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# Authorisation

**Title** Operational Policy – Assessment of Fit and Proper Persons

**Issuing Division/ Branch** Earth Resources Regulations

**Date Effective** 1 July 2019

**Enquiries** customer.service@ecodev.vic.gov.au

**🕿 Contact** 136 186

**Approved by** Jaclyn Symes MP, Minister for Resources

**Issued by** Anthony Hurst, Executive Director, Earth Resources Regulation

Issued as guidance under section 13(g) of the *Mineral Resources* (*Sustainable Development) (Mineral Industries) Regulations* 2019

# Objective and Principles

This operational policy sets out the factors that will be considered by the Minister for Resources (or Ministerial delegate) in assessing a licence applicant’s status as a ‘fit and proper person’, under the *Mineral Resources (Sustainable Development) Act 1990* (MRSDA). Applicants are expected to meet high standards of honesty and conduct.

The overall objectives are to:

* Enable responsible and competent operators to generate investment and job opportunities, particularly in regional areas, through the grant of exclusive access to the State’s earth resources;
* Provide assurance for land holders, government and the wider community that operators will fulfil their regulatory obligations and social responsibilities to protect people, land, infrastructure and the environment, throughout the exploration and mining life cycle;
* Safeguard Authorised Inspectors by reducing the risk of exposure to anti-social behaviour, particularly in remote locations; and
* Provide upfront guidance to all licence applicants on how all applications will be assessed in a transparent, fair and consistent way.

Applicants for an exploration, retention, mining or prospecting licence *must* satisfy the Minister, among other matters, that they are a fit and proper person to hold a licence. Licence applicants competing for access to the same land must satisfy the Minister that they are *likely* to be a fit and proper person to hold a licence.

A licence application must be refused if the Minister is not satisfied the applicant is a fit and proper person to hold a licence.

The fit and proper person provisions must be met on a continuous basis for the duration of a licence. A licence must be cancelled if the licensee is no longer considered to be a fit and proper person[[1]](#footnote-1). Similarly, an application to renew a licence must be refused if the licensee is no longer considered to be a fit and proper person.

The principles of procedural fairness, natural justice and restorative justice will be applied in assessing a person’s overall status as a fit and proper person to hold a licence.

This operational policy applies to all licence applicants and associates of the applicant[[2]](#footnote-2). An associate means a director, partner, trustee, executive officer, secretary or any other officer or person associated or connected with the ownership, administration or management of the applicant’s business.

# Fit and Proper Persons

## 3.1 General Concepts

The concept of a fit and proper person is incorporated in a wide range of legislation, with the intent to ensure that only those persons with the appropriate expertise, professional integrity and high standards of personal behaviour are authorised to undertake certain types of activities, in the public interest.

Assessing a person’s status as a fit and proper person involves considering their overall suitability to carry out a proposed activity and takes meaning from its context. This typically includes considering a range of relevant factors, such as the activities in which the person will be engaged, the nature of the activities and how the activities are regulated.

A range of other factors is often taken into consideration to assess a person’s overall status as a fit and proper person to undertake an activity, including the seriousness of previous unacceptable behaviours (including resultant harms and penalties), singular or repetitive patterns of unacceptable behaviours, reformed behaviours, mitigating circumstances and time elapsed.

The concept of a fit and proper person is not narrowly construed or confined, nor does it remain constant over time. The assessment of the factors listed above is made in a general or an overall sense, with all aggravating and mitigating circumstances considered.

## 3.2 Exploration and Mining Context

The MRSDA establishes a legal framework to eliminate or minimise risks posed to the environment, to members of the public or to land, property or infrastructure.

There is a high reliance on operator trustworthiness to work within the legal framework and comply voluntarily with their legal obligations and social responsibilities, taking account of a range of contextual factors for this industry sector including (but not limited to):

* Operators undertake a range of activities that present potential risks of harm to people, land, infrastructure and the environment, if not effectively managed;
* Operators often use dangerous materials and equipment (e.g. explosives and heavy machinery);
* Regulatory oversight of operations is constrained, particularly in remote locations;
* Operators are expected to behave as good citizens through their operations and in their engagement with local communities;
* Operators are required to provide true, accurate and timely reports on their operations; and
* Authorised Inspectors may be vulnerable to anti-social behaviour by operators in remote locations where response times for emergency intervention can be limited.

