



Submission

to

Senate Standing Committee on Environment and Communications inquiry into rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities

prepared by

Environmental Justice Australia

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For further information on this submission, please contact:

Bronya Lipski, Lawyer, Environmental Justice Australia

David Barnden, Lawyer, Environmental Justice Australia

T: 03 8341 3100

1. “Commonwealth responsibilities” – why we need effective national leadership on mine rehabilitation

Environmental Justice Australia welcomes the opportunity to make a submission to the Senate Standing Committee on Environment and Communications inquiry into rehabilitation of mining and resources projects as it relates to Commonwealth responsibilities.

Australia has long prided itself as a world leader in mineral resource supply for both domestic and international markets. However, this proud history is accompanied with a problem so prodigious that it is overwhelming in both complexity and scope. Mine rehabilitation is, arguably, increasingly becoming a matter of national environmental, social and economic significance. There are some 60,000 mines in Australia, across nine jurisdictions. Each jurisdiction has different approaches to mine rehabilitation, creating a disparate approach as to how rehabilitation is planned, regulated and enforced throughout the country.

A thorough consideration of the appropriate role of our national government in relation to these issues is welcome and timely.

Although superficially the Commonwealth’s regulatory role in this area appears to be confined to situations where a mining project triggers federal environmental assessment and approval to protect matters of national environmental significance under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”), a more careful consideration is required before concluding that the Commonwealth’s governments responsibility is such a limited one.

There is a national system of standard setting in place for a range of hazardous activities under the National Environment Protection Act regime facilitated by mirror Commonwealth and State legislation. Its failure to extend in anything other than a peripheral manner to with issues arising in relation to mine rehabilitation needs to be examined, as does the adequacy of the standard setting framework to deal with mine rehabilitation issues even if it was determined that these issues ought to be within the scope of the regime.

More fundamentally, it is already the case that the Commonwealth clearly sees itself as playing a role in mining best practice, including mine closure and rehabilitation, through the Leading Practise Sustainable Development Program for the Mining Industry.

The “standards” developed through this Commonwealth government auspiced program are the basis, to varying degrees, for the setting of rehabilitation conditions in State regulatory systems. What we in effect have in place is an industry driven self regulatory regime encouraged and enabled by the Commonwealth government. The result is that, to the extent that mine rehabilitation is failing to meet community expectations, the Commonwealth must bear part of the blame and certainly a large proportion of the responsibility for sorting out the problem given the clearly recognised

desirability for nationally consistent approaches to standard setting in areas such as air, land and water contamination.

Improved national regulation is required. Apart from ensuring that there is a rigorous national process in place to set appropriate standards, there is also an important role for the federal government to oversee and enforce mine rehabilitation, including enforcing compliance with financial and environmental obligations on the part of both mine owners and the States and Territories to adequately plan for mine rehabilitation.

Effective management of the impacts of mining requires a detailed planning process that must consider and synthesise technical knowledge, technological advancements, the local environment, longer-term changes to the environment and community expectations and involvement. If the impacts of mining are not managed, including in relation to mine rehabilitation, mines can have significant impacts on amenity, health, environmental and economies outside the mine. If this occurs, communities and the State end up bearing the costs of the impact of mining.

A further issue, discussed in more detail below, is the importance of the financial and corporate regulatory framework to ensuring that adequate and secure provision is made for mine rehabilitation, both during the course of the mine operations and, critically, post mine closure.

2. Constitutional responsibilities and powers

The lack of an effective national regulatory approach at present reflects the historical legacy of State responsibility for mining activities, and the undoubted political reticence of the Commonwealth to exercise the constitutional powers available to it.

The Commonwealth government clearly has adequate constitutional powers available to it to assume the necessary leadership in this area in our view. The principal heads of power available here are:

- a. corporations - s 51(xx)
- b. trade and commerce – s 51(i)
- c. bankruptcy and insolvency – s 51(xvii)
- d. external affairs – s 51(xxix)

Clearly this is a foundational issue. If there is any doubt on the part of the Committee as to the constitutional foundations for a stronger Commonwealth role in this area, then we would urge the Committee to seek suitable advice or expert input to clarify the issue. Such clarification would be an important contribution to future consideration of this important issue.

