Submission in response to

Draft Mineral Resources (Sustainable Development) (Mineral Industries) Amendment Regulations 2022

prepared by

Environmental Justice Australia and Environment Victoria

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Director, Policy and Legislation
Earth Resources Policy and Programs
Department of Jobs, Precincts and Regions

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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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About Environment Victoria

Environment Victoria (formally the Conservation Council of Victoria) is Victoria's premier not-for-profit environmental advocacy organisation. Established in 1969, we have worked closely with communities throughout the state to establish national parks, fight off inappropriate industrial development, and fight for a fast and fair energy transition to mitigate climate change for the benefit of all.

Environment Victoria played a significant advocacy role throughout the Hazelwood mine fire and both the 2014 and 2015-2016 Hazelwood Mine Fire Inquiries, including the specific inquiry into Mine Rehabilitation. Our advocacy for better coal mine law and oversight, increased rehabilitation bonds and community engagement in mine rehabilitation has helped to bring significant changes to how Victoria's brown coal mines are regulated.

Submission on the Proposed Mineral Resources (Sustainable Development) (Mineral Resources) Amendment Regulations 2022

EXECUTIVE SUMMARY

Decades of brown coal mining to power Victoria has left the Latrobe Valley with enormous mine pits and toxic coal ash contaminating land and groundwater. The Latrobe Valley has provided more than 85% of Victoria's power for almost a century, and as a result the community have been disproportionately impacted by the health and environmental impacts of burning coal. As our state moves away from coal, the community deserves assurance that companies who profited from mining and burning coal are accountable for cleaning up the damage caused in the process. Safe and thorough rehabilitation of these sites is a critical part of the just transition to clean energy.

Underneath the Latrobe Valley brown coal mines is a complex aquifer system comprising several different depths and stretching nearly the entirety of the Gippsland region. These aquifers are already significantly depleted from groundwater extraction for brown coal mining and power station operations. Mine run-off and leachate from coal ash dumps has been slowly contaminating groundwater underneath the mines and ash dumps for decades. Gippsland is home to the Ramsar-protected Gippsland Lakes, and a large number of precious species that are already threatened. 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 regions' river system.[1]

Victorians, and the Latrobe Valley community in particular, are all too familiar with the consequences of an inadequate regulatory framework for rehabilitation and the failure of regulatory oversight.

In 2014 the Hazelwood mine caught fire for 45 days, creating the worst air pollution disaster in Victoria's history. The 2014 Hazelwood Mine Fire Inquiry (the **2014 Inquiry**) that followed concluded that both mine operator GDF Suez (as it then was) and multiple government agencies, including the Environment Protection Authority and Earth Resources Regulator (**ERR**), failed to appropriately oversee activities in the mine that contributed to the fire's severity. Volume 4 of 2015-2016 Hazelwood Mine Fire Inquiry (the **2015-16 Inquiry**), in which the Board of Inquiry investigated into mine rehabilitation of the brown coal mine, found that EER and the legislative framework it oversees were not achieving positive outcomes for the community or the environment.

Eight years after the disastrous mine fire and the recommendations of the two Hazelwood Mine Fire Inquiries, the proposed Mineral Resources (Sustainable Development) (Mineral Resources) Amendment Regulations 2022 (**proposed regulations**) are an opportunity for the government to set comprehensive standards for Latrobe Valley coal mine rehabilitation. The community has waited a long time for regulatory certainty on what mine rehabilitation will leave them with and how. 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 oversite (and where appropriate, enforcement) is undertaken 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.

We have reviewed the proposed regulations and it is clear that they fail to ensure:

- a clear and transparent decision-making process which meaningfully involves the community;
- the best option for the community and the environment; and
- that government and regulator decision-making is based on expert evidence and advice.

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[1] Latrobe Valley Regional Rehabilitation Strategy, see: https://www.water.vic.gov.au/planning/LVRRS.

We urge the Department to improve the proposed regulations. These regulations must address the shortcomings we identify above and throughout this submission to significantly improve the process for a community that has worked to power Victoria for over a century. We have 13 recommendations to ensure a transparent and evidence based rehabilitation planning process that puts community first:

Recommendation 1: The consultation process be revised to ensure best practice community consultation conducted by government.

Recommendation 2: Licensees to submit new declared mine rehabilitation plans, which include comprehensive technical detail and evidence to support the plans.

Recommendation 3: The proposed regulations be amended to place obligations on the licensee to meet standards set by government (rather than leaving it to the licensee to set the standards as per 64C).

Recommendation 4: Proposed 64C be amended so that the licensee is required to list measures that it *will* take to meet the government set standards and additional amendments as detailed below.

Recommendation 5: Reduce the timeframe in proposed regulation 64A for the submission of declared mine rehabilitation plans from 3 years to 12 months.

Recommendation 6: Introduce a penalty for non-compliance with the statutory timeframe for submission of a declared mine rehabilitation plan in s 84AZU(2) of the MRSD Act to incentivise compliance.