## 3.3 MRSDA Provisions – Overview

Section 16 of the MRSDA specifies the factors that *must* be considered in assessing whether an applicant is a fit and proper person under section 15(6)(a). This list is not exhaustive.

Other factors that are relevant to the purpose and objectives of the Act and the principles of sustainable development in the MRSDA can be considered in the assessment, under Section 16(3).

Licence applicants competing for access to the same land must satisfy the Minister that they are *likely* to be a fit and proper person to hold a licence, under Section 23(2)(b) of the MRSDA.

The relevant extracts of the MRSDA provisions are listed in Appendix 1.

## 3.4 MRSDA Provisions – Mandatory Factor

An applicant is not a fit and proper person to hold a licence if they or an associate is an insolvent under administration, as prescribed under Section 16(2) of the MRSDA.

No other specific factor automatically makes an applicant not a fit and proper person under the MRSDA.

## 3.5 MRSDA Provisions – Specific Factors

The Minister *must* have regard to the following matters to be satisfied than an applicant is fit and proper to hold a licence, in accordance with section 16(1) of the MRSDA:

* whether the Minister has taken action under section 83 of the MRSDA to rehabilitate land because the applicant or an associate has failed to do so in accordance with Part 7 of the MRSDA;
* whether an applicant or an associate has had their licence cancelled due to non-compliance with the MRSDA or associated regulations;
* whether an applicant or an associate has been convicted of an offence against the MRSDA; or
* whether an applicant or an associate has been convicted of a fraud or dishonesty offence.

## 3.6 MRSDA Provisions – Other Factors

The Minister *may* consider other relevant matters for the purpose of being satisfied that an applicant is a fit and proper to hold a licence, in accordance with Section 16(3) of the MRSDA. The following factors will be considered:

* An applicant’s professional history, including whether they:
* have been banned or disqualified from being a company director;
* have been in receivership or under administration;
* have been or are non-compliant with the MRSDA or other resource management, Native Title, environmental or safety related legislation, including companies that the applicant is/was a director or senior officer; or
* has been convicted of a criminal offence.
* The applicant’s professional reputation and character, including whether they have:
* failed to comply with legal obligations, regulatory requirements or professional standards;
* been obstructive, misleading or untruthful in dealing with regulatory bodies or courts;
* participated in negligent, deceitful, or otherwise discreditable business or professional practices;
* behaved unethically towards or failed to work cooperatively with relevant landholders and local communities;
* failed to cooperate or acted in a threatening way towards Authorized Inspectors;
* acted unethically in the treatment of their employees and sub-contractors, such as failing to pay employee entitlements or contractors or failing to ensure their health and safety;
* any business associations with any person, body or association that is not of good repute having regard to character, honesty and integrity; or
* the competence, diligence and judgement of the applicant (which may include the applicant's level of relevant experience), as it relates to the nature and details of the application.

The Minister may consider any current investigations into an applicant or licensee’s conduct in the application of section 15(6)(a), such as alleged breaches of resources management, Native Title, environmental, safety legislation or criminal conduct. Generally, assessments and decisions on licence applications will not be concluded in such circumstances until the resolution of the investigation or charges is determined by a court.

The Minister may also consider any other information that may be relevant for determining whether the applicant is a fit and proper person to hold the licence.

## 3.7 Assessment of Identified Specific and Other Factors

Any identified factors will be considered on their merit to inform the assessment of an applicant’s status as fit and proper to hold a licence, taking account of the following elements (to the extent relevant):

* The circumstances for any identified specific or other factors, including (but not limited to):
* the circumstances that led to action being taken;
* when the circumstance arose;
* the nature of the offence;
* when the offence occurred; and
* the penalty imposed, including whether the applicant’s conduct resulted in a fine, term of imprisonment, infringement notice or prosecution.
* The seriousness of the applicant’s conduct will also be considered, including (but not limited to):
* the impact of the applicant’s conduct on any victim, community, employee or the environment,
* any injury, loss, or damage resulting directly from the applicant’s conduct,
* whether the applicant’s conduct involved any fraud or dishonesty,
* whether the applicant’s conduct involved violent or threatening behaviour, or
* whether the applicant committed a summary or indictable offence.

