separate and distinct mines.

6. Where relevant, details of communication protocols between adjoining mines (*Communication may relate to ventilation, gas monitoring, vehicle movements, people movements, emergency plans, withdrawal conditions etc*).
7. Details of operational overlaps, where the responsibility for such overlaps lies and the controls in place to manage any such overlaps. Note: that such overlaps must be minimised as far as practicable (*examples may be a shared facility or infrastructure eg admin buildings, access road, shared services, shared personnel or equipment etc*).
8. Details of emergency procedures, particularly where an incident at one mine could involve or impact on another.

The information outlined above should be included by the mine holder as an attachment to the nomination form(s).

7. MULTIPLE MINES WITH ONE OPERATOR

Should one operator be nominated for a number of mines (for example councils will multiple mines or State – wide extractives companies with multiple operations) The application for nomination of operator must include details of each mine as specified in Table 1 that is included in the nomination form at pg 4.

8. SMALL QUARRIES CONTROLLED AND OPERATED BY THIRD PARTIES

Where a small quarry is operated on land where the landholder held the right to mine but has passed that right to some other entity such as a council, the other entity will be considered the mine holder for the purpose of nominating the operator.

In the case of a council, when making their nomination in this case, it will be required to provide proof of the basis upon which they are considered the mine holder.

Preferably the proof required will be either copies of the contractual arrangement between the land holder and the council, a statutory declaration from the landholder or a letter or some other form of documentation setting out the arrangement whereby they have passed the right to mine to the council.

Where a council or other entity is the mine holder for a number of mines and intends to nominate the same operator for each of those mines the nomination form contains a table (Table 1) making it possible to list each of the mines and the basis upon which the council or other entity is the mine holder.

North East Area

Armidale

NSW Department of Primary Industries
Earth Sciences Building (C2)
University of New England
Armidale NSW 2350
Phone: (02) 6738 8500
Fax: (02) 6772 8664

Maitland

516 High Street
Maitland NSW 2320
PO Box 344
Hunter Regional Mail Centre NSW 2310
Phone: (02) 4931 6666
Fax: (02) 4931 6790

Singleton

Level 1, 1 Civic Avenue
Singleton NSW 2330
PO Box 51
Singleton NSW 2330
Phone: 02 6572 1899
Fax: 02 6572 1201

South East Area

Lightning Ridge

Lot 60 Morilla Street
Lightning Ridge NSW 2834
PO Box 314
Lightning Ridge NSW 2834
Phone: (02) 6829 0678
Fax: (02) 6829 0825

Lithgow

Suite 1, 1st Floor, 184 Mort Street
Lithgow NSW 2790
Phone: (02) 6350 7888
Fax: (02) 6352 3876

Wollongong

Level 3, Block F, 84 Crown Street
Wollongong NSW 2500
PO Box 674
Wollongong NSW 2520
Phone: (02) 4222 8333
Fax: (02) 4226 3851

Central West Area

Broken Hill

Level 2, 32 Sulphide Street
Broken Hill NSW 2880
PO Box 696
Broken Hill NSW 2880
Phone: (08) 8088 9300
Fax: (08) 8087 8005

Orange

161 Kite Street
Orange NSW 2800
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Orange NSW 2800
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Cobar

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62-64 Marshall Street
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