3. The importance of the regulatory framework

Good regulation and enforcement is necessary to ensure the impacts of mine rehabilitation are assessed and planned for, and define the standards and boundaries with which mining companies are expected to operate. If regulations are vague, incomplete or out-of-date, they are likely to fail in clearly setting expectations for behaviour of mining companies and result in less than optimal outcomes. Good regulations will not achieve their objectives if the regulations are not implemented in full. This requires monitoring companies' compliance with regulations and taking appropriate enforcement action in the event that non-compliance is identified.

Mining companies undertaking large operations are typically large corporations, many foreign-owned. It is unrealistic to expect these companies to implement environmental best practise and rehabilitation planning without adequate regulatory oversight, and prioritise their obligations to the environment and community over those shareholders.

Weak regulations and weak regulators have meant that rehabilitation requirements are unlikely to result in the land being returned to a productive and usable state. Often mines are not even fulfilling the bare minimum rehabilitation requirements in place. This is a failure of the States to regulate mine rehabilitation properly. The legal regimes and their approaches to implementing them have resulted in bad outcomes for the environment and communities.

For example, in 2014 a catastrophic fire broke out in the Hazelwood mine in Morwell, Victoria. A toxic plume of smoke blanketed Morwell, and surrounding communities in the Latrobe Valley, for some 40 days. The air pollution was found by the 2015-2016 Hazelwood Mine Fire Inquiry to have likely contributed to a spike in deaths in the area. The northern batters of the mine in which the fire broke out was "worked-out" and not rehabilitated in accordance with the mine owner's rehabilitation plan nor with Victorian laws under the *Mineral Resources (Sustainable Development) Act 1990*. The 2014 Hazelwood Mine Fire Inquiry found that the overwhelming number of industry and government regulators including GDF Suez (the mine's owner), the Victorian Environment Protection Authority, WorkSafe Victoria, Earth Resources Regulation, had all failed in their duties to either rehabilitate disused sections of the mine or oversee and enforce progressive rehabilitation.

Since the fire Victoria's approach to rehabilitation of the Latrobe Valley's brown coal open cut mines is an example of promising effective mine rehabilitation programs. Victoria's approach has been to increase the bonds for each brown coal mine in the Latrobe Valley, create a Latrobe Valley Mine Rehabilitation Committee and Mine Rehabilitation Commissioner, implement the recommendations of the Mine Fire Inquiry Board, and initiate environmental reforms that give the Victorian EPA a greater role in mine rehabilitation plans to avoid environmental degradation. However these approaches were undertaken in the wake of fire which demonstrated the inadequacies of progressive mine rehabilitation in the Latrobe Valley and the inadequacies of regulators to oversee and enforce rehabilitation obligations. The instigation of such initiatives should not have to depend on the occurrence of foreseeable disasters like the Hazelwood mine fire.

Whilst the Victorian government's approach is welcomed it is limited in its approach to mine rehabilitation. These initiatives pertain solely to the Latrobe Valley. It does not account for the disused brown coal mine at Anglesea, or other disused and/or abandoned mines in Victoria.

Inadequate rehabilitation has caused legacy contamination in all jurisdictions, a legacy that is shrouded by the praise reserved for the mining history in Australia. Communities that live closest to mines are exposed to the greatest environmental and social consequences of inadequate State regulation of mine rehabilitation, including toxic legacies that continue to impact on environmental and human health despite mining activities having ceased years earlier.

In the Victorian goldfields, for example, people exposed to soil contaminated with arsenic have been found to have rates of certain types of cancers much higher than people not exposed to soil contaminated with arsenic.¹ People who live around open-cut coal mines are routinely exposed to fine particle pollutants that are known to increase cardiovascular and respiratory diseases. Without a rigorous approach to mine rehabilitation these communities risk exposure to pollutants well beyond the use of the mines. The injustice of this is obvious.

When mining companies eventually surrender or revoke their mining licences, the land typically returns to the Crown who resumes liability and responsibility. If adequate rehabilitation is not achieved, those costs become the problem of the State.