Consideration may be given to statements from the applicant, reports from regulatory bodies, police reports, police checks, court transcripts and sentencing remarks in assessing any identified factors. Information from other sources may also be considered, provided these are relevant and credible.

## 3.8 Mitigating Circumstances

Consideration may be given to any mitigating circumstances where a relevant factor has been identified.

A mitigating circumstance will not automatically excuse the applicant’s conduct, but it may lessen the significance of the conduct in the overall assessment of a person’s status as a fit and proper person to hold a licence.

Examples of mitigating circumstances that may be considered, where known, include (but are not limited to):

* The applicant’s intent:
* Did the applicant knowingly commit a breach or offence under the MRSDA or other resource management, Native Title, environment or safety related legislation or criminal law?
* Was the offence (including criminal offences) committed by the applicant premeditated?
* The consequences of the offence:
* Was any land significantly damaged?
* Were employees, including contractors, or the community put at risk or injured?
* Any breach of trust:
* Did the applicant try to cover up a breach of the MRSDA or other resource management, Native Title, environmental or safety related legislation?
* Was the applicant truthful in their dealings with the relevant regulator, police or the courts?
* Age:
* Was the applicant under the age of 18 when the conduct occurred?
* Mental illness:
* Was the applicant’s conduct affected by mental illness?
* Alcohol or drug addiction:
* Was the applicant’s conduct affected by alcohol or substance abuse or addiction?

## 3.9 Time Elapsed

Consideration may be given to the time elapsed since the occurrence of an identified factor, subject to assessing its significance taking account of:

* the seriousness of the matter under consideration;
* whether the matter is part of a sustained or repeated pattern of behaviour;
* whether the matter relates to dishonesty or violent and threatening conduct;
* whether the matter has been fully disclosed by the applicant at the first time of asking; and
* whether the circumstances that contributed to the matter have been removed or are no longer operative.

The interplay of these factors is not calculated by any pre-determined weighting.

As a general principle, the fact that time has elapsed since a matter occurred is likely to be relevant where the misconduct is less serious, less sustained and does not relate to dishonesty, violence or threats.

The Minister has the discretion to give greater or lesser weight to the time elapsed in each case.

## 3.10 Repeated Non-compliant Conduct

Consideration may be given to repeated non-compliant conduct against the criminal law and the MRSDA or other resource management, Native Title, environment or safety related legislation.

As a general principle, repeated non-compliant conduct may carry significant weight in assessing the applicant’s fitness and propriety to hold a mining licence.

## 3.11 Reformed Behaviours

Consideration may be given to any evidence of reformed behaviour or steps the applicant has taken to improve their conduct. Examples include:

* deliberate action to redress a circumstance;
* recent compliance with MRSDA or other resource management, Native Title, environment or safety related legislation;
* remedial training;
* rehabilitation courses; or
* community service.

Consideration will also be given to whether the applicant has been forthcoming in declaring and acknowledging any relevant previous adverse behaviours, remorse and commitment to improved behaviours.

## 3.12 Assessment

All identified factors will be considered severally and collectively on their merit to inform the assessment of an applicant’s overall status as being a fit and proper person to hold a licence.

An application must be refused if an applicant is found not to be a fit and proper person to hold a licence.

A whole application may fail section 15(6)(a) of the MRSDA in circumstances where joint applicants apply for a licence and one of the applicants is determined not to be a fit and proper person to hold a licence.

An application will continue to be assessed against other requirements in section 15 of the MRSDA, if the applicant is determined to be a fit and proper person to hold a licence.

# General Procedures

## 4.1 Procedural Fairness

Applicants will be informed in writing of any decision and the reasons for the decision with respect to their status as a fit and proper person to hold a licence.

