

5 February 2023

## Trailing liabilities for Victoria's Declared Mines

### Consultation Paper

Great Latrobe Park (GLP Inc) is pleased to have been given the opportunity to provide a response to the proposed "Trailing liabilities for Victoria's Declared Mines", Consultation Paper.

This response comprises a commentary providing an explanation of our reasoning and the formal answers to the questions posed within the Consultation Paper.

#### 1. Background:

GLP is a small group of interested community members<sup>1</sup> concerned that Latrobe Valley coal mines are repurposed in an appropriate and environmentally responsible manner so as to deliver long term benefits and future opportunities for the community.

GLP seeks to Champion the full potential opportunities available to transform Latrobe Valley declared coal mine lands, including voids, to be inclusive of pristine waterways, lakes and parks for potential tourism/economic benefit and community enjoyment. It wants to ensure that all mine lands, including voids, are accessible, attractive and potentially useful from an economic and industrial viewpoint. Nature parks, animal sanctuary and job creation possibilities should NOT be ruled out in considering future land uses.

GLP currently seeks to fulfil this objective by **not** being politically aligned and using advocacy methods, but reserves the right to change our methods, if deemed required.

#### 2. Introduction

The proposal for this legislation is presented as though it is just a bit of "tying up of a few possible 'loose ends'". While in some respects that may be correct, it is possible that the

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<sup>1</sup> A broad range of skill sets is available within GLP, including geology, geotechnical, mine planning, engineering, project management, strategic and regional planning, medical, agricultural and teaching. 1/6

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legislation could have enormous implications for the prospects of satisfactory, long-term LV mine repurposing.

There would seem to be 3 major premises for the proposed legislation: -

1. To guarantee full company compliance with post mining rehabilitation responsibilities and prevent any scope for “back-sliding” or “premature exiting” by companies before rehabilitation obligations are fully completed, which GLP supports.
2. To guarantee that there is **no** possibility of any Victorian Government financial responsibility for LV mine rehabilitation which GLP disagrees with, and
3. That premises 1 & 2 can be effectively achieved by substantially “copying” recent Australian Government legislation on trailing liabilities introduced as a result of problems which have arisen in a recent off-shore oil project, which GLP disagrees with.

The following are a few comments about each of these premises.

### **Premise No. 1: Guaranteeing company compliance with rehabilitation obligations**

In the normal course of events, of course, companies should fulfill their agreed rehabilitation requirements.

One of the reasons that trailing legislation may be warranted is that the existing level of company rehabilitation bonds are still far too low relative to the realistic probable costs of satisfactory mine rehabilitation. One partial alternative to trailing legislation may be to massively increase the level of company rehabilitation bonds.

### **Premise No.2: Guaranteeing that there is **NO** possibility of any Victorian Government financial responsibility for LV mine rehabilitation.**

It could be argued that if companies fully complete their rehabilitation agreement obligations, then there should be no possible need for any Victorian Government financial commitments to LV mine rehabilitation. It is contended that this is a far too simplistic viewpoint.

It is considered that there could be several types of situations in which Victorian Government financial involvement would be very appropriate, possibly even absolutely essential, in order to achieve satisfactory repurposing outcomes. The following are a couple of types of situations which would warrant direct Victorian Government financial involvement. It is likely that there will also be other examples.

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**Situation 1:** Company rehabilitation plans, which have already been agreed to by the Victorian Government, are later found not to be feasible or appropriate. Subsequent feasible and appropriate rehabilitation plans may well cost substantially more money to achieve than the original government agreed rehabilitation plans would have. In such a circumstance, is it reasonable that a company should have to pay substantially more money for rehabilitation all because the government did not evaluate their original rehabilitation plans adequately in the first place? This situation could well apply to a couple of the LV mines for various reasons eg. due to the belated recognition by government of the likely limited availability of water for rehabilitation purposes.

**Situation 2:** The government has only required mine rehabilitation work must achieve important but very limited, basic requirements of being safe, secure and sustainable. It is highly desirable, however, that if the mine areas are not to become “wastelands” repurposing arrangements need to be of a very high quality and ensure repurposed mines are valuable economic and environmental assets i.e. repurposing goals that go well beyond the government’s limited, basic requirement specifications.

**Situation 3:** It may be found that the achievement of some of the company rehabilitation proposals may prove to be substantially more difficult &/or expensive than could reasonably have been anticipated due to the results of earlier inappropriate planning or actions by the Victorian Government &/or State Electricity Commission of Victoria. One example could be the provision of an inadequate buffer distance of only 400 metres between the Morwell (Hazelwood) mine and Morwell town (whereas Sir John Monash had required a buffer distance of 1.6 km over 25 years earlier!). Other examples could be testing of lands that indicated SECV environmental practices that have created long term liabilities which were not disclosed at the time of sale.

### **Premise No. 3: Dealing with any trailing issues by “copying” recent Australian Government legislation.**

There are substantial differences in the history and circumstances between the recent offshore drilling matters being dealt with by the Commonwealth Government and the situation of over 100 years of mining activity in the LV, the majority of which was undertaken directly on behalf of the Victorian Government by the SECV for the benefit of the Victorian community.