In 1996, after operating for a mere four years, the owners of the Benambra zinc and copper mine in north-eastern Victoria went into receivership. The mine was abandoned without rehabilitation being conducted. Toxic pollutants from the tailings dam leached into the upper Tambo river and eventually polluted parts of the Ramsar Convention listed Gippsland Lakes.² The then Department of Primary Industries, and the Victorian Environment Protection Authority, took over rehabilitation of the mine site, including the tailings dam, to the tune of \$6 million in tax-payer money. The former owners had paid a \$3000,000 rehabilitation bond.³ This is an example of the environmental and financial liability to the States for a relatively small mine, and a section of the mine at that.

¹ <https://theconversation.com/soil-arsenic-from-mining-waste-poses-long-term-health-threats-5901>.

² <http://www.environment.gov.au/cgi-bin/wetlands/ramsardetails.pl?refcode=21>.

³ Pepper, M, Rocha, CP, and Mudd, GM, *Mining Legacies – Understanding Life-of-Mine Across Time and Space*, Life-of-Mine Conference, Brisbane, QLD, 16-18 July 2014, 461.

4. A coordinated national approach to mine rehabilitation – a proposal for reform

Without federal oversight, States will continue to fail in their regulation and enforcement of adequate mine rehabilitation. Furthermore, there is recognition that current State/Federal cooperative processes are inadequate and that there is a need for the Federal Government to take a stronger role in the regulation of the environment across the nation. Given the vast breadth of impacts on the environment and of inadequate mine rehabilitation, there is a strong argument for rehabilitation to be an issue on which the Federal Government exercises leadership.

Federal oversight of mine rehabilitation is beneficial for several reasons, not least in that the Commonwealth clearly sees itself as having a role in both domestic and international standards of mining regulation, including rehabilitation and closure, through the establishment of the Leading Practise Sustainable Development Program for the Mining Industry. Moreover, a coordinated approach ensures consistency in mine rehabilitation preparation, regulation and enforcement, increasing the likelihood that community expectations will be satisfied and environmental

A national coordination process needs to be more robust and more transparent than current dysfunctional National Environment Protection Council and COAG processes that, in the environmental area, is characterised by a lack of outcomes due to lack of commitment, and a need for consensus amongst State and Federal government.

We recommend that the Committee consider the establishment of a National Mine Rehabilitation Commission (“NMRC”) and Commissioner. Such a body would be comprised of environmental scientists, environmental engineers, environmental and commercial legal experts, to devise and implement a national mine rehabilitation strategy. The legislation could also be the foundation for a statutory role in the form of a National Mine Rehabilitation Commissioner, who would have appropriate investigative and enforcement powers to ensure the national mine rehabilitation coordination plan is adequately implemented.

The functions of the NMRC and Commissioner would be to investigate and report on:

- the status of all mines in each jurisdiction (i.e. in use, mothballed, abandoned);
- the planning requirements for mine rehabilitation in each jurisdiction;
- rehabilitation plans for each mine;
- financial mechanisms for mine rehabilitation;
- laws regarding enforcement to comply with rehabilitation, including where a company goes into administration or claims inability to fulfil rehabilitation requirements;
- estimate the accurate cost to each jurisdiction for adequate rehabilitation for each mine site;
- prepare a community consultation strategy.

The NMRC and Commissioner could be empowered to prepare to a national mine rehabilitation plan to be implemented throughout the country, including setting out national regulations and standards for mine rehabilitation and closure.

The Commissioner will have adequate investigatory and enforcement powers to implement and oversee mine rehabilitation in Australia. As a separate statutory position the Commissioner's role, duties and obligations will be clarified in legislation, giving the Commissioner adequate powers to fulfil these duties and obligations. Moreover, a statutory role would ensure adequate funding for the NMRC and Commissioner and is protected against interference to the extent that legislation will need to be amended to alter either the NMRC or Commissioners' functions.

5. Mine rehabilitation, and the adequacy of corporate and financial regulation

5.1 *Financial assurances*

Third party non-revocable, non-expiring bank guarantees with amounts based on costs to rehabilitate individual mines (as in Queensland and NSW) are considered best practice and we recommend this is implemented nationally. The common fund concept, such as the Mining Rehabilitation Fund in Western Australia, is not an option with significant shortcomings. States, such as Queensland, which have recently undertaken audits of mining rehabilitation frameworks, have determined individual financial assurance in the form of third-party guarantees is appropriate.

