ENVIRONMENTAL JUSTICE AUSTRALIA

Submission in response to

Trailing Liabilities for Mining Licenses – Consultation Paper

prepared by

Environmental Justice Australia

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Submitted to: Director, Policy and Legislation
Earth Resources Policy and Programs
Department of Energy, Environment and Climate Action (DEECA)

Submitted via email only.

About Environmental Justice Australia

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. We are independent of government and corporate funding. Our legal team combines technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to community-based environment groups, regional and state environmental organisations, and larger environmental NGOs, representing them in court when needed. We provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

We have been providing legal advice and representation to the community for over two decades on air pollution and other risks arising from mining and burning coal. We advocate for better regulation of mines and power stations at the state and federal level to protect the health of communities and the environment. Through our legal advice, law reform and community legal education services we provide support to the community to understand the health impacts of coal pollution and how to best prevent them.

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Submission on the Trailing Liabilities for Victoria's Declared Mines – Consultation Paper

EXECUTIVE SUMMARY

Environmental Justice Australia (**EJA**) welcomes the government's introduction of a trailing liability scheme for Victoria's declared mines.

As Victoria and the Latrobe Valley move away from mining coal, the community who powered the rest of the State for almost a century deserves assurance that those who profited from coal will rehabilitate and clean up the damage caused in the process. Ensuring that coal companies carry out rehabilitation and leave communities with useful, non-polluting spaces is crucial to a just and fair transition to clean energy.

The current proposals for mine rehabilitation risk seriously exacerbating existing ecological challenges by further reducing flows of fresh water and accelerating the loss of biodiversity in the Gippsland region's river system.[1] Currently, there is insufficient incentive for operators to carry out rehabilitation in the first place, and to rehabilitate mines in a way that does not prevent future ecological damage. To support the aims of the trailing liability scheme, it is crucial that rehabilitation bonds for the three Latrobe Valley coal mines reflect the likely cost of rehabilitation. The current bond amounts are inadequate.

The reforms should consider the totality of ways that liability and responsibility can shift with companies governed by the *Corporations Act 2001* (Cth). It should also accommodate and comply with the Victorian Charter of Human Rights and Responsibilities, as well as any Victorian Treaty legislation, including binding principles that affect and direct State conduct.

We have 7 recommendations to the Department which would lead to an enduring trailing liability scheme that would give the community some certainty that the mine operators who received the most financial benefit from coal mining are responsible for ensuring that rehabilitation is carried out, and are incentivised to ensure that rehabilitation does not cause lasting issues such as water pollution, stability or the depletion of natural water resources.

Recommendation 1: Amend the *Mineral Resources (Sustainable Development) Act 1990* (**MRSD Act**) to require declared mine licensees to seek approval of changes in ownership. In addition to the existing financial capability and section 15(6) test, the Resources Minister should consider:

a. The impact continuing to mine at the site would have on the ability to rehabilitate the site;
b. The impact on the community and the benefit the community will derive from the sale;
c. Whether the purchaser genuinely intends to carry out rehabilitation;
d. Whether the purchaser can afford rehabilitation considering the actual cost of rehabilitation, rather than the current value of the rehabilitation bond; and
e. The implications of any Victorian Treaty.

[1] Department for Energy, Environment and Climate Action (**DEECA**) 'Latrobe Valley Regional Rehabilitation Strategy' (June 2021).

Recommendation 2: The Victorian government should introduce an enduring trailing liability scheme for Victoria's declared mines. The liability should be far-reaching to capture company directors and corporate structures.

Recommendation 3: The Victorian scheme should contain remedial directions that cover both failing to carry out rehabilitation plans and any residual issues. The amendments should set an objective standard for the completion of remedial actions, and remedial directions should include:

a. General directions to direct people to take an action or stop taking an action;
b. Directions that apply more specifically to coal mine rehabilitation, including directions that support the conservation and protection of the environment;
c. Directions that do not bind the government to rehabilitating in line with operators' current plans, whether approved or not.

Recommendation 4: Ensure the penalties for non-compliance with a remedial direction are sufficient to incentivise compliance and thorough rehabilitation planning.

Recommendation 5: The government should extend the trailing liability provisions to all Victorian mines and quarries.

Recommendation 6: The government should introduce a trailing liability scheme for offshore oil and gas projects in Victoria, applied retrospectively from the date of announcement of the scheme.

