28 February 2023

EnergyAustralia
LIGHT THE WAY

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Dear Sir or Madam,

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

EnergyAustralia welcomes the opportunity to provide a submission on the Trailing Liabilities for Victoria's Declared Mines Consultation Paper (**consultation paper**).

EnergyAustralia is one of Australia's largest energy companies, providing gas and electricity to 1.7 million customers across Eastern Australia. EnergyAustralia employs over 2,300 people and operates over 5,500 MW of electricity generation, including around 850 MW of renewable energy and 80 MWh of utility-scale batteries. In Victoria, we have 2,500 MW of electricity generation capacity.

EnergyAustralia has committed to net zero (scope one, two and three) by 2050, to be out of coal by 2040, and to reduce our direct emissions by 60 per cent by 2028/29 relative to 2019-20. We are determined to demonstrate that coal-fired power can exit the market in a responsible way that supports our people and ensures customers continue to receive reliable energy, and increasingly cleaner supplies of electricity.

EnergyAustralia owns and operates the Yallourn Mine and Power Station in the Latrobe Valley, on a site covering 5,995 hectares. The Yallourn Mine, which covers approximately 3,000 hectares, provides brown coal fuel to the 1,480MW power station which produces approximately 22 per cent of Victoria's electricity. Together the mine and power station employ around 500 people. The Yallourn Mine is a Declared Mine per the *Mineral Resources (Sustainable Development) Act 1990* (**MRSDA**).

In 2021, EnergyAustralia announced the Yallourn Power Station will cease operation in mid- 2028. Our multimillion-dollar support package, coupled with seven years' advance notice, means our power station and mine site people will have time to plan, reskill or retrain. The notice period also provides clarity for the market, which supports future energy investments. Following the closure of the power station and associated mining activities, EnergyAustralia is committed to delivering a safe, stable and sustainable landform.

Key points

The Trailing Liabilities framework (**proposed framework**) presented in the consultation paper is predicated on the concept that Victoria's existing regulatory structure is insufficient. This view is premature considering that the Victorian Government has not yet updated its Rehabilitation Bonds policy and has only recently finalised comprehensive

changes to the Declared Mine regulations which are in the process of being implemented by mine operators.

Similarly, the proposed framework is designed, according to the consultation paper, for a "*worst case scenario*" which "*is not expected to occur*". The proposed framework presents an unwarranted lack of confidence in both Victoria's mine rehabilitation regulation and the mine operators expected to deliver on the requirements of mine rehabilitation regulations.

It is unclear what defect in Victoria's mine rehabilitation regulations that the proposed framework is seeking to remedy. Victoria's comprehensive mine rehabilitation regulation already provides:

- A clear obligation in the MRSDA for mine licensees or transferees to demonstrate their ability to finance rehabilitation of mine land.
- In the case of Declared Mines such as Yallourn:
    - a **Declared Mine Rehabilitation Plan** (**DMRP**) which is required to identify activities to manage potential risks posed by Declared Mine land; and
    - payment of a mine stability levy to fund research and technical advice.
- **Rehabilitation Bonds** designed to cover rehabilitation if a mine licensee defaults – the exact situation that the proposed framework attempts to address. The State of Victoria currently holds **1,415 bonds** worth nearly **$832 million** for mining tenure under the MRSDA. Over two-thirds of the value of these bonds relate to Declared Mines. As the consultation paper acknowledges, these bonds will be updated in 2023.
- **Cost recovery** enforcement powers in the MRSDA which enable the Minister to pursue licensees and former licensees for additional rehabilitation costs incurred in excess of bond amounts.
- **Contingent Liability**, in accordance with the MRSDA, which the State of Victoria holds in addition to rehabilitation bonds, and provides an additional $124 million[1] for situations where, following a default, rehabilitation bonds are insufficient for rehabilitation costs.

The above measures, operating together, put Victoria in a stronger position than the circumstances that prompted the Commonwealth Government to introduce its trailing liability regime. In that scenario, the Commonwealth lacked the ability in legislation to "block" so-called corporate changes if the Minister was not satisfied that the transferee is able to finance the proposed work and rehabilitation. This is not the case in Victoria.

The consultation paper appears to suggest imposing further rehabilitation obligations, where a licensee cannot complete rehabilitation, on "*parties that derived the greatest financial benefits from the project*." The State of Victoria was the owner and operator of the Declared Mines unlike the Commonwealth which had no historical ownership stake in the Northern Endeavour Floating Production Storage Facility referenced in the consultation paper.