Recommendation 7: Regulations 64K and 64L be amended to require the Department Head to seek and consider independent geotechnical, hydrological, hydrogeological, methodological and contamination expert advice before making a decision to approve the declared mine rehabilitation plan.

Recommendation 8: The list of prescribed matters in regulation 64K should be strengthened to ensure that pollution and contamination will not occur or will be minimised so far as reasonably practicable during rehabilitation and as a final landform.

Recommendation 9: The requirements for annual reports in 57A be strengthened including so that up to date information is provided and annual reports are made publicly available online.

Recommendation 10: Additional requirements and amendments to strengthen post-closure plan requirements in proposed regulation 64D as set out below.

Recommendation 11: Proposed regulation 64Q regarding the declared mine fund be amended to include an independent expert review of the declared mine rehabilitation plan or post-closure plan to assess the potential cost.

Recommendation 12: Ensure approved Work Plans/Work Plan Variations for each declared mine site and the approved declared mine rehabilitation plan and post-closure plans are publicly accessible online on either the ERR or MLRA website.

Recommendation 13: The consultation period on the proposed regulations should be extended to enable adequate time for the community to properly engage with the proposed amendments and the RIS.

BACKGROUND

History of the Proposed Regulations

The proposed regulations are part of a major reform for ERR, Victoria's mine regulator. The ERR received significant criticism in the 2014 and 2015-16 Inquiries, the Commissioner for Better Regulation's *Getting the Groundwork Right* Report in 2017 and a report by the Victorian Auditor-General's Office in August 2020. Those investigations have prompted various legislative and regulatory changes over the past decade, including a substantial increase in rehabilitation bonds. The Department of Jobs, Precincts and Regions' (**the Department**) waited until 2018 to turn its mind to reforming and addressing brown coal mine rehabilitation issues.

The *Mineral Resources (Sustainable Development) Act 1990 (Vic)* (**the MRSD Act**) and the *Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019* (**2019 Regulations**) provide the current legislative framework for the rehabilitation of all mines and quarries in Victoria.

The purpose of the proposed regulations is to support the declared mine rehabilitation provisions introduced by amendments to the MRSD Act in 2019. Without new regulations, there is no obligation for operators of Victoria's 'declared mines' to comply with the 2019 provisions in the Act.

There are only three declared mines in Victoria: Hazelwood coal mine which ceased coal extraction activities in 2017; Yallourn coal mine which is scheduled to cease coal extraction activities in 2028 and Loy Yang coal mine which is scheduled to cease coal extraction activities in 2045. Prior to privatisation in the 1990s, all mines were state-owned when they were initially dug, including by the State Electricity Commission.

History of mine rehabilitation outcomes in the Latrobe Valley

In 2014 a catastrophic fire burned in the Hazelwood coal mine and a toxic plume of smoke blanketed Morwell and surrounding Latrobe Valley communities for some 45 days. The air pollution was found by the 2015-16 Inquiry to have likely contributed to a spike in deaths in the area. The northern batters of the mine in which the fire ignited were "worked-out" and had not been rehabilitated in accordance with the mine owner's rehabilitation plan, nor with Victorian laws under the MRSD Act.

The 2014 Inquiry found that GDF Suez (as it then was) and a number of government regulators, including the Victorian Environment Protection Authority, WorkSafe Victoria and ERR, had all failed in their duties to either rehabilitate disused sections of the mine or oversee and enforce progressive rehabilitation.

Subsequent inquiries and reports have considered the regulatory framework and effectiveness of the ERR. In 2017, the Commissioner for Better Regulation released a report titled '*Getting the Groundwork Right'*, identifying significant areas for improvement in both ERR regulatory framework and in the operation of the regulator.

In August 2020, the Victorian Auditor General's Office released a report following an audit of ERR. The report found that the Department was not effectively regulating operators' compliance with their rehabilitation responsibilities, exposing the State to significant financial risk when sites are poorly rehabilitated or not rehabilitated at all. If not addressed, these sites also present significant health and environmental risks to Victorians. Systemic regulatory failures identified by the report included:

- the use of outdated cost estimates;
- failure to periodically review bonds;
- returning bonds without verifying rehabilitation activities;
- approving rehabilitation plans that lack adequate detail; and
- a lack of enforcement activities.

Victoria's approach has been to increase the bonds for each brown coal mine in the Latrobe Valley, create a Latrobe Valley Mine Rehabilitation Authority, implement the recommendations of the Mine Fire Inquiry Board, and initiate environmental reforms that give the Victorian Environment Protection Authority a greater role in mine rehabilitation plans to avoid environmental degradation.

However, extant rehabilitation plans proposed by brown coal mine operators in Victoria carry significant risks for the Latrobe Valley community, surface water and groundwater, and the surrounding environment. The community has no certainty about whether, after a lengthy EES process for the Hazelwood mine, these plans will be allowed to go ahead. Further, there is no evidence to suggest that Gunaikurnai have provided their free prior and informed consent for rehabilitation plans, activities, and outcomes.