Recommendation 7: Increase rehabilitation bonds for declared mines to reflect the true cost of rehabilitation.

BACKGROUND

Environmental Justice Australia has been working with Latrobe Valley community groups to support law reform advocacy on coal mining issues for years. Throughout that time, the Latrobe Valley community has asked for regulatory certainty on what mine rehabilitation will leave them with and how this will be achieved. Given the complexity of three enormous mine rehabilitation projects in their future, deep and transparent community engagement is required to ensure that the development of rehabilitation plans and regulatory oversight (and where appropriate, enforcement) is undertaken to ensure rehabilitation plans are in line with the community's vision and to prevent the community being left with a legacy of environmental damage. Consultation must be undertaken with the Gunaikurnai Traditional Owners, who must give their free prior and informed consent for rehabilitation activities and outcomes. There is no evidence to suggest that Gunaikurnai people have provided their free prior and informed consent for rehabilitation plans, activities, and outcomes.

Rehabilitation plans proposed by brown coal mine operators in Victoria carry significant risks for the Latrobe Valley community, the regions' surface water and groundwater, and the surrounding environment. Expert advice suggests that some of the potential longer term issues with current mine rehabilitation plans include:

- The flooding of coal ash dumps located inside coal mines, whether capped or uncapped, would likely result in floating toxic coal ash creating a white layer on the top of pit lakes;[2]
- Concerns about water availability, ecological impacts and groundwater pollution;[3]
- The viability in light of climate change;[4]
- Groundwater contamination from coal ash sites that were not lined in accordance with best practice coal ash storage, the impacts of which may not become apparent 78-105 years from now.[5]

The introduction of a trailing liability scheme has the potential to incentivise the drafting of rehabilitation plans that do not risk residual issues after rehabilitation has been completed and mining licences have been relinquished. This would not only give the community certainty, but would reduce the likelihood that the costs of residual issues are passed onto the State. The scheme should tackle private gain at the expense of public goods (for example, harmed or destroyed environments), which is in effect a transfer of public wealth to private commercial entities. Australia has approximately 60,000 abandoned mine sites and while many are legacy sites, modern mines are abandoned every year in Australia. In abandoning mines without rehabilitating these sites, private companies are benefiting at the expense of the environment.

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[2] Steven Campbell, 'Technical memorandum regarding proposed closure of the Hazelwood mine and power station, including flooding the Hazelwood mine void to form a "pit lake", Morwell, Gippsland, Victoria, Australia' (July 2022), p 7.
[3] DEECA, Latrobe Valley Regional Rehabilitation Strategy, 'Latrobe System Water Availability – Technical Report' (May 2020); DEECA, Latrobe Valley Regional Rehabilitation Strategy, 'Latrobe Valley Regional Water Study: Ecological Effects Assessment' (November 2020).
[4] DEECA, Latrobe Valley Regional Rehabilitation Strategy, 'Latrobe System Water Availability – Technical Report' (May 2020).
[5] RTI International, 'Human and Ecological Risk Assessment of Coal Combustion Wastes', prepared for US EPA (2007).

As outlined in the consultation paper, the aims of the proposed trailing liability scheme are:

- To reduce the likelihood that rehabilitation costs are passed onto the State; and
- To allow the government to require those who derived the greatest financial benefit from mining projects to be responsible for remediated the rehabilitation risks and liabilities caused by the project

RECOMMENDATIONS

Changes in ownership

The consultation paper seeks feedback on whether the *Mineral Resources (Sustainable Development) Act 1990* (**MRSD Act**) should be amended to require declared mine licensees to seek approval of changes in ownership above a certain threshold. EJA supports this change and submits that the amendment would support the effective operation of a trailing liabilities framework for the following reasons:

a. The trailing liability scheme gives the government an avenue to recover the costs of rehabilitation where rehabilitation obligations cease due to an expired mining licence or where the government exercises its power to cancel a licence on financial grounds. Previously, the government have assumed that liability, for example in 2019 when the Earth Resources Regulator (**ERR**) did not renew Kralcopic Pty Ltd's three mining licences on the basis that the company was unable to provide surety that it could finance its rehabilitation obligations.[6] The amendments also aim to prevent changes in ownership in the first place, where a company proposes to sell a mine to a company less financially likely to satisfy rehabilitation obligations or changes structure (including selling subsidiaries) into a less financially stable company. The scheme should provide for the totality of ways that liability and responsibility can shift with companies governed by the *Corporations Act 2001* (Cth).