For the Yallourn Mine, the State of Victoria is undoubtedly one of the parties that has received substantial benefits as the mine, for the overwhelming majority of its life (~1921-1996), was owned and operated by the State Electricity Commission of Victoria. The legacy of that ownership, particularly historical mining and environmental management practices, continues to impact decisions regarding the site's rehabilitation. Consequently, if the State is minded to retrospectively extend liability for Declared Mines to "*the parties that derived the greatest financial benefits from the project*" then the 5 May 2022 date is arbitrary and retrospectivity should be extended to the original project proponent. With respect to the

[1] Department of Jobs Precincts and Regions, *Annual Report 2020-21* (note: the 2021-22 Annual Report was not available at the date of writing this submission).

Yallourn Mine, EnergyAustralia is committed to implementing, in a safe, stable manner, the rehabilitation concept of a flooded mine void that the State had for the Yallourn Mine prior to its sale. EnergyAustralia looks forward to working with the State to implement this concept prudently and responsibly to deliver prosperity and amenity for the local community for generations to come.

An offshore floating oil platform has limited further opportunities for an alternative beneficial use; whereas, as has been the experience in Australia and around the world, mines are regularly rehabilitated in ways that can provide lasting jobs, investment, and social benefits for host communities. Placing further regulatory obligations, which are intended to operate purely "*as a last resort*", risks stifling innovation on projects that could seek to provide a lasting beneficial use from rehabilitated mines in Victoria.

Response to Consultation Questions

Please find below responses to the questions raised in the consultation paper.

What are your views on the Commonwealth Government's trailing liabilities regime?
As outlined above, the Commonwealth regime was a direct response to address clear gaps in the Commonwealth regulatory framework. As the consultation paper acknowledges, the existing Victorian mine rehabilitation framework enables the Minister to block licence transfers if they are not satisfied that the transferee is able to finance the proposed work and rehabilitation. Arguably, this power alone would have provided a different result to the situation that occurred involving the Northern Endeavour.

The *Walker Review*[2] found that prior to the liquidation of the Northern Oil and Gas Australia Pty Ltd group in 2020, the National Offshore Petroleum Titles Administrator had "*a number of opportunities during 2015-2019 to influence the change of titleholder…"* but "*…it was having to work under a number of legislative limitations which it considered prevented it from being able to fully consider, and influence, the ramifications of the change of titleholder."*[3] In Victoria, section 33(3) of the MRSDA requires that prior to the transfer of title, the Minister must be satisfied, *inter alia*, that the prospective transferee "*is likely to be able to finance the proposed work and rehabilitation of the land.*"

Victoria's legislation already provides critical, early opportunities for the Minister to intervene and prevent the transfer of titles to entities that are incapable of financing and/or delivering on rehabilitation obligations. Consequently, the Commonwealth offshore regime does not provide any tangible improvements to mine rehabilitation regulations already in the place in Victoria.

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?
No. As discussed above, adopting a version of the Commonwealth offshore regime does not provide any tangible enhancements to mine rehabilitation regulations already in place in Victoria. The proposed framework presented in the consultation paper is predicated on the concept that the existing framework is insufficient. This view is premature considering that Victorian Government has not yet updated its Rehabilitation Bonds policy and has recently made comprehensive changes to the Declared Mine regulations which are in the process of being implemented by mine operators. The consultation paper does not consider how other Australian states with extensive mining operations address the scenario where a mine operator may become insolvent. Consideration of these jurisdictions may provide

[2] *Walker Review of the Circumstances that Led to the Administration of the Northern Oil and Gas Australia (NOGA) Group of Companies* (2020).
[3] Ibid.

more relevant models for adaptation in Victoria than the offshore petroleum extraction industry.

Do you think the proposed trailing liability regime will be effective in ensuring Victorians are not exposed to rehabilitation liability risk?
No. In the context of floating offshore oil platform, the Commonwealth did not identify, develop and produce the resource. This is not the case in Victoria where the Latrobe Valley mines exist solely because of historical decisions taken by the State of Victoria. In the context of Declared Mines, the principle of extending liability to "*parties that derived the greatest financial benefits from the project*" would require the legislation to specifically exclude the State of Victoria from further liability despite these sites existing solely due to the State's choices.

The legacy of that ownership, particularly historical mining and environmental management practices, continues to impact decisions regarding Declared Mine rehabilitation. Accordingly, given the proposed framework is intended to work as a last resort, and the State of Victoria does not expect to exercise the proposed trailing liability powers, it is reasonable to exclude Declared Mines from the trailing liabilities framework given the considerable value of rehabilitation bonds already held for Declared Mines and the State of Victoria's role in establishing and operating these mines.

What are your views on the proposed Victorian trailing liability regime?
The proposed framework does not adequately regard how Victoria's comprehensive mine rehabilitation regulation protects the community from the consequence of a mine operator entering into liquidation. The State of Victoria has tangible opportunities in the MRSDA to intervene prior to a licensee entering into liquidation and being unable to fulfill its rehabilitation obligations. This is unlike the Commonwealth which introduced a number of measures identified in the Walker Review, aside from Trailing Liabilities provisions, to influence titleholder changes.