THE PURPOSES OF THE MRSD ACT AND THE PROPOSED REGULATIONS

The objectives of the MRSD Act include establishing a legal framework that aims to ensure:

- risks to the public, environment and infrastructure are identified and eliminated or minimised as far as reasonably practicable;
- consultation mechanisms are effective and appropriate access to information is
- provided;
- mined land is rehabilitated;
- appropriate compensation is paid for the use of private land for extractive mining;
- conditions in licences and approvals are enforced; and
- dispute resolution procedures are effective.[2]

The 2019 amendments to the MRSD Act were designed in part to fulfil the Government's commitments to the Latrobe Valley community and the people of Victoria by implementing recommendations from the Hazelwood Mine Fire Inquiry relating to responsibility for the rehabilitation and ongoing management of the Latrobe Valley coal mines.[3] However, the amendments were also intended to enable expansion of the framework to future mines that present a significant risk to public safety, the environment and infrastructure, beyond the current declared mines.[4]

The 2019 amendments introduced new rehabilitation and post-closure requirements for declared mines including declared mine rehabilitation plans (**DMRPs**).[5] The proposed regulations are intended to achieve the purposes of the amendments and in particular allow for the DMRP framework to be put into practice. Two options were assessed against the base case in the Regulatory Impact Statement (**RIS**) and 'Option 2' was preferred'.

Option 2 is an iterative approach purportedly designed to facilitate continuous improvement. The RIS states that this option: [6]

> "centres on promoting rehabilitation planning, progressing towards rehabilitation outcomes that are acceptable against legislative standards, but do not focus early in the process on the exact end landform. This option seeks to develop the evidence base about mine sites over time and have this inform the rehabilitation plans and activities."

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[2] *Mineral Resources (Sustainable Development) Act 1990* ('the Act'), s 2(1)(b).
[3] *Mineral Resources (Sustainable Development) Amendment Bill 2019 – Second Reading Speech* (5 June 2019) (Tim Pallas, Treasurer) Hansard, 1942-1943.
[4] Ibid.
[5] See section 3 of the MRSD Act; declared mine rehabilitation plan means a plan approved by the Department Head under section 84AZV(2)(a) and as varied under section 84AZW(3)(a);
[6] RIS, 57.

RECOMMENDATIONS TO ACHIEVE THE PURPOSE OF THE MRSD ACT

A. Consultation

One of the objectives of the MRSD Act is that consultation mechanisms are effective and appropriate access to information is provided.[7]

There is a general duty on declared mine licensees under section 39A of the MRSD Act to consult with the community throughout the period of the licence by sharing information about activities under the licence that may impact the community, and giving members of the community a reasonable opportunity to express their views about those activities.

Under the new scheme, s84AZU(4) of the MRSD Act places an obligation on licensees to consult with a prescribed person or a prescribed class of persons in relation to the DMRP before the plan is submitted to the Department. The proposed regulations state at regulation 64G that 'prescribed persons or class of persons' includes several statutory authorities, mine owners, landowners directly adjacent to declared mine land, Traditional Owner groups in the area in which the declared mine is located, and communities in the Gippsland Region set out in Column 2 of Schedule 2 of the *Regional Development Victoria Act 2002* in which the local councils are identified.

Proposed regulation 64H provides that the licensee must publish a notice seeking submissions on the proposed plan 'at least 28 days' before giving the proposed plan to the Department Head for approval. However, the notice must contain the key elements of the plan rather than the full plan itself.[8]

The licensee is then only required to provide a report on the consultations that sets out the 'matters raised' within the consultations and the declared mine licensee's 'response' to those matters,[9] and an assessment of how the plan will meet the rehabilitation outcomes articulated in the plan.[10] Those consulted are not afforded a right of reply.

In determining whether to approve the DMRP under proposed regulation 64K, the Department is not even required to consider the licensee's report on the consultations (as the report does not form part of the DMRP itself). Rather, the Department Head must consider whether, in relation to the licensee-devised rehabilitation outcomes identified in the plan, the benefits to the wellbeing and prosperity of the community are promoted, the views of the community and Aboriginal persons are taken into account and that the knowledge, rights and aspirations of traditional owner groups in caring for country is acknowledged.[11]

This process does not achieve the objectives of the MRSD Act. The objectives of the MRSD Act include that consultation mechanisms are effective and appropriate access to information is provided. The proposed consultation mechanisms are ineffective and inappropriate for the following reasons:

- By failing to include independent incorporated community groups and/or not for profit organisations in the definition of 'prescribed persons or classes of persons' it is our view that the consultation mechanisms proposed are ineffective and do not align with the objectives of the MRSD Act.[12]

- The community must be consulted on the entire DMRP and post-closure plans, not a licensee-determined range of key elements. It is unreasonable to expect community members to