b. It works to prevent issues like the Northern Oil and Gas project case study outlined in the consultation paper, where companies are sold to companies unable to finance rehabilitation without the government's ability to intervene. If the former operator was required to seek approval for the changes in ownership, issues with the ability to finance could have been detected and acted upon sooner. Without this amendment, the government would have to rely on the provisions in section 15 of the MRSD Act to refuse to grant a licence to mine the land on financial grounds. If the sale or restructure had already occurred, the government could use the trailing liability provisions to direct the previous owner, who no longer has a rehabilitation bond, to carry out rehabilitation. Preventing the sale or restructure with the proposed amendment would prevent these additional steps.

c. The Latrobe Valley coal mines are so deep, large and unstable that rehabilitation will already be an enormous task. Continuing to mine at these sites increases the difficulty of rehabilitation and in that sense, continuing to mine at the sites is already unfeasible. If ability to carry out rehabilitation and feasibility of proposed operations are criteria for approval of

[6] Earth Resources Regulator, 'Rehabilitation of former Kangaroo Flat, New Moon, Eaglehawk mining and Woodvale Evaporation Ponds sites' (Last updated January 2023).

changes in ownership, this would add to community certainty that these holes will not become larger and more unstable with more mining after coal-fired power stations close.

Criteria for changes of ownership

Criteria exist within the MRSD Act for the granting of a mining licence, as follows:[7]

a. That the applicant is a fit and proper person to hold the licence;
b. Intends to comply with the Act;
c. Genuinely intends to do the work;
d. Has an appropriate program of work; and
e. Is likely to be able to finance the proposed work and rehabilitation of the land.

The fit and proper person test involves whether:[8]

a. The Minister has taken action against the applicant to rehabilitate land because the applicant has not complied with rehabilitation obligations;
b. Whether a previous licence has been cancelled;
c. Whether the applicant or an associate has been convicted of an offence against the Act;
d. Whether the applicant or an associate has been convicted of an offence involving fraud or dishonesty;
e. Whether the applicant or an associate is insolvent.

In addition, the Department's Financial Capability Policy includes criteria for assessing whether a company is likely to be able to finance rehabilitation.[9] The risk assessment under that policy includes factors such as the works required, the complexity of determining the estimated cost for rehabilitation, the applicant's financial history and access to funds.

The section 15(6) criteria, including the financial test and fit and proper person test, should be replicated in the new MRSD Act provisions relating to changes of ownership. In addition to assessing applications against those criteria, the government should be required to assess:

a. **The impact that any continuing mining activity at the site would have on the operator's ability to rehabilitate the site.** Decades of coal mining at the Latrobe Valley mines has resulted in enormous, unstable pits. As the mines continue to operate, the holes become larger, more unstable and more difficult to rehabilitate. When assessing whether to approve changes in ownership, the government should consider whether continuing to mine at the site would make rehabilitation, an already extremely difficult task, more difficult.

b. **The impact on the community and the benefit the community will derive from the sale,** for example the economic benefit and the creation of local jobs. The government could look, for example, to the criteria applicable where an overseas company proposes to purchase a coal mine, the *Foreign Acquisitions and Takeovers Act 1975* (Cth). That Act requires that foreign companies who propose to acquire a coal mine or other Australian company apply to the

[7] *Mineral Resources (Sustainable Development) Act 1990* (**MRSD Act**), s 15(6).
[8] MRSD Act, s 16.
[9] Earth Resources Regulator, 'Financial Capability Policy' (last updated January 2023).

Federal Treasurer, who can refuse applications if the applicant fails to satisfy certain criteria. Among other considerations, the Treasurer must consider the impact on the economy and the community, such as the level of community participation in the enterprise after the foreign investment occurs.

c. **Whether the purchaser genuinely intends to carry out rehabilitation, or whether they intend to rely on the trailing liability provisions to pass rehabilitation obligations back to the previous owner.**

d. **Whether the purchaser can afford rehabilitation taking into consideration the fact that bonds do not currently reflect anywhere near the likely costs of rehabilitation.** In order for the new provisions and the existing section 15(6) test to be effective, rehabilitation bonds need to reflect the true cost of rehabilitation. Otherwise, changes in ownership could occur and licences could be granted based on the apparent ability of a company of meeting its rehabilitation obligations, when in reality rehabilitation costs are much higher. Increasing the rehabilitation bonds for the Latrobe Valley coal mines should be a priority in order to make approvals for changes in ownership and the fit and proper person test in the licence approvals process effective tools.

