



**NSW
Resources
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FIT AND PROPER PERSON POLICY



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Introduction

Mining is an important part of the NSW economy. It delivers a significant number of direct and indirect jobs for people throughout NSW and is a major contributor in revenue to the economy which helps to fund hospitals, schools and transport. For this reason, the objects of the *Mining Act 1992* and the *Petroleum Act (Onshore) 1991* expressly recognise the significant social and economic benefits to NSW that result from the efficient development of mineral and petroleum resources.

However, mining and exploration activities can also be hazardous activities. Conducted poorly, they can have unacceptable impacts on the community and the environment. Further, the right to access and develop the mineral and petroleum resources that belong to the people of NSW is a special privilege. The community rightly expects the government to regulate these activities to prevent harm to the community, other industries and the environment, and ensure that the right of exploration and mining is only conducted by companies that can and will respect that privilege.

The government has listened to the community and has acted in a range of areas including establishing a new independent Resources Regulator, establishing minimum technical and financial standards for explorers and miners, and strengthening penalties and investigative powers. As a result, NSW now has a best practice regulatory framework for mineral and petroleum exploration and mining.

An important part of the framework is the fit and proper person test. The test is in section 380A of the *Mining Act 1992* and section 24A of the *Petroleum (Onshore) Act 1991*. It gives a decision maker the power to restrict operations under an authorisation, suspend or cancel an authorisation, or refuse an application to grant, renew or transfer an application, if they are of the opinion that an applicant or title holder is not a 'fit and proper person'.

Purpose and scope of the policy

The rights granted to authorisation holders are significant to both that holder and the community. Accordingly, it is important that the community and the industry have clarity around the exercise of the fit and proper person test.

The purpose of this policy is to provide the community and industry with guidance as to the meaning of the fit and proper person test and how it will be applied. This policy operates only as a guide to the legislative provisions and does not substitute for those provisions. The following matters are addressed in this policy:

- What is the fit and proper person test?
- Who does the test apply to?

- What evidence is required?
- How the test operates within the regulatory framework.

The fit and proper person test applies to exploration licences, assessment leases and mining leases under the *Mining Act 1992* and exploration licences and production leases under the *Petroleum (Onshore) Act 1991*. These rights are collectively referred to in this policy as ‘authorisations’.

In summary:

- A decision maker applying the fit and proper person test must carefully consider the merits of each particular case.
- The fit and proper person test is only one of a range of tools available under the *Mining Act 1992* or *Petroleum (Onshore) Act 1991* to ensure that mining is conducted in a manner that complies with relevant approvals and NSW law. If non-compliance arises, the appropriate regulatory response will depend on the nature of the non-compliance having regard to relevant compliance policies and the tools available.
- A decision made about an authorisation on the basis that a person is not fit and proper can be appealed to the Land and Environment Court. Accordingly, it is desirable that when making decisions about fit and proper, decision makers rely on evidence that would be admissible in a court.
- Decision makers should ensure they rely on substantiated, factual evidence or material that enables them to reach a high level of satisfaction with regards to the fit and proper person test. Suspension or cancellation of an authorisation can have serious impacts on an authorisation holder, shareholders and for business confidence.
- When applying the fit and proper person test, the behaviour of related bodies corporate or their directors that have no control over the day-to-day operations or decision-making processes of the authorisation holder may be given little, if any, weight. Conversely, evidence that a related body corporate or individual does have operational influence over the authorisation holder or has contributed to poor culture or governance of the authorisation holder may be given greater weight.

What is the fit and proper person test?

The fit and proper person test is a discretionary power for the decision maker to take action to:

- restrict operations by imposing or varying conditions on an authorisation
- suspend an authorisation
- cancel an authorisation
- refuse an application to grant, renew or transfer an authorisation.

The power can be exercised at any time if the decision maker forms the opinion that a person (which includes a company) is not a fit and proper person. The opinion must be that of the decision maker. The decision maker may not simply adopt an opinion that has been formed by some other agency or person.

For example, a conclusion of corruption by ICAC would not alone be grounds for exercise of this power. However, the decision maker could refer to the evidence that was before another body (such as ICAC) to inform their own independent conclusion about that material for the purposes of the fit and proper test.

In forming their opinion, the decision maker may have regard to a broad range of matters, including, but not limited to, the specific matters listed in the legislation. These are set out in full in Attachment A, but broadly include:

- compliance or criminal conduct issues, including significant environmental matters
- technical competence and financial capacity
- good character and repute.

The matters in Attachment A are not exhaustive considerations. The decision maker can have regard to other relevant matters.

The mere fact that previous conduct falls within one of the listed considerations does not automatically mean that a person is not fit and proper. The issue is whether the authorisation holder or applicant (as relevant) is a fit and proper person to hold the authorisation - that is, are they a fit and proper person to explore for and mine, minerals or petroleum. It is not merely a question of whether a company or relevant person meets the moral standards of any individual person. Rather, the conduct must be of sufficient significance and relevance to enable the decisionmaker to come to a reasonable conclusion that the person is not fit and proper for this purpose.

