Trailing Liabilities
Submission by The Alliance for Responsible Mining Regulation (ARMR)
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Proposed Legislation

The proposed legislation is not a "new tool". In fact: "the trailing liability provisions will not change the existing rehabilitation obligations of the declared mine licensees."[1] The problem is: these obligations have never been satisfactorily enforced. The VAGO *Report Rehabilitating Mines* (August 2020) found **"systemic regulatory failures"** relating to mine rehabilitation. It concluded that the Victorian Department of Jobs, Precincts and Regions (DJPR) was "*not effectively regulating operators' compliance with their rehabilitation responsibilities and bonds generally do not cover actual rehabilitation costs*. [Importantly:] "Undervaluing the bond exposes the state to **significant financial risk** and if rehabilitation issues are not addressed, **these sites also present risks to Victorians and the environment**" (VAGO August 2020, pp 4;1).

Consequently, the costs and the risks of major catastrophes eventuating, such as collapsing tailings dams and toxic pollution, are habitually passed on to Victorian taxpayers. That being so, ARMR has no confidence in the proposed Trailing Liabilities provisions to change the situation. The fact that they are described as "a last resort" says it all because realistic bonds should be compulsory as the legislation prescribes.

The Government says it "does not expect" a licensee will fail or be unable to meet its rehabilitation obligations. However, the record clearly shows that this is simply not true.

Rehabilitation Impossible

Currently, there are a staggering 80,000 abandoned mines in Australia,[2] many in Victoria. In many/most cases, the damage is so great that full rehabilitation is impossible. For example, the huge coal mining chasms in the Latrobe Valley can never be returned to their original farmland and wildlife habitat. Nor can the Latrobe and Morwell Rivers – the latter having been diverted and channelled—ever be as they were. No amount of soil or water can repair the craters left by decades of mining. And if water is used to fill the mines post closure, the damage to waterways, groundwater and the RAMSAR Gippsland Lakes will be irreversible.

Licensees to Show Capacity to Finance Rehabilitation

Given the reluctance of licensees to meet their legal obligations, ARMR has no confidence the status quo will change. What measures will the Government implement to recover the millions/billions of unpaid bond monies from licensees who go into administration, on sell or simply abandon their leases?

Bond monies have never been sufficient. Licensees have consistently reneged on their legal duties. Debt recovery from a bankrupt company is impossible. The idea that, If the mine is sold, the new owner can be held accountable for past damage may deter potential buyers, but this would not solve the rehabilitation problem. Therefore, the only way for licensees to be held to account is that a licensing condition be the upfront payment of bonds large enough to fully cover all future costs. To secure the bond, it must be paid in cash into a designated trust fund. The bottom line. **No bond, no licence**.

[1] Consultation Paper, p4/17.

[2] Jeremy Bourke, July 18 2022 https://www.australiangeographic.com.au/topics/history-culture/2022/07/australias-abandoned-mines-rehabilitated/

Cost Recovery and Other Enforcement

ARMR welcome the use of the MRSDA, Part 12, enforcement powers to compel compliance If the licensee defaults its rehabilitation responsibilities. However, due to the historic underfunding of bonds, ARMR has no confidence that current bonds can cover the rehabilitation costs. This means the taxpayer will inevitably be the funder of last resort which contradicts the Trailing Liabilities stated objective.[3] How will the Government pursue costs when the licensee or former licensee, that is, the corporation, is bankrupt or no longer exists?

ARMR supports the introduction of trailing liability "call back" provisions like those of the Commonwealth Government for decommissioning offshore infrastructure and addressing residual related issues. However, we understand they have yet to be applied. To strengthen enforcement powers, past, present and future company directors would need to be held legally liable for rehabilitation obligations in accordance with the Hutley Opinion on Climate Change litigation.[4] That advice warned that climate change being a foreseeable risk imposed a duty of care and diligence on directors under the Corporations Act 2001, s180. The opinion was that "company directors who fail to consider climate change risks now could be found liable for breaching their duty of care and diligence in the future. [And that] a negligence allegation against a director who had ignored climate risks was likely to be only a matter of time."[5] Without the imposition of strict legal liabilities upon mine licensees ARMR has no confidence behavioural change will be achieved.[6]

Fit and Proper Person

ARMR supports the following requirements of the Financial Capability Policy (Section 15(6)(d):

- The capacity to finance the proposed work and rehabilitation of the land be included in the "fit and proper" criteria.
- That the full funding of rehabilitation, including "ongoing monitoring and management to [ensure closed mine works] remain safe, stable and sustainable after rehabilitation is completed", apply throughout the life of the licence.
- The Minister for Resources can cancel the licence if the licensee no longer meets the requirement.
- The ability to block a transfer of a licence if the Minister is not satisfied the transferee is able to finance fully the proposed work and rehabilitation. Satisfaction would need to be founded on a forensic accounting of the transferee's financial position and operational ability to meet their statutory requirements.

May 2022 Retrospectivity

Retrospective legislation is considered unfair. However, in this case, given the number of unrehabilitated mines in recent years, for example, those owned by Iluka and Kralpocic Pty Ltd. ARMR considers an earlier date is appropriate.

Reimbursement and/or Access to Existing Rehabilitation Bonds

Given the underfunding of bonds, ARMR submits that the potential for any leftover monies is not believable. If conducted at all, rehabilitation takes decades and may never be completed. The costs increase exponentially. For example, in 2015, the bond for Engie's Hazelwood Mine, Latrobe Valley was $15 million. By 2017, Engie's estimate was initially $73 million, Earth Resource determined $289 million was more accurate. Engie subsequently raised the estimate to $743 million.[7] It would not surprise were the final cost in the billions.