e. **The implications of any Victorian Treaty.**

Recommendation 1: Amend the MRSD Act to require declared mine licensees to seek approval for changes in ownership. In addition to the existing financial capability and section 15(6) test, the Resources Minister should consider:

a. The impact continuing to mine at the site would have on the ability to rehabilitate the site;
b. The impact on the community and the benefit the community will derive from the sale;
c. Whether the purchaser genuinely intends to carry out rehabilitation;
d. Whether the purchaser can afford rehabilitation considering the actual cost of rehabilitation, rather than the current value of the rehabilitation bond; and
e. The implications of any Victorian Treaty.

Adapting the Commonwealth Scheme to fit the Victorian context

It is difficult to comment on whether the Commonwealth trailing liability scheme (**the Commonwealth scheme**) is effective without the scheme having being used in practice. Despite this, looking to the aims and wording of the provisions, our view is that the Commonwealth regime could be adapted to Victorian mines. The Victorian scheme would require significant changes in order to be applicable to the Latrobe Valley coal mines, for example, the circumstances in which a remedial direction can be made. The remedial directions under the MRSD Act do not adequately capture all relevant circumstances and new remedial direction provisions should be added, as outlined below.

Enduring liability

The trailing liability provisions in the Commonwealth scheme are enduring. They apply where a title has expired, been wholly or partly revoked, cancelled, surrendered or terminated, and extend liability beyond current and former title holders to 'related persons'. A person could be issued with a

remedial direction at any point after their involvement in the title has ceased, and the scheme covers residual issues associated with the decommissioning of offshore infrastructure. This should be replicated in the Victorian scheme to ensure that the liability for costs of common longer term impacts associated with coal mine rehabilitation remain with operators and to incentivise longer term impact planning in developing rehabilitation plans.

The liability should be far-reaching and should capture personal liability for the directors of companies and parent companies. The Department should also consider the extra-territorial application of the scheme, as current declared mine operators are owned by larger overseas companies.

Recommendation 2: The Victorian government should introduce an enduring trailing liability scheme for Victoria's declared mines. The liability should be far-reaching to capture company directors and corporate structures.

Types of liability

The trailing liability provisions in the Commonwealth scheme fall into two categories: liability for failure to decommission and for residual issues that occur after decommissioning. Failure to decommission applies where, for example, a titleholder went into liquidation and decommissioning obligations were not met, or where a licence expires before completing decommissioning activities. Residual issues cover, for example, a well that has previously been plugged and abandoned but it has a leak and impacts arise from a previously decommissioned activity, such as impacts to a seabed.

The aim of the Commonwealth scheme is for remedial directions to be issued in relation to any decommissioning or any residual issues. Like the Commonwealth scheme, the Victorian scheme should cover liability for both the failure to rehabilitate and residual issues post rehabilitation. However, distinctions should be made between decommissioning offshore infrastructure and the rehabilitation of a large coal mine and the wording of the remedial directions inserted into the MRSD Act should reflect this difference.

Failure to rehabilitate

The process involved in decommissioning offshore oil and gas, and the likely residual issues, appears to be largely uniform for oil and gas infrastructure. This is reflected in the circumstances in which remedial directions may be issued. The Commonwealth scheme allows NOPSEMA and the Commonwealth Minister to give directions to titleholders, former titleholders or other persons about:

a. The removal of property;
b. The plugging or closing off of wells;
c. The conservation and protection of natural resources; and
d. The making good of damage to the seabed or subsoil.

The consultation paper indicates that the existing remedial directions under the MRSD Act will be expanded to include 'related persons' for the purposes of the trailing liability scheme. However, the remedial directions are inadequate to effectively ensure that any required works to carry out

rehabilitation are undertaken or any residual issues are addressed. The MRSD Act only covers the issuing of remedial directions to:

a. Carry out a declared mine rehabilitation plan; or
b. Where an act or omission by the holder of a licence is likely to result in a risk to public safety, the environment, land, property or infrastructure.