For example, a one-off breach may be technical or administrative in nature and not significant. In other instances, the breach may be sufficiently serious, or be part of a pattern of breaches or behaviour to support a conclusion that the authorisation holder does not have the capacity to comply with its

obligations under NSW law when exercising the right, and therefore is not a fit and proper person. Further examples of things which might be relevant include:

- evidence of serious or repeated environmental breaches that raise significant concerns about a company's compliance or management systems
- evidence that a person is not of good character or repute, with particular regard to honesty and integrity. This may demonstrate an unacceptable risk of a corporate culture that cannot be trusted if the evidence is sufficiently serious and the person has a real influence on the corporate culture
- evidence of ongoing financial difficulties. This may, if sufficiently serious, show that the authorisation holder may not have the financial capacity to meet its obligations under an authorisation.

Who does the test apply to?

In forming the opinion that a person (which includes a company) is not a fit and proper person, the decision maker is able to have regard to the behaviour of a range of other persons including:

- If the person is a company:
 - directors of that company
 - any related body corporate (e.g. as defined under section 50 *Corporations Act 2001*)
 - an associated entity (e.g. as defined under section 50 AAA *Corporations Act 2001*)
 - a director of a related body corporate or associated entity.
- Persons that the authorisation holder is in partnership with, or has other formal or informal arrangements with, in connection with the mining or petroleum activities.

This list is just an example of other persons whose behaviour may be considered. In today's business world, companies are increasingly using complex corporate structures to manage their affairs. However, complex structures will not protect companies from the scrutiny of this test. Importantly, where the decision maker is considering the behaviour of another individual or company, the question is whether that behaviour affects the capacity of the authorisation holder or applicant to meet its obligations under NSW law when exercising the right. For example:

- Behaviour of related bodies corporate or their directors that have no control over the day-to-day operations, or decision-making processes of the company may be given little, if any, weight.
- Evidence that the related body corporate or individual does have operational influence over the authorisation holder may be given greater weight.
- Evidence that a related body corporate or individual has contributed to poor culture or governance of the authorisation holder may be given greater weight.

What evidence is required?

A decision maker applying the fit and proper person test must carefully consider the merits of each particular case. The decision maker should ensure they rely on substantiated, factual evidence or material that enables them to reach a high level of satisfaction with regards to the fit and proper person test that is commensurate with the gravity of a finding that a person is not fit and proper and the consequences of any decision based on that finding. In particular, suspension or cancellation of an authorisation can have serious impacts on an authorisation holder, shareholders and for business confidence.

Robust evidence of proven bad behaviour in other jurisdictions may be a relevant consideration that informs the decision maker's own decision that a person is not a fit and proper person.

Where a decision maker makes a decision on the basis that a person is not fit and proper, the merits of that decision can be appealed to the Land and Environment Court. The rules of evidence will apply to those proceedings. This means that if the initial decision is based on material that would not be admissible in court, that material may not be considered in review proceedings and increase the risk the decision will not be upheld.

Therefore, it is desirable that when making decisions about fit and proper, decision makers rely on evidence that would be admissible in a court. Examples of the types of material which may not be admissible are:

- media reports alleging corrupt or unlawful conduct whether in Australia or overseas, unsubstantiated by other evidence
- conclusions by non-judicial bodies
- allegations that are unsupported by evidence.

Conversely, authoritative decisions of courts in other jurisdictions with robust judicial and regulatory systems may be highly relevant.

In determining the matter, the decision maker is required to provide the authorisation holder or applicant with procedural fairness.

How does the test operate within the regulatory framework?

The *Mining Act 1992* and *Petroleum (Onshore) Act 1991* contain a number of mechanisms to ensure the integrity of persons conducting exploration or mining activities in NSW. The fit and proper person test sits within this broader regulatory framework, and other specific tools may be more appropriate to minimise imminent and longer-term risks. The test may overlap with both:

- decisions to grant or refuse authorisations, renewal and transfers of authorisations
- regulatory powers that may be used to address breaches of the legislation or the conditions of an authorisation.

Application of the test needs to be considered within these broader frameworks and against relevant compliance policies, when determining appropriate responses to contraventions.

Decision to grant, renew or transfer

A decision to refuse to grant, renew or transfer an authorisation may be made on the basis that a relevant person is not a fit and proper person. As discussed above, compliance and criminal conduct issues are relevant to whether a person is a fit and proper person.

However, under both the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*, the compliance history of the applicant and, in the case of a body corporate, any of its directors, and the applicant's technical and financial capability are already relevant to the determination of an application to grant, renew or transfer an authorisation (unrelated to the fit and proper test). Therefore, such applications can be refused having regard to these and other factors without the need to form a view as to whether the person is a fit and proper person for the purposes of the Act.