[7] MRSD Act 1990, s 2(1)(b)
[8] Proposed regulation 64H(2)(d)(iv).
[9] Proposed regulation 64J(a).
[10] Proposed regulation 64J(b).
[11] Proposed regulation 64K(b).
[12] See proposed regulations 64G, 64H and 64J.

determine the appropriateness of licensee plans without access to full information. Without full information, it would be difficult for communities to engage independent, expert opinions on the adequacy of the plans. Further, in not being required to make the DMRP available in its entirety to the community, declared mine licensees have an opportunity to control public perception of mine rehabilitation plans by determining for the community what elements the declared mine licensee believes to be 'key'. This is inappropriate. It is not for declared mine licensees to decide for the community what it should or should not be concerned with.

- A timeframe for consultation of 28 days (minimum) is unreasonable, particularly in circumstances where communities are presented with technical information regarding mine rehabilitation. Whilst we appreciate that declared mine licensees must have certainty regarding the timeframe of the DMRP process, the consequences of mine rehabilitation are significant for the community. People must be given an appropriate timeframe in which to consider a proposed DMRP, of at least 60 days.

- There is no requirement for community submissions to be provided by the licensee to the Department. There is also no statutory guidance as to what licensees should include in their consultation report. The licensee can select what information is included in the report of consultations. This is inappropriate and lacks transparency. It does not guarantee that matters raised by community members will be provided to the Department Head let alone considered in a fulsome way when making a decision on the DMRP.

- It is inappropriate for the government to outsource the community consultation process to licensees. It is an abrogation of the government's responsibility to engage with the very people affected by rehabilitation rather than imposing decisions. Licensees are private entities with no direct accountability to the public. Consultation should be conducted by government to ensure there is transparency, appropriate access to the process and a requirement for government to consider public submissions.

- There is no mechanism for the community to seek review of an approval decision. Third party review rights are an essential element of legislation in Victoria and the Commonwealth.

- There is no requirement for DMRPs or post-closure plans to be independently reviewed by experts or reviewed by the Department before the community are asked to comment on the adequacy of the plans. DMRPs will contain technical information and the risks associated with carrying out the plans without technical review could have catastrophic implications for the Gippsland region. Asking the community to comment on plans before they undergo independent review is unreasonable. We have also addressed the need for independent expert review below at Recommendation 7.

We make the following recommendations based on best practice community consultation, which will ensure that the community is able to make fully informed comments and that those comments are considered appropriately by the government in the decision-making process:

Recommendation 1: The consultation process be revised to ensure best practice community consultation conducted by government, in particular we recommend the following:

a) Revise regulation 64L(a) to require the Department Head to consult with independent appropriately qualified and experienced experts on the DMRP and post-closure plan (see recommendation 7 below).

b) The Department Head must conduct public consultation for a period of 60 days <u>after</u> the Department head has consulted with agencies and bodies described in proposed regulation 64L(a).

c) **In its public consultation, the Department Head must make the entire DMRP publicly available including the post-closure plan, consultations with relevant and prescribed statutory authorities and public sector bodies, and independent experts that the Department Head must consult with and any expert reports produced during the government's review of the plan.**

d) **Submissions received during the public consultation period are a mandatory consideration in making a decision under s 84AZV(2) of the MRSD Act.**

B. DMRP and post-closure plan

The 2019 amendments to the MRSD Act acknowledge the need for more detailed planning in relation to declared mine sites, and for roles and responsibilities to be clearer. The proposed regulations fail to promote more detailed rehabilitation planning. While they more clearly define the role of government and operator, they place obligations on the operator that should be managed by government, including determination of rehabilitation and post-closure criteria and what must be achieved to satisfy this.

The need for more detailed coal mine rehabilitation plans was identified as early as the 2015-16 Inquiry. The Latrobe Valley coal mine rehabilitation plans have not been updated since the Inquiry. We note that both the Hazelwood Mine Fire Inquiries and the Auditor General's report on mine rehabilitation were critical of mine industry self-regulation, and the 'hands-off' approach taken by ERR and other authorities in mine rehabilitation oversight.

Content of DMRP

Under the current regime, work plans are required to be prepared by all licensees (including declared mine licensees) and must include a rehabilitation plan component setting out activities for progressive rehabilitation and content relating to the final landform to be achieved through rehabilitation of the mine site. Each of the three Latrobe Valley coal mines have work plans which include some degree of detail regarding mine rehabilitation that has been signed-off by the Department Head. However, these details are not publicly available.

Additionally, declared mine licensees are required to prepare a DMRP in accordance with s84AZU of the MRSD Act which must include:

- Any existing rehabilitation plan (i.e. under the work plan);
- The closure criteria outlined in the proposed regulations;
- A post-closure plan which outlines the monitoring and maintenance to be carried out on the closure of the mine on the declared mine land;
- An undertaking to pay the declared mine registration amount;
- An assessment of the risks posed by geotechnical, hydrogeological, water quality or hydrological factors within the declared mine land; and
- Any other prescribed matters.