The directions should extend beyond directing operators to carry out their rehabilitation plans. Firstly, no operator currently has a declared mine rehabilitation plan, and the draft Declared Mine Regulations provide that operators have three years to submit their plans, with the possibility of extension. Secondly, even if operators had approved declared mine rehabilitation plans, the government may need to make more general directions for operators or related persons to take a specific action or to stop doing an action outside of the declared mine rehabilitation plan. Under the current regime, the government would be unable to make directions outside the carrying out of the plan.

For the Latrobe Valley coal mines, if operators fail to carry out rehabilitation in line with their plans, the government should not bind itself to only being able to direct that the operators' existing declared mine rehabilitation plan be carried out. As they stand, the rehabilitation plans are not likely to be the best option for the environment or the community. After an independent investigation into the Earth Resources Regulator's mine rehabilitation practices, the Victorian Auditor-General's Office released a report in 2020 (**VAGO Report**), which found that the statistics surrounding rehabilitation plans indicated that it is highly likely that more than half of all approved rehabilitation plans are non-compliant with the rehabilitation requirements under the MRSD Act.[10] The government should introduce new remedial directions to make broader directions as to how rehabilitation is carried out, rather than limiting itself to directing plans that could have harmful impacts or are non-compliant with the MRSD Act. Such directions would be preferable to a direction to implement an existing rehabilitation plan. There should also be precise and binding duties on the Minister to require remediation actions to occur, or take action to recover costs where the state is compelled to complete remediation. This could be contained in a discrete duty on the Minister, such as 'The Minister must ensure rehabilitation works are devised and carried out to the maximum degree practicable'. In addition, the Victorian scheme could mimic the Commonwealth scheme and include provisions specifically relating to mine rehabilitation activities, for example, but not limited to:

a. The taking of an action necessary to leave the community with a useful amenity after closure;
b. The remedying of any damage to First Nations culture and Country;
c. The taking of any action necessary to remedy harm or prevent future harm;
d. The addition, removal or remediation of property or infrastructure;
e. The conservation, preservation and protection of the environment, ecology and biodiversity;
f. The prevention or remediation of any potential risks to public safety, human health, the environment, land, property or infrastructure;
g. The remediation of any damage to the environment associated with the rehabilitation, including on natural resources; and

[10] Victorian Auditor General's Office (**VAGO**), 'Rehabilitating Mines' (August 2020), p 6.

h. The development of a study, an assessment or expert opinion.

Residual issues

The current MRSD Act remedial directions and proposed post-closure plan Regulations do not adequately cover residual issues. The 'harm' remedial direction does not cover the conservation, restoration or protection of the environment like the Commonwealth scheme. The Resources Minister should have an obligation to make remedial directions to prevent environmental damage before it occurs, as well as after the eventuation of any risk becomes likely. This is a key difference between the Commonwealth remedial directions and the existing directions under the MRSD Act.

The government should ensure that the scheme covers a situation where rehabilitation has been completed but residual issues arise. The proposals for rehabilitation of the Latrobe Valley coal mines are likely to have residual issues.[11] The difficulty with coal mine rehabilitation is that the impacts of the residual issues are unlikely to be realised until after rehabilitation has occurred. In addition to providing accountability for clean up, it provides incentive to proactively avoid residual issues by carrying out thorough rehabilitation in the first instance that won't create lasting environmental or social impacts for communities, for example by remediating sites in line with best practice and removing coal ash from the inside of mine voids.

As the Hazelwood rehabilitation plans currently stand, they are likely to have residual issues that could be prevented at the project design phase, with sufficient incentive. Hazelwood is one of the two Latrobe Valley coal mines with coal ash dumps inside their mines. All three have coal ash dumps external to their mines. A significant issue with coal ash pollution is that the full extent of coal ash contamination problems don't appear until decades later.[12] The EPA recognises this in its landfill guidelines.[13] This is the experience in the United States, for example, where communities that live near coal ash dams have suffered catastrophic harms, including deaths, caused by poorly constructed and managed coal ash dams.[14] A US EPA risk assessment warns that peak pollution from ash dams occurs 78 to 105 years after they first started operating.[15] Old dam sites, even if they cease receiving coal ash, still pose very significant environmental and human health threats.[16] Operators might be incentivised to rehabilitate these sites in line with best practice standards if the government could call them back to remedy any residual issues in future.