Due to the complex nature of mine rehabilitation for the Declared Mines, a Trailing Liabilities regime should only apply to the rehabilitation plan as laid out in the DMRP, with regard to the rehabilitation bond and not on any additional areas of works that licensees may have undertaken in order to add value and improve the post-mining legacy of the regions in which they operate. This distinction should be clear in any regulations.

Do you have any suggested improvements to the proposed Victorian regime?
There is currently insufficient detail to suggest what improvements could be made. However, the proposed framework should appropriately distinguish sites that have a legacy of State ownership.

The consultation paper does not adequately consider the adverse implications of the proposed regime on potential innovation as described elsewhere in this submission. In particular, it does not appropriately address complications involved in:

- determining how responsibility would be allocated in circumstances where there are many potential parties captured (with varying levels of contribution and control to the need for rehabilitation); and
- introducing a significant, expansive and arbitrary change of control regime requiring State consent for corporate activity simply because an affected entity may hold rehabilitation obligations under the MRSDA.

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?

The proposed framework does not yet contain sufficient detail to provide a fully informed view on the potential implications. However, on the information provided, there is the possibility for issues to arise if the proposed provisions were used.

Currently, the proposed framework suggests a "*related person*" is:

- a related body corporate of the registered holder of the permit, lease or licence;
- any former registered holder of the permit, lease or licence; or
- a person who was a related body corporate of any former registered holder of the permit, lease or licence at the time the permit, lease or licence was in force.

In the scenario posed in the question, a licensee has failed to complete their rehabilitation obligations and, as a result, the provisions transfer these obligations to a "*related person*" of the licensee. To the extent that the rehabilitation bond provided by the defaulting licensee is available, it should be the first source of funding for the completion of rehabilitation, whether conducted by the State or a "*related person"* who takes over this responsibility.

Without access to the rehabilitation bond, the "*related person*" (other than in the case of a related body corporate with the same beneficial ownership) bears all financial risk relating to rehabilitation and this would act as a further constraint to beneficial reuse of the site.

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?
As above.

Should the MRSDA be amended to require declared mine licensees to seek approval of changes in ownership above a set threshold?
No. The obligations contained in section 33(3) of the MRSDA provide a sufficiently broad range of considerations for the Minister to be satisfied of before approving an instrument to transfer a licence including that the proposed transferee:

- is a fit and proper person to hold the licence;
- intends to comply with the licence;
- genuinely intends to do the work;
- has an appropriate programme of work;
- is likely to be able to finance the proposed work and rehabilitation of the land; and
- has paid (or the former licensee has paid) all outstanding fees, bonds, royalties and rents in respect of the licence;

Introducing further provisions to seek approval of changes in ownership, creating a significant, expansive and arbitrary change of control regime, could have considerable unintended consequences for corporate activity generally.

Do you have any further comment on any other aspects of the proposed trailing liability scheme?
EnergyAustralia intends for the Yallourn Mine's rehabilitation to provide ongoing social, economic and environmental benefits for the community. This could mean third parties purchasing land in the Declared Mine area to undertake business activities potentially including civil works and investment in new plant which could provide economic benefits for the local community. There are limited viable repurposing options for an offshore oil and gas platform but there are a variety of repurposing options for coal mines that could benefit local communities, if given time and support to be implemented. If the proposed

framework does not carefully cater for these opportunities, then repurposing projects of this kind at Yallourn and other Declared Mines will be put at serious risk.

In summary, it is unclear what defect in Victoria's mine rehabilitation regulations that the proposed framework is seeking to remedy. Victoria's comprehensive mine rehabilitation regulation already provides:

- A clear obligation in the MRSDA for mine licensees or transferees to demonstrate their ability to finance rehabilitation of mine land;
- In the case of Declared Mines such as Yallourn, a requirement to submit a DMRP and payment of a mine stability levy;
- Rehabilitation Bonds designed to cover rehabilitation if a mine licensee defaults;
- Cost recovery enforcement powers in the MRSDA which enable the Minister to pursue additional rehabilitation costs incurred; and
- Contingent Liability, in accordance with the MRSDA, which provides an additional funding source where bonds are insufficient for rehabilitation costs.

The above measures, operating together, put Victoria in a stronger position than the circumstances that prompted the Commonwealth Government to introduce its trailing liability regime. In that scenario, the Commonwealth lacked the ability in legislation to "block" so-called corporate changes if the Minister was not satisfied that the transferee is able to finance the proposed work and rehabilitation. This is not the case in Victoria.

Thank you for the opportunity to contribute to the consultation. If you require any further information, or would like to discuss further any of the issues raised in this submission, please contact XXXXXXX, by email at XXXXXXXX

Yours sincerely

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