Requiring licensees to re-submit their existing rehabilitation plans does not resolve the problem that the existing rehabilitation plans lack sufficient detail, and therefore does not support the legislative objectives of the 2019 amendments to the MRSD Act. The RIS anticipates that knowledge gaps would be identified and included in the DMRP, however its Option 1 scenario would require all detail for the DMRP plan upfront.

The RIS states at various points that under Option 2 the regulations will prescribe the 'evidence to be provided with approval/closure application' to ensure 'sufficient evidence in support of the DMRP to

enable the Department head to make a decision'.[13] In our view, proposed regulations (specifically 64F and 64J) do not specify sufficient supporting evidence to be provided.

The DMRPs and post-closure plans for the three Latrobe Valley mines should not be approved unless there is sufficient technical detail and supporting evidence to support the viability, safety and environmental impacts of the rehabilitation method proposed by operators. The process proposed as Option 1 of the RIS should be the preferred option to ensure that operators do not submit plans lacking crucial details.

Proposed regulation 64F outlines the 'prescribed matters' to be included in a DMRP for the purposes of s 84AZU(3)(f) of the MRSD Act. A major flaw of the 'prescribed matters' in 64F of the proposed regulations is that post-mining landforms and land uses beyond relinquishment remain entirely licensee determined. Licensees remain able to privately assess viable rehabilitation options and propose the option that is the most cost effective, least labour intensive, and therefore prioritise private interests over the environment, the community and the State without any transparency. There is no requirement in the proposed regulations to provide details of other viable rehabilitation options, or viable options within the proposed plan (i.e. alternative fill methods or alternative land forms).

In our view, ERR should not approve DMRPs without knowledge of all viable options for rehabilitation of the declared mine land or options which could result in better outcomes for the environment and the community. It is inappropriate to consult communities on the suitability of one option without any transparency of alternative options and the reasons those other options were not adopted.

It is our understanding that an 'options analysis' study is likely to have been undertaken by mine operators in assessing the viable options for rehabilitation and the economic viability of each option. We recommend that an options analysis study of all viable rehabilitation options for the declared mine site, and information regarding why the preferred rehabilitation method was selected by the licensee (for example, it was the most cost effective), be added as prescribed matters under proposed regulation 64F.

We note that there was another viable option identified by the Hazelwood Mine Fire Inquiry, being partial backfill below natural groundwater level. [14] We have subsequently sought independent expert analysis of this option which found that this option would leave the community and the government with a more positive legacy that requires less active management.[15] We enclose a copy of that analysis with this submission.

Post-mining land use

Proposed regulation 64F(1)(c) requires licensees to include within their plans 'the post-mining land use, including any land that is not able to be rehabilitated to a stable condition[.]' We recommend that this provision be amended to include the "viable post-mining land uses". The potential issues have been demonstrated by ENGIE Hazelwood's 'Concept Master Plan', which shows the pit lake as three separate lakes yet does not include the results of water quality modelling, which we understand may be lower than required to sustain aquatic life or be fit for human recreation. Only viable post-mining land uses should be included.

Recommendation 2: Licensees to submit new DMRPs, which include comprehensive technical detail and evidence to support the plan including as follows:

[13] RIS, p 59.
[14] Hazelwood Mine Fire Inquiry Report, Volume IV, p 79 and 82.
[15] David Chambers, 'Comments on the Hazelwood mine closure proposal', 26 July 2022.

a) **An options analysis study which assesses viable alternative rehabilitation methods for the declared mine land. Licensees should identify the reasons for selecting the preferred rehabilitation method (e.g. cost, environmental impact).**

b) **Independent geotechnical, hydrological, hydrogeological and contamination expert advice in relation to the preferred rehabilitation method.**

c) **An analysis of the cumulative impacts of the project, along with other proposed declared mine rehabilitation projects in the region, on environmental resources, such as water resources.**

d) **Amend the wording of 64F(1)(c) to "the viable post-mining land use" to prevent operators from proposing unviable land uses.[16]**

e) **Amend 64F(1)(d) to "or likely required" to capture legal approvals and permissions operators may require. For example, whether operators can use groundwater allocations for the purpose of mine rehabilitation.**

f) **Amend 64F(2)(d) to include environmental risks to surrounding environment and environment likely to be impacted by the project.[17]**

g) **Under regulation 64F(2)(d)(iii), insert "(iv) Any alternative methods which would eliminate, mitigate or provide more beneficial outcomes for the environment, land and community regarding the risks proposed in (d)."[18]**

Closure criteria

Proposed regulation 64C provides 'closure criteria' for the purposes of s84AZU(3)(b) of the MRSD Act. That provision provides that a DMRP must include the prescribed closure criteria. However, the proposed regulations frame the setting of the criteria the licensee must meet in order to reach closure goals as the licensee's obligation. The proposed standards would vest the responsibility to the licensee to determine the standards the licensee must meet.