Other potential residual issues were uncovered through the Latrobe Valley Regional Rehabilitation Strategy supporting technical reports. Those expert reports reveal major concerns about water

[11] See, for example: RTI International, 'Human and Ecological Risk Assessment of Coal Combustion Wastes', prepared for US EPA (2007); Environmental Justice Australia, 'Unearthing Australia's toxic coal ash legacy' (July 2019), p 25; Steven Campbell, 'Technical memorandum regarding proposed closure of the Hazelwood mine and power station, including flooding the Hazelwood mine void to form a "pit lake", Morwell, Gippsland, Victoria, Australia' (July 2022), p 7.
[12] See, for example: RTI International, 'Human and Ecological Risk Assessment of Coal Combustion Wastes', prepared for US EPA (2007).
[13] Environment Protection Authority Victoria, Publication 788.3, 'Siting, design, operation and rehabilitation of landfills' (August 2015), Part 8.
[14] Environmental Justice Australia, 'Unearthing Australia's toxic coal ash legacy' (July 2019), p 25.
[15] RTI International, 'Human and Ecological Risk Assessment of Coal Combustion Wastes', prepared for US EPA (2007).
[16] Clara G. Sears, PhD, MS1, and Kristina M. Zierold, PhD, MS, 'Health of Children Living Near Coal Ash', Global Paediatric Health, Volume 4, 1-8 (2017), at 4-7 to 4-8.

availability, ecological impacts and groundwater pollution.[17] Drawing water from the Latrobe River system to fill, or even partially fill, the mines could have lasting impacts, the extent of which may not be realised until after operators have discharged their rehabilitation obligations under the MRSD Act and relinquished their licences. If there were any consequence for unnecessarily depleting water resources, such as being directed to remedy the issue by the Resources Minister later on, operators may re-think their rehabilitation designs at an earlier stage.

We recommend amending current remedial direction provisions to ensure they adequately cover a direction to rehabilitate that falls outside the declared mine rehabilitation plan and the many residual issues that could occur with Latrobe Valley coal mine rehabilitation. Having a 'catch all' provision is appropriate here because rehabilitation of coal mines and the associated residual risks with rehabilitation plans vary widely.

The government should also legislate an objective standard for the completion of remedial directions.

Recommendation 3: The Victorian scheme should contain remedial directions that cover both failing to carry out rehabilitation plans and any residual issues. The amendments should set an objective standard for the completion of remedial actions, and remedial directions should include:

a. General directions to direct people to take an action or stop taking an action;
b. Directions that apply more specifically to coal mine rehabilitation, including directions that support the conservation and protection of the environment; and
c. Directions that do not bind the government to rehabilitating in line with operators' current plans, whether approved or not.

Enforcement

Under the Commonwealth scheme, the Minister or NOPSEMA may take action if a direction has not been complied with.[18] Any costs incurred in relation to taking action are recoverable.[19] If a person breaches a remedial direction, the OPGGS Act provides for penalties to be enforced including imprisonment, penalty units or both. The OPGGS Act provides for penalties to accumulate for each day that a person continues to be non-compliant with a direction and we recommend that be replicated in the Victorian scheme.

When setting penalties for the Victorian scheme, the government should consider the penalty for breaching a remedial direction relating to residual issues caused years after rehabilitation has occurred. The penalty should be set an amount that acts to incentivise preventing residual issues at the outset.

Recommendation 4: Ensure the penalties for non-compliance with a remedial direction are sufficient to incentivise compliance and thorough rehabilitation planning.

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[17] Latrobe Valley Regional Rehabilitation Strategy, 'Latrobe System Water Availability – Technical Report' (May 2020); Latrobe Valley Regional Rehabilitation Strategy, 'Latrobe Valley Regional Water Study: Ecological Effects Assessment' (November 2020).
[18] Offshore Petroleum and Greenhouse Gas Storage Act 2006 (**OPGGS Act**), s 509A and s 637.
[19] OPGGS Act, s 590A(3).

Scope of the scheme

The Victorian scheme should be extended to all mines and offshore oil and gas projects in Victoria, instead of being limited to the State's declared mines.

The scheme should tackle private gain at the expense of public goods (for example, harmed or destroyed environments), which is in effect a transfer of public wealth to private commercial entities. Australia has approximately 60,000 abandoned mine sites and while many are legacy sites, modern mines are abandoned every year in Australia. In abandoning mines without rehabilitating these sites, private companies are benefiting at the expense of the environment. In relation to Victoria's abandoned mines, in order to reduce the likelihood that rehabilitation costs from the resources sector are passed on to the State and to ensure private companies who derived the greatest financial benefit from mining projects are to be responsible for the remediation risks and residual issues, the government should extend the trailing liability provisions to all Victorian mines, whether through the current amendments or subsequent amendments.