Applicants will be given an opportunity to explain any relevant matter. Applicants will be provided 28 days to respond in writing and given opportunity to provide any supporting evidence.

## 4.2 Request for Further Information

Applicants are required to submit current and accurate information to inform the assessment of their status as a fit and proper person. Licence holders may also be requested to submit updated information to inform the assessment of their continuing status as a fit and proper person.

Earth Resources Regulation will conduct Police Checks, company searches and other relevant inquiries, and use its official record of previous dealings with the applicant to verify and inform the assessment of their status as a fit and proper person to hold a licence. The applicant’s consent will be sought where necessary.

Any requests for further information will be sent in writing (letter or email) to the applicant. Applicants will be provided 28 days to respond in writing and given opportunity to provide any supporting evidence.

An application may be refused or a licence cancelled if an applicant fails to provide sufficient information to enable the assessment of whether they are a fit and proper person, despite requests for further information. A negative inference will not be drawn from any failure to provide the further requested information. However, the assessment may result in an unfavourable determination in circumstances where the application is assessed on incomplete or insufficient information.

## 4.3 Rights of Appeal

A decision to reject a licence application may be appealed to the Victorian Civil and Administrative Tribunal: https://www.vcat.vic.gov.au

A dispute may also be brought to the Mining Warden for resolution. The Mining Warden is an independent statutory office holder appointed by the Governor in Council under the Mineral Resources (Sustainable Development Act) 1990 who investigates and attempts to resolve disputes by mediation, conciliation or arbitration, including between a licensee or an applicant for a licence and the Department.

**4.4 Subsequent applications**

A prior failure to meet the fit and proper person test will not prejudice subsequent applications.

# Records Management

**Last Reviewed** May 2019

**Next Review** April 2021

**Version No.** 1.1

# Appendix 1: Relevant Sections of the MRSDA

**Section 15 Application for a licence**

(6) An applicant for a [licence](http://classic.austlii.edu.au/au/legis/vic/consol_act/mrda1990432/s4.html#licence) must satisfy the Minister that the applicant—

* 1. is a fit and proper person to hold the [licence](http://classic.austlii.edu.au/au/legis/vic/consol_act/mrda1990432/s4.html#licence);

**Section 16 Applicant for licence – fit and proper person**

1. For the purpose of being satisfied under section 15(6)(a) that an applicant for a licence is fit and proper person to hold the licence, the Minister must have regard to whether –
	1. The Minister has taken action under section 83 to rehabilitate land because the applicant or an associate of the applicant has not complied with Part 7, including

 (i) the circumstances which led to the taking of that action under that Part; and

 (ii) when those circumstances arose;

 (b) a licence held by the applicant or an associate of the applicant has been cancelled, including

 (i) the circumstances which led to that cancellation;

 (ii) when those circumstances arose;

 (c) the applicant or an associate of the applicant has been convicted of an offence against the Act, including—

 (i) the nature of the offence;

 (ii) when the offence was committed;

 (iii) the penalty imposed;

 (d) the applicant or an associate of the applicant has been convicted of an offence involving fraud or dishonesty including—

 (i) the nature of the offence;

 (ii) when the offence was committed;

 (iii) the penalty imposed.

 (2) The Minister cannot be satisfied under section 15(6)(a) that an applicant for a licence is a fit and proper person to hold the licence if the applicant or an associate of the applicant is an insolvent under administration.

 (3) Subsections (1) and (2) do not limit what the Minister must be satisfied of under section 15(6)(a).

 (4) In this section "associate "means a director, partner, trustee, executive officer, secretary or any other officer or person associated or connected with the ownership, administration or management of the applicant's business.

**Section 23 Priority of applications**

(2) The Minister must assign the highest priority to the application that he or she believes will best further the objectives of this Act after considering—

(a) the relative merits of the applications; and

(b) the likely ability of each applicant to meet the requirements specified in section 15(6).

1. The term ‘applicant’ is used throughout this operational policy document to describe an applicant for a licence or an existing licence holder. [↑](#footnote-ref-1)
2. The term ‘applicant’ is used throughout this operational policy document to describe an applicant or an associate of an applicant. [↑](#footnote-ref-2)