Despite a proposal to restrict the retrospectivity of the legislation to be backdated to May 2022, other parts of the discussion paper clearly reference ‘related persons’ who have benefited significantly from the operations. Also on page 11, it is stated that the aim of the proposed reforms is *“Ensuring the risks and liabilities of rehabilitation remain the responsibility of those who have derived the greatest financial benefits from the project;”* This could be construed to relate to the Victorian Government and the Victorian community who could therefore be liable to contribute to resolving trailing issues....as indeed a majority of LV community seems to believe that they should (Reference the Loy Yang Community

survey). Furthermore on page 11, the proposal allows *“the Minister for Resources to call back any former mine licensee and/or related body corporate or persons by issuing a remedial notice or order requiring them to take on rehabilitation obligations.”*

### Questions raised in the Consultation Paper:

- Do you agree that trailing liabilities provisions should only be applied to declared mines? What are your reasons for that view? **Response:** *In principle GLP believes that trailing liabilities should apply to all areas where the State has picked up the bill for failures by Owners, however in practice this is a potentially complex and time-consuming task, potentially fraught with uncertainties and legal avenues of appeal. Therefore, trailing liabilities should only be reserved for cases involving very significant financial liabilities. GLP support restricting this to declared mines, at least initially.*
- What are your views on the Commonwealth Government’s trailing liabilities regime? **Response:** *The Commonwealth trailing liabilities regime has 2 fundamental differences to that proposed for declared mines in Victoria. Firstly, the Commonwealth has never been an owner/operator of any of the assets that the regime applies to, whereas the State of Victoria has been the owner/operator of all 3 declared mines. Whilst the legal framework makes the private owner/operators solely responsible it is clear that the State of Victoria, and Victorians at large, benefitted significantly from many decades of low-cost electricity of which the Mine Voids are the direct and most visible consequence. It can be argued that this makes the State of Victoria at least morally responsible for its share of the cost of rehabilitation. It is only the commencement date of 5 May 2022 that prevents the State from being partially responsible for these significant costs. Secondly, the offshore petroleum rehabilitation works do not significantly impact the local human population in the same manner that the declared mines will. This adds much complexity to the potential scope of works, including works over and above those required of the declared mine owners.*
- Do you believe the Commonwealth Government trailing liabilities regime, developed for the offshore petroleum sector, could be adapted to Victoria’s declared mines? What are your reasons for that view? **Response:** *There are substantial differences in the history and circumstances between the recent offshore drilling matters being dealt with by the Commonwealth Government and the situation of over 100 years of mining activity in the LV, the majority of which was undertaken directly on behalf of the Victorian Government by the SECV for the benefit of the Victorian community. The concept of a trailing liabilities regime for Victoria’s declared mines is supported by GLP as a sensible position to protect the State of Victoria from nefarious business dealings aimed at avoiding legal responsibilities.*
- Do you think the proposed trailing liability regime will be effective in ensuring Victorians are not exposed to rehabilitation liability risk? **Response:** *Imposition of a scheme of trailing liabilities will have limitations as the legislation will have to be very broad to capture all of the possible nefarious actions. Such broad rules will create “new” and potentially unintended risks. At the same time, it is very hard to cover off all avenues for avoiding obligations potentially worth hundreds of \$M. Such large sums of money create opportunities for creative thinking to avoid the obligations.*

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- What are your views on the proposed Victorian trailing liability regime? **Response:** *The need for a scheme to manage trailing liabilities was highlighted when AGL first proposed to demerge its operations, at which point it was possible that the remaining AGL entity would have insufficient funds to manage the potential Loy Yang Mine liability. As such, creation of a scheme of trailing liabilities is an essential part of the proper legislative regime for managing these critical liabilities.*
- Do you have any suggested improvements to the proposed Victorian regime? **Response:** *No, we aren't legal practitioners.*
- If the trailing liabilities provisions were used, do you believe the related persons should have access to any existing rehabilitation bond to undertake the necessary works, as they would be doing the rehabilitation instead of the Government? **Response:** *Yes, they should have access to the rehabilitation bond. If not, what happens to the bond funds? Why hold a bond?*
- If the trailing liabilities provisions were used and rehabilitation obligations were completed successfully by the related persons, do you think their expenses should be reimbursed (in full or in part) from any rehabilitation bond held by Government against the operation? **Response:** *Yes*
- Should the MRSDA be amended to require declared mine licensees to seek approval of changes in ownership above a set threshold? **Response:** *Unless there is a lack of confidence in the ability of the trailing liabilities to do its job, what is the benefit as the size of the liabilities will nearly always trigger the threshold unless the project is nearly complete or the threshold is set at \$000'sM.*
- Do you have any further comment on any other aspects of the proposed trailing liability scheme? **Response:** *No, but, GLP believes:*
  1. *the State of Victoria has at least a moral obligation for having been a major beneficiary and previous owner/operator of all 3 declared mines. Except for the start date being 5 May 2022 the State would be partially legally responsible under the definitions proposed.*
  2. *the proportion of obligation would be equivalent to the proportion of coal used to generate electricity during the respective periods of ownership,*
  3. *whilst not legally responsible for any of the rehabilitation costs, the State will be responsible for all of the costs after the current operators have discharged their rehabilitation responsibilities. These could be significant and drag out the period before the local community has anything approaching an asset. Creation of an asset is the standard that GLP refers to as having been "repurposed". It is generally acknowledged that the rehabilitation phase is likely to take several decades. To avoid conflicts between rehabilitation works and repurposing works it is unlikely that repurposing works will commence until handback has been achieved. This is likely to add further decades, and potentially hundreds of \$M before the community will have access to a usable "repurposed" asset.*
  4. *a better model is that the State works with each owner to identify the final "repurposed community asset" and a joint agreement is made for the respective elements. GLP believes this is a superior approach to that currently being pursued because:*
    - a. *the final repurposed project costs less money (zero rework),*
    - b. *the community receives an asset much.*
    - c. *the mine owner actually hands over an asset for which they can claim positive publicity. Presently, the best a mine owner can do is claim to have met their legal liabilities (in which case they will be seeking to do so at the least cost).* 5/6

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*GLP believes implementing trailing liabilities is essential but not mutually exclusive to pursuing a superior outcome as outlined immediately above.*

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