It is our view that these standards should be government prescribed, and the licensee should outline how they will achieve those standards based on government prescribed criteria. The regulations should place obligations on licensees to meet those standards as well as require the licensee to outline the measures it "will take" to meet the standards.

Further, the criteria and the standards imposed by the Department must be subject to independent expert advice. There is significant public interest in industry self-regulation generally, and a considerable degree of public interest in the thorough oversight of mine rehabilitation planning. The community must have certainty that the methodology, criteria and standards utilised by government, Departments and industry are founded on solid science and technical expertise, and subject to third-party scrutiny to ensure robustness. Industry should be obligated to meet standards and criteria rather than write their own rules.

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[16] See ENGIE Hazelwood Concept Master Plan 2019 which outlines recreational, ecological and industrial options for use of the pit lake, some of which we understand are unviable despite likely to be unviable due to likely water quality.

[17] We note that the Act provides that the principles of sustainable development should be considered in the administration of its provisions and environmental risks should be assessed here.

[18] For example, alternative water sources in the case of the Hazelwood coal mine rehabilitation.

Recommendation 3: The proposed regulations be amended to place obligations on the licensee to meet standards set by government (rather than leaving it to the licensee to set the standards as per 64C).

Recommendation 4: Proposed 64C be amended so that the licensee is required to list measures that it *will* take to meet the government set standards and also amended as follows:

a) **Regulation 64C(b) should require the licensee to outline the measures it must take to "address and *mitigate* the risks".**
b) **Regulation 64C(p) should require the licensee to outline the measures the licensee will take to "enable the expected post-closure environmental outcomes". This term should be defined or given more precision.**
c) **Add 64C(q) "The measures the licensee will take to ensure a beneficial land use for the community after rehabilitation is complete".**

Timeframe for submission of DMRP and post-closure plan

The current regulatory regime does not provide a timeframe for licensees to submit a DMRP. Under the proposed regulations, proposed regulation 64A provides that existing mine licensees are required to submit a DMRP to ERR within 3 years from September 2022, with the ability to seek an extension for 1 year.

It is our understanding that a factor in deciding on the 3 year time period in regulation 64A was that it would allow sufficient time for licensees to seek the necessary environmental assessments for their rehabilitation proposals under the *Environmental Effects Act 1976* (EE Act). However, there is no mechanism under the proposed regulations or the MRSD Act that requires licensees to seek those approvals three years in advance of submitting their DMRPs to the Department in accordance with s64A. In the absence of a requirement to commence the environmental assessments under the EE Act three years in advance, it is unlikely that licensees would proactively seek an assessment under the EE Act. If DMRPs were submitted by licensees to the Department at the 3 year time period, the Department could not approve the plans until the EE Act assessment had been completed. There is therefore no need to delay the submission of DMRPs by 3 years.

The 3 year timeframe does not make practical sense considering the operational stages of the Yallourn and Hazelwood coal mines. The Yallourn coal mine is scheduled for closure in 2028, and there is a strong public interest in providing clarity to the community as soon as possible as to the rehabilitation of the mine. There is also public interest in preventing ongoing uncertainty as far as possible, which has occurred and is still occurring with the Hazelwood rehabilitation. This could be mitigated in the case of the Yallourn mine if the DMRP is provided to ERR and the community well in advance of the scheduled closure date.

There is no regulatory offence or penalty attached to incentivise submitting a DMRP to the Department on time. The VAGO report identified insufficient incentives for industry to comply with rehabilitation obligations and that ERR ineffectively utilise enforcement powers in relation to non-compliance with mining laws and regulations.[19] Penalties are an important part of legislative provisions involving time limits. They allow a regulator to enforce non-compliance with time limits, and this has been recognised in other jurisdictions.

For example, in the recently revised requirements for mine rehabilitation in Queensland, the Environmental Protection (Rehabilitation and Reform) Amendment Regulation 2019 (Qld), amending

[19] Victorian Auditor-General´s Report *Rehabilitating Mines* 5 August 2020. See: https://www.audit.vic.gov.au/report/rehabilitating-mines?section=33613--appendix-b-acronyms-and-abbreviations&show-sections=1#33613--appendix-b-acronyms-and-abbreviations.

the *Environmental Protection Act 1994* (Qld) (**the Qld EP Act**), included enforcement provisions to hold licensees accountable to the standards and timeframes required by a rehabilitation plan. Per the QLD EP Act, licensees are subject to penalties if works occur without a Progressive Rehabilitation and Closure Plan (**QLD PRCP**) or if the schedule to the QLD PCRP conditions (encompassing all milestones) are contravened,[20] inclusive of vicarious liability for the holder of the QLD PCRP.[21] Further, non-compliance with a QLD PRCP can enliven a range of other enforcement tools in the QLD EP Act, including environmental protection orders[22] and environmental audits.[23] The report from the Victorian Auditor General's Office specifically refers to a lack of enforcement activities[24] as a failure of the EER to date, and stringent legislated enforcement options have the potential to increase compliance with DMRPs.