5.2 *Asset transfers*

Queensland has recently seen two types of asset transfers from larger, experienced, financially stable organisations, to smaller, unproven organisations.

Under Queensland law, if shares in the company that enjoys the mining license are sold to another company effectively changing ownership, there is no reviewable transfer by the Minister. Whilst the rehabilitation bond stays in place, there is no trigger for a review of a review of the human, technical and financial resources to comply with its regulatory obligations (s 318AAX Mineral Resources Act 1989 (Qld) (MR Act). This is because it is not an 'assessable transfer' under s 318AAR Mineral Resources Act. There should be a review.

Further, public interest requirements under s 318AAX MR Act should be better defined. We query whether, for example, it is in the public interest to permit sales for \$1 of a mine by larger players with financial resources to smaller, unproven players. In this instance, where the actual sale to give the mine away with \$80 million in rehabilitation guarantees, the market suggests that the rehabilitation obligations are significantly more and the mine is not profitable. A broader issue arises: that is the long-term owner of the mine, one which has made the most profits from the mine and knows intimately the requirements for rehabilitation, may be able to offload it to speculative investors with

a high risk appetite who may never operate the mine. The upwards re-valuation of rehabilitation obligations upon mine closure is a clear trend. Issues arise as to the equity of permitting the company who profited most from the mine to sell it to a speculative outfit whose directors may not have much to lose.

Queensland's Chain of Responsibility legislation permits the Environment Protection Agency to seek monies from individuals involved in actions that contribute to damage the subject of Environment Protection Orders. The time limit is two years. The committee should consider similar requirements to ensure those that have profited from mining activities (and who may have insight into the likely final costs of rehabilitation) are appropriately responsible for rehabilitation costs.

Our concerns are on the time limits on the Chain of Responsibility legislation given the long life of mines and the ability for mines to be placed into care and maintenance.

We invite the Committee to review EJA's publication *Dodging clean up costs: six tricks coal mining companies play* (copy attached) as background to how and why companies avoid rehabilitation costs.

5.3 Adequate disclosure of risk – for investors and individuals

Improved disclosure of mining rehabilitation liabilities, including the amount of financial assurance and the identity of the bank providing any guarantee, is in the public interest. Further, disclosure is essential for investors to obtain a true and fair view of the company's financial position. This is especially so given the upwards repricing of risk on mine closure.

Company accounts seen by EJA indicate resource companies may disclose total contingent liabilities for mining rehabilitation on balance sheets subject to discounting in accordance with AASB 137 Provisions, Contingent Liabilities and Contingent Assets.

Under the current reporting framework there is no little to no clarity on individual mines including:

- a. financial assurance provided to regulators;
- b. whether that amount is cash backed or otherwise;
- c. which financial institution(s) provide the financial assurance;
- d. estimated rehabilitation liabilities if mining operations were to cease immediately;
- e. range of internal calculations for future rehabilitation costs not subject to discounting;
- f. non-discounted total costs on the balance sheet.

We recommend mandatory disclosure of the items above. For ASX listed companies, changes could be made to ASX listing rules, however, given the public interest aspect that would apply to both private and public companies, changes to should be made to the Corporations Act.

The public interest requirement for disclosure demands that this information is readily accessible by the public. We ask the Committee to recommend a national body such as the proposed National Mine Rehabilitation Commission that publishes up to date information on the points above.

6. Conclusion – a summary of what we submit the Committee should recommend

- A. The Commonwealth Government needs to use the constitutional powers available to it to develop an effective national regulatory response to mine rehabilitation because the current system is not working.
- B. The Committee should recommend a national regulatory and standard setting body such as a National Mine Rehabilitation Commission with a statutory office holder, the National Mine Rehabilitation Commissioner. This body and the Commissioner should be sufficiently empowered to lead an effective and transparent, nationally consistent mine rehabilitation scheme.
- C. The Committee should also recommend reforms to financial and corporate regulation to deal with the problems related to financial assurances, asset transfers and risk disclosure.