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[3] "The provisions would be used by the Minister for Resources as a last resort option available to government to prevent rehabilitation liability from falling to the State, and if all other safeguards have failed" Consultation Paper, p13/17.

[4] Centre for Policy Development, Noel Hutley and Mr Sebastian Hartford Davis, *Supplementary Memorandum of Opinion*, 26 march 2019.

[5] Ibid., No 2, p2/34.

[6] See Consultation Paper, p13/17.

[7] Nicole Asher, 'Hazelwood rehabilitation estimated to cost $743 million but may rise, Engie says' ABC Gippsland, 20 January 2017.

As the VAGO Report found due to the Regulator's enforcement failures, there is little incentive for companies to carry out rehabilitation. The role of a Mine Land Rehabilitation Authority would need to guarantee that rehabilitation works are genuinely successful in returning the land to its original condition as the Act requires. Related persons must be legally held accountable to both the Authority and the community, including Traditional Owners. Quality control would require multi-disciplinary expertise to ensure that after rehabilitation the land, soils and water can sustain a healthy environment for biodiversity and ecosystems and is clean and safe for people. Without that certainty, communities will never grant consent for mining.

Recommendations

The Trailing Liabilities' proposal underestimates the financial capacity of licensees to operate and rehabilitate mines. Experience shows that existing bonds are insufficient to manage the risk of defaults. All mines have complex, ongoing risks. All rehabilitation and ongoing maintenance is complex, difficult, and very expensive. For the reasons outlined in this submission, ARMR recommends:

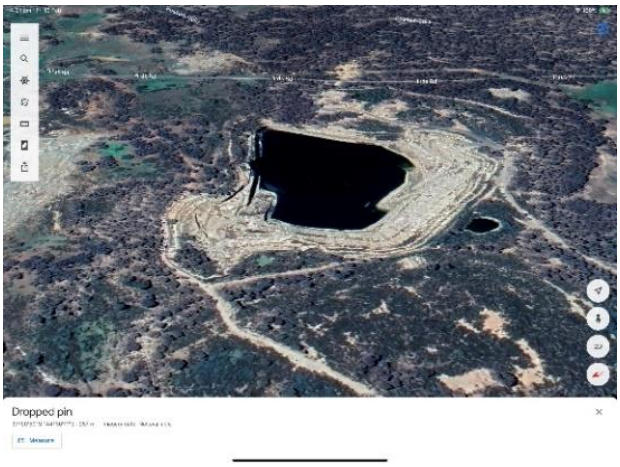
The proposed amendments must apply to all mines, not just declared mines.

1. An independent Mine Land Rehabilitation Authority (MLRA), like the Latrobe Valley Authority, be established with functions, responsibilities, and enforcement for the rehabilitation of all mines.
2. The Financial Capability Policy be amended to secure full funding for the management and monitoring of rehabilitation works, including enduring residual contingencies, which inevitably occur.
3. Scientific research shows tailings dams will inevitably leak and/or fail. Tailings dams must be included in rehabilitation management plans.
4. Rehabilitation bonds must be high enough to fully cover rehabilitation works in perpetuity. This includes all aspects of mine operations: volatile organic compounds (VOCs), fuels, other toxic substances, eg arsenic, diesel, radioactive soils/dust, tailings dams, pits, old tyres and infrastructure.
5. The excision of a tailings dams from a mine licence and renaming it a toxic waste dump, eg Iluka's Pit 23, is not rehabilitation and must be prohibited.
6. Local governments should not be saddled with rehabilitation works when mining companies default.
7. Rehabilitation plans and their ongoing monitoring into the future must ensure outcomes fully and genuinely protect community health and safety and prevent ecological damage. If this cannot be guaranteed, then no licence should be granted.
8. Realistic bonds must be a condition of a mining licence. Bonds must be secured as cash, not bank guarantees, in a trust fund established for the sole purpose of providing for rehabilitation costs.
9. Given that many companies go into administration and walk away, as a licence condition, a levy on all companies to go into a general rehabilitation fund would be prudent.
10. The State Government adopt the Commonwealth Offshore Petroleum Trailing Liabilities Framework in full and implement it.
11. The introduction of a 'related person', as defined, for the purposes of trailing liability that applies to all licensees.[8]
12. The detailed scope of a 'related person' in Victoria be a matter for consultation during the final design of the trailing liability provisions, including an exposure draft of the Bill, regulations and guidelines.
13. Penalty provisions for non-compliance regarding the remedial notice or direction be increased.
14. Change of ownership be included in the legislation to support the effective operation of the trailing liabilities framework.
15. The Government must approve change of ownership in all cases.

[8] See Consultation Paper, p13,14/17.

Appendix: Examples of Unrehabilitated Tailings Dams

Hird's Pit Heathcote – Costerville



This pit has been used as an evaporation dam for mine water from the Costerfield mine 10 km away. Under the MDRS Act it must be considered as a tailings dam. The water is heavily polluted with antimony and arsenic. School children have been observed swimming in it during a previous Christmas holiday period. The pit was excavated by a previous mining company and never rehabilitated. It sits within a nature flora reserve. The Costerfield mining company have abandoned the pit. It remains full of toxic water unrehabilitated. The company has not been required to identify it as plant.

Kangaroo Flat Bendigo Mine Site

The above photo shows how the Victorian Government has managed dust suppression at the Kangaroo Flat Bendigo Mine Site after Kralpocic Pty Ltd went into administration (Earth Resources Regulator, "Rehabilitation of former Kangaroo Flat, New Moon, Eaglehawk mining and Woodvale Evaporation Ponds sites"). Note: This is not rehabilitation.