Recommendation 5: Reduce the timeframe in proposed regulation 64A for the submission of declared mine rehabilitation plans from 3 years to 12 months.

Recommendation 6: Introduce a penalty for non-compliance with the statutory timeframe for submission of a DMRP in s 84AZU(2) of the MRSD Act to incentivise compliance.

C. Approval of DMRP

The proposed regulations enable the Department to:

a. Request further information from the declared mine licensee prior to making approval decisions;
b. Consult with government agencies and other Ministers; and
c. Prescribe a list of matters for the Department to take into account in their DMRP approval decisions.

Prescribed process

S84AZV(1)(d) of the MRSD Act required the Department to follow the "prescribed process" for the Department's consideration of a DMRP is. Proposed regulation 64L provides the prescribed process. Proposed regulation 64K provides prescribed matters that the Department must consider in determining whether a DMRP should be approved. Those matters require geotechnical, hydrological, pollution and contamination expertise. These aspects cannot be considered in isolation, as aspects such as contamination may impact on biodiversity loss downstream, for example.

The Department Head should use the 64L consultation process with other government agencies to work out and engage appropriate independent experts required to review the DMRP. In the absence of independent regulatory oversite of the rigor with which the DMRP is prepared, independent expert analysis must be embedded in the regulatory framework. Independent expert analysis from suitable qualified and experienced experts must scrutinise the DMRP including the methodology used, geotechnical, contamination risk, hydrology, and hydrogeology to assist the Department Head in making an informed decision on the DMRP.

As already identified at Recommendation 1 above, after expert advice is sought the Department should run public consultation on the draft DMRP before deciding whether to approve it.

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[20] Environmental Protection Act 1994 (Qld) s 206A.
[21] Environmental Protection Act 1994 (Qld) ss 431 – 431C.
[22] Environmental Protection Act 1994 (Qld) s 358.
[23] Environmental Protection Act 1994 (Qld) s 321.
[24] Victorian Auditor-General's Office, *Rehabilitating Mines: Independent assurance report to Parliament 2020-2021: 1* (August 2020), p 6.

Recommendation 7: Regulations 64K and 64L be amended to require the Department Head to seek and consider independent geotechnical, hydrological, hydrogeological, methodological and contamination expert advice before making a decision to approve the DMRP.

Recommendation 8: The list of prescribed matters in regulation 64K should be strengthened to ensure that pollution and contamination will not occur or will be minimised so far as reasonably practicable during rehabilitation and as a final landform.

D. Content of annual report

In addition to the annual reporting obligations set out in the MRSD Act, proposed regulation 57A prescribes furthers matters. The annual reports may include information about risks, potential issues or non-compliance, in which case the Department Head can direct a declared mine licensee to apply for variation of the DMRP under s84AZX(1) of the MRSD Act, or other enforcement action.

In our view, proposed regulation 57A relating to the contents of annual reports should be amended for the following reasons:

- Some provisions are vague and licensees may not provide the information the government intends them to without more specific language.
- Additional information should be included in annual reports for the government to be able to accurately assess information about risks, potential issues with the plans and non-compliance with the plans.
- An additional provision should be added requiring licensees to make annual reports public, so that both the community and government are aware of progress being made on rehabilitation plans and of any risks associated with the implementation of the plan.

Recommendation 9: The requirements for annual reports in 57A be strengthened including so that up to date information is provided and annual reports are made publicly available online as follows:

a) Revise 57A(b)(ii) as follows:

(ii) an identification and assessment of any *current or anticipated future* risks to the rehabilitation and post-closure management of the declared mine;

An annual report should not be limited to information regarding any current risks, but rather any anticipated risks that could arise in the future which ERR would not otherwise be alerted to until the following years' annual report, or in the case of an issue eventuating.

b) Include the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) in provision 57A(b)(vi).

The EPBC Act must automatically be triggered in relation to DMRPs. There is no reason why a summary of the matters of national environmental significance that may be impacted by a DMRP, and the status of the regulatory process under the EPBC Act, should not be included.

c) Regulation 64F(ix) should be amended as follows to avoid narrow interpretation.

(ix) a report of potential issues that ~~exist in relation to~~ *which could impact on* the declared mine rehabilitation plan and/or the progressive rehabilitation of the declared mine land, *the environment or the surrounding community.*

The potential issues this provision intends to capture is unclear and could be interpreted narrowly. The criteria for 'potential' must include what the licensee knows, or ought reasonably to know, about the issue or risk of the issue occurring, the likelihood that the issue will eventuate, the severity of harm the issue would cause if it eventuated, and, where appropriate, steps being taken by the licensee to prevent the issue from occurring.

d) Add 64F(xi) which states "any new academic, scientific, expert or government reports or studies that could impact on the suitability or viability of the declared mine rehabilitation plan and the progressive rehabilitation of the declared mine land".