The issues arising from ERR's regulation of mines and quarries in Victoria were uncovered through the 2014 and 2015-16 Hazelwood Mine Fire Inquiries, the Commissioner for Better Regulation's *Getting the Groundwork Right* 2017 Report and the 2020 report by the Victorian Auditor-General's Office. Those investigations have prompted various legislative and regulatory changes over the past decade, including a substantial increase in rehabilitation bonds.

The 2020 VAGO report uncovered that:[20]

- There were over 500 mine and quarry sites across the state with no rehabilitation bonds;
- The state had significant contingent liability if rehabilitation was not carried out;
- ERR returned bonds to operators without ensuring the site had been rehabilitated and the state had no remaining liability;
- ERR was unable to provide assurance that it undertakes assessments to ensure satisfactory rehabilitation in all cases;
- 68.6% of bonds were overdue for review, by up to 23 years (and nine years on average); and
- The government inherited the cost of rehabilitating mine sites where licences had expired before rehabilitation was commenced or where ERR had returned bonds without ensuring rehabilitation had occurred.

The report found that ERR's regulation of mining rehabilitation did not meet its responsibilities under the Act, relevant regulations and policies.[21] It found that until regulation is effective, ERR will not be able to:

- Incentivise operators' compliance with their rehabilitation responsibilities; or
- Limit the government's exposure to rehabilitation liabilities.[22]

Expanding the scheme to all mines and quarries

[20] VAGO, 'Rehabilitating Mines' (August 2020).
[21] VAGO, 'Rehabilitating Mines' (August 2020), p 48.
[22] VAGO, 'Rehabilitating Mines' (August 2020), p 6.

One way to improve performance in relation to mine and quarry rehabilitation is to make the trailing liability scheme apply to all mines and quarries governed by the MRSD Act. Even though the Latrobe Valley coal mines are the only mines in Victoria that fit the criteria to be a declared mine under the MRSD Act, there is clearly insufficient incentive for the thousands of other non-declared mines and quarries across the state to carry out rehabilitation, and liability for carrying out rehabilitation falls to the State where licences expire or rehabilitation isn't thorough.

Smaller mines and quarries around Victoria also pose residual risks that can occur after rehabilitation or after mining licences have ended. For example, Alcoa's Anglesea coal mine rehabilitation proposal could have longer term impacts on the health of the river system.[23] Quarries can also interfere with geological systems, including by producing saline water, interfering with groundwater systems or distorting geophysical landscapes and the impacts may not be exposed until after operators have packed up and left remediation responsibilities with the State.

An additional step to reduce the chances that the cost and responsibility of rehabilitating mines and quarries falls to the State is ensuring that rehabilitation bonds reflect the actual cost of rehabilitation.

Expanding the scheme to offshore oil and gas

In addition to expanding the scheme to all mines and quarries in Victoria, we support the introduction of a trailing liability scheme for the decommissioning of offshore oil and gas projects in Victoria. During the briefing EJA attended on 9 February 2023 and during a phone call on 20 February 2023, the Department advised that if a trailing liability scheme is adopted for offshore oil and gas projects in Victoria, the Minister could decide to either:

a. Consult on the amendments alongside the MRSD Act amendments, potentially delaying the MRSD Act amendments by around 6-9 months; or
b. Make an announcement that a trailing liabilities scheme for offshore oil and gas will be introduced, make those amendments apply retrospectively to the date of announcement and make the offshore oil and gas amendments subsequently.

Our view is that where the introduction of a trailing liability scheme would delay the introduction of the proposed scheme for declared mines, the offshore oil and gas scheme should be introduced separately. However, the introduction of an offshore oil and gas trailing liability scheme should still occur urgently and we recommend that the government announce the introduction of a scheme without delay and no later than the completion of this current reform process. Consistently with the approach taken by the State previously in relation to declared mines in May 2022, the scheme regarding offshore oil and gas should apply retrospectively from the date of announcement.[24]

There are many offshore oil and gas projects in both the Gippsland Basin and Otway Basin. [25] The benefits of replicating the Commonwealth offshore oil and gas trailing liabilities scheme to capture these projects are clear. Prior to the commencement of the Commonwealth scheme, we saw reports of offshore oil and gas companies attempting to avoid decommissioning by either selling off their