Compliance decisions

Where a breach of the *Mining Act 1992* or *Petroleum (Onshore) Act 1991* has occurred, consideration needs to be given as to whether cancellation or suspension is the most appropriate regulatory action having regard to the other powers that include:

- imposing conditions on an authorisation
- lodging of security deposits to ensure conditions of authorisations are complied with
- penalty infringement notices
- enforceable undertakings
- prosecution.

If cancellation or suspension is determined to be the appropriate response, consideration should then be given to the legal basis for that response. For example, action to cancel an authorisation could be taken on the grounds of the breach alone, without forming a view that the person is not fit and proper. As with the fit and proper test, the decision maker should provide the authorisation holder or applicant with procedural fairness in these instances.

Attachment A – The fit and proper person test

Extracts of relevant provisions of section 380A of the *Mining Act 1992* and section 24A of the *Petroleum (Onshore) Act 1991* are set out below. Identical provisions have not been replicated but any differences are identified below (see cross references in subsection (7)).

- 2) For the purpose of determining whether a person is a fit and proper person, the decision maker may take into consideration any or all of the following matters (but without limiting the matters that can be taken into consideration for that purpose):
 - (a) whether the person or (in the case of a body corporate) a director of the body corporate or of a related body corporate has compliance or criminal conduct issues (as defined in this section)
 - (b) in the case of a body corporate, whether a director of the body corporate or of a related body corporate is or has been a director of another body corporate that has compliance or criminal conduct issues (as defined in this section) but only if the person was a director of that other body corporate at the time of the conduct that resulted in the compliance or criminal conduct issues
 - (c) the person's record of compliance with relevant legislation (established to the satisfaction of the decision maker)
 - (d) in the case of a body corporate, the record of compliance with relevant legislation (established to the satisfaction of the decision maker) of any director of the body corporate or a related body corporate
 - (e) whether, in the opinion of the decision maker, the management of the activities or works that are or are to be authorised, required or regulated under the mining right are not or will not be in the hands of a technically competent person
 - (f) whether, in the opinion of the decision maker, the person is not of good repute
 - (g) in the case of a body corporate, whether, in the opinion of the decision maker, a director of the body corporate or a related body corporate is not of good repute
 - (h) whether, in the opinion of the decision maker, the person is not of good character, with particular regard to honesty and integrity
 - (i) in the case of a body corporate, whether, in the opinion of the decision maker, a director of the body corporate or a related body corporate is not of good character, with particular regard to honesty and integrity

- (j) whether the person, during the previous three years, was an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit
 - (k) in the case of an individual, whether he or she is or was a director of a body corporate that is the subject of a winding up order or for which a controller or administrator has been appointed during the previous three3 years
 - (l) in the case of a body corporate, whether the body corporate or a related body corporate is the subject of a winding up order or has had a controller or administrator appointed during the previous three years
 - (m) whether the person has demonstrated to the decision maker the financial capacity to comply with the person's obligations under the mining right
 - (n) whether the person is in partnership, in connection with activities that are subject to a mining right or proposed mining right, with a person whom the decision maker considers is not a fit and proper person under this section
 - (o) whether the person has an arrangement (formal or informal) in connection with activities that are subject to a mining right or proposed mining right with another person whom the decision maker considers is not a fit and proper person under this section, if the decision maker is satisfied that the arrangement gives that other person the capacity to determine the outcome of decisions about financial and operating policies concerning those activities
 - (p) any other matters prescribed by the Regulations.
- 3) A person or body corporate has **compliance or criminal conduct issues** if:
- (a) the decision maker is satisfied that the person or body corporate has contravened any relevant legislation, whether or not the person or body corporate has been prosecuted for or convicted of an offence arising from the contravention, or
 - (b) in the previous 10 years, the person or body corporate has been convicted in NSW or elsewhere of a serious offence or an offence involving fraud or dishonesty, or
 - (c) the person or body corporate has held a mining right, or any other instrument issued or granted under relevant legislation, that has been suspended, cancelled or revoked.
- 7) In this section:
- **director** of a body corporate includes any person involved in the management of the affairs of the body corporate

- **mining right** means an exploration licence, an assessment lease, a mining lease, a mineral claim or an opal prospecting licence
- **related body corporate** has the same meaning as in the *Corporations Act 2001* of the Commonwealth
- **relevant legislation** means the following legislation:
 - (a) this Act
 - (b) the *Petroleum (Onshore) Act 1991* [or the *Mining Act 1992*]
 - (c) the environment protection legislation
 - (d) the *Environmental Planning and Assessment Act 1979*
 - (e) the work health and safety legislation [as defined in the *Mining Act 1992*]
 - (f) any other legislation prescribed by the regulations under this Act.
- **serious offence** means:
 - (a) an offence committed in NSW that is punishable by imprisonment for life or for a term of five years or more or by a fine of \$500,000 or more, or an offence committed elsewhere than in NSW that if committed in NSW would be an offence so punishable, or
 - (b) an offence committed under a law of the Commonwealth that is punishable by imprisonment for life or for a term of five years or more or by a fine of \$500,000 or more.