Each year, the CSIRO, the government, the Independent Panel on Climate Change and many other scientific bodies release studies and reports regarding the state of the environment, for example biodiversity, water resources and climate change. New research could impact on the suitability of a DMRP or post-closure plan resulting in a need to revise and/or vary those plans. It must be incumbent on licensees to provide assessment of relevant contemporary research that may impact on their DMRP or post-closure plan, and a requirement that those plans be reviewed with a view to variation to integrate that research where relevant and/or necessary.

There is legislative precedence to achieve this. For example, provisions regarding state of knowledge under the *Environment Protection Act 2017* (Vic) require those whose activities may give rise to risk of harm to human health and the environment to understand the risks associated with their activities and the steps to mitigate that risk, including being abreast of advances in science and technology that impacts their activities.

Ideally, the DMRP and post-closure plans should be "live" documents with room for variation where circumstances require. By integrating contemporary information relevant to DMRPs and post-closure plans into their annual reports, licensees and the Department Head can anticipate potential changes that may need to be made.

e) Add 57A(c) that requires ERR to upload annual reports to a publicly available website within one month of the annual report due date.

One of the goals of the 2019 amendments to the MRSD Act was increased transparency. The Latrobe Valley community are invested in rehabilitation projects. They live very close to the mines and deserve reassurance about any risks with the projects, details of progress of rehabilitation projects and whether licensees are making timely progress. There is currently no statutory mechanism for the publication of this information. This can be compared to the Environmental Protection Authority requiring power station operators to publish data on their websites.

E. Post-closure plan

Post-closure plans are required to be submitted as a component of the DMRP. Those plans must contain the information prescribed by proposed regulation 64D. We recommend including the following amendments to strengthen the proposed regulation.

Recommendation 10: Additional requirements and amendments to strengthen post-closure plan requirements in proposed regulation 64D as follows:

a) Amend (b) as follows: 'a risk management plan for known and credible risks that may continue post-closure *and which identifies alternatives that could be implemented during rehabilitation which would mitigate those risks*';

b) **Amend (d) to ensure that is not left to operator to determine what level of data, reports and information must be provided to the Rehabilitation Authority;**

c) **Add '(e) an economic analysis of the likely cost of (a);' and**

d) **Add '(f) the viable post-closure land uses of the declared mine land.'**

F. Declared mine fund

Proposed regulation 64Q provides that in determining the amount to be paid into the Declared Mine Fund, the Minister must consider information submitted by the declared mine licensee relating to the cost of rehabilitating the declared mine after an adverse event. In our view, an independent expert should review the licensee's DMRP or post-closure plan and associated information and determine the potential cost.

Recommendation 11: Proposed regulation 64Q regarding the declared mine fund be amended to include an independent expert review of the DMRP or post-closure plan to assess the potential cost.

G. Registration of declared mine land

Proposed regulation 64R provides a list of prescribed matters which must be included on the register of declared mine land. Those prescribed matters do not include approved work plans or work plan variations relating to the declared mine land, or the approved DMRP and post-closure plans approved under the proposed regulations. The proposed regulations promised "greater transparency for the community on operator plans".[25] Making these documents available to the public is critical to achieving a transparent process and ensuring communities have access to up-to-date information regarding the risks associated with rehabilitation plans, plans for stakeholder engagement and mine closure.[26] We presume local authorities such as local councils and water catchment authorities may also require the detailed information about rehabilitation progress and risks contained in these document for their decision-making.

To achieve the purposes of the proposed legislation, the following documents should be made publicly available on either the ERR or Mining Land Resource Authority (**MLRA**) websites:

1. Approved Work Plans/Work Plan Variations for the declared mine site; and

2. The approved DMRP and post-closure plans with all attachments and data.

Recommendation 12: Ensure approved Work Plans/Work Plan Variations for each declared mine site and the approved DMRP and post-closure plans are publicly accessible online on either the ERR or MLRA website.

Consultation period

We note that in the lead up to this submission deadline, a number of community members have raised their concern with us about the relatively short timeframe of only four weeks within which to make a submission on the proposed regulations and lengthy RIS. The Department should therefore consider extending the public consultation period for major regulatory reform such as this to ensure the community has sufficient time to engage with the process. This would accord with the objectives of the

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[25] Engage Victoria website. See: https://engage.vic.gov.au/draft-declared-mine-regulations-ris.
[26] Mineral Resources (Sustainable Development) (Mineral Industries) Amendment Regulations (2022), Reg 57A.

MRSD Act, including that consultation mechanisms are effective and appropriate access to information is provided.[27]

Recommendation 13: The consultation period on the proposed regulations should be extended to enable adequate time for the community to properly engage with the proposed amendments and the RIS.

[27] MRSD Act 1990, s 2(1)(b).