[23] Tim Lamacraft, 'Shire raises concerns about Anglesea River' (July 2022).
[24] As the former Resources Minister did with the trailing liabilities scheme for declared mines in May 2022. See Jaala Pulford, 'Media Release' (6 May 2021).
[25] Earth Resources Regulator, 'Oil and Gas in Victoria' (Last updated June 2021).

assets, delaying decommissioning or dumping infrastructure in the ocean.[26] The disasters such as the oil spill at the former Linc Energy site in Queensland and Woodside selling its project to Northern Oil and Gas Australia, who went into liquidation before decommissioning, both demonstrate the liability risks associated with failing to or delaying decommissioning and the residual issues that can occur. The introduction of a trailing liability scheme would add a layer of community certainty that the cost of decommissioning will not fall to the State and that the mess made by the fossil fuel industry will be cleaned up.

Recommendation 5: The government should extend the trailing liability provisions to all Victorian mines and quarries.

Recommendation 6: The government should introduce a trailing liability scheme for offshore oil and gas projects in Victoria, applied retrospectively from the date of announcement of the scheme.

Rehabilitation bonds should be increased

We welcome the Victorian government's commitment in May 2022[27] and again in the consultation paper to reassess rehabilitation bonds for declared mines this year and we expect that community feedback should be an integral part of that process.

Ensuring there is proper incentive to carry out rehabilitation through rehabilitation bonds in addition to a robust trailing liabilities scheme would, in our view, provide stronger protection for the public interest. The government can achieve this by ensuring rehabilitation bonds more accurately reflect the true cost of rehabilitation and ensuring the penalties applicable to failing to carry out rehabilitation appropriately penalise operators for failing to comply with rehabilitation obligations under the MRSD Act.

The 2020 VAGO report found that almost 70% of rehabilitation bonds were overdue for review, by up to 23 years.[28] The average amount of time bonds were overdue was by nine years, making ERR on track with its review of only 8.3% of its rehabilitation bonds.[29] It found that this failing meant that ERR could not assure that bond values reflect what it would cost to undertake rehabilitation if an operator defaults, making the State's total potential liability likely substantially higher than current bond amounts.[30] The evidence demonstrates that this concern was well founded and that failure to review bonds has meant they are significantly below actual rehabilitation costs.

A crucial initial step to reduce the likelihood of rehabilitation costs of the Latrobe Valley's declared mines being passed onto the State is to increase rehabilitation bonds to reflect the true cost of rehabilitation.

In 2015, Engie Hazelwood's bond was $15 million and the company's self-estimated cost for rehabilitation was $73 million. In 2017, the Department determined that $289 million was more accurate and set the bond at that amount. We now know significantly more about the substantial costs of rehabilitation of the Latrobe Valley's three coal mines after Engie revealed a revised figure of

[26] Peter Milne, 'Offshore oil and gas may finally have to cough up for its $56b clean-up bill' (17 January 2022).
[27] Jaala Pulford, 'Media Release' (6 May 2021).
[28] VAGO, 'Rehabilitating Mines' (August 2020), p 43.
[29] VAGO, 'Rehabilitating Mines' (August 2020), p 43.
[30] VAGO, 'Rehabilitating Mines' (August 2020), p 43.

$743 million in 2017. At that time, Engie increased its estimate by over $500 million from its previous estimate. The figure was only revealed in documents lodged with ASIC in 2017 rather than through any Victorian regulatory process and the bond has not been increased since that date.[31]

This estimate was in 2017, and today, we know a lot more about the risks associated with operators' current plans. As more independent experts review the Hazelwood rehabilitation plan, the more issues are becoming apparent, for example water pollution issues and the longer term impacts on the river system. Expert advice is that this is clearly the cheapest rehabilitation method and is likely to pollute the environment.[32] Prior to approval by government, changes to current plans are required to prevent environmental harms and this may increase rehabilitation costs above Engie's 2017 estimate.

Recommendation 7: Increase rehabilitation bonds for declared mines to reflect the true cost of rehabilitation.

[31] Nicole Asher, 'Hazelwood rehabilitation estimated to cost $743 million but may rise, Engie says' (January 2017).
[32] Environmental Justice Australia, 'New report reveals Engie's Hazelwood mine rehab plan will release toxic coal ash pollution' (September 2022).