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08/05/2014 07:12 AM

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Hazelwood Coal Mine Inquiry

A Submission to the Hazelwood Coal Mine Inquiry Concerning the Need to Improve the Regulation Surrounding Rehabilitation Plans

**Submitted by: Professor Samantha Hepburn, School of Law, Deakin
University**

1. Purpose of the Submission

I am making a submission to this inquiry for the purpose of illustrating the deficiencies of the existing regulatory framework under the Mineral Resources (Sustainable Development) Act 1990 (Vic)(MRSD) regarding the implementation and regulation of rehabilitation plans pursuant to ss78 - 84. This submission argues that the scope, adequacy and effectiveness of the regulatory provisions for the rehabilitation plan and, in particular, the lack of any clear external monitoring and enforcement of rehabilitation criteria have a direct connection to the preparedness of the Hazelwood Coal Mine to prevent the outbreak of a fire, to be prepared to respond to the outbreak of a fire and to mitigate its spread and severity.

2. How is a Rehabilitation Plan Currently Regulated?

The MRSD requires all applicants for a licence to conduct rehabilitation of the land during the course of exercising mining authority: s81. A rehabilitation bond must be paid with the amount being at the Ministers

discretion: s80, which is reviewable pursuant to a rehabilitation liability assessment: s79A which is conducted at the discretion of the minister. The rehabilitation plan must take into account (i) the special characteristics of the land, (ii) the surrounding environment and (iii) the need to stabilize the land including the desirability of returning agricultural land to a state reasonably akin to that which existed prior to the mine and any potentially long term environmental degradation of the land: s79.

The underlying rationale for a rehabilitation plan is to provide an outline of how a mining licensee plans to remediate and mitigate the impact of the mining process upon the land and the landscape during the operational life of the mine. The guidelines that accompany the MRSD provide further detail regarding how a rehabilitation plan should be constructed. The guidelines make it clear from the outset that the rehabilitation plan must direct, from the date when the licence is applied for, remediation and maintenance of the land and the mining operations will occur during the currency of the licence.

In this respect, the rehabilitation plan, whilst conceived as a component of the application process, necessarily goes beyond this and is intended to function as a working document despite its predictive focus. This necessarily means that particular rehabilitation processes may need to evolve as the needs of the mine and the practical impact of the mining process becomes apparent and the regulatory framework should support this shift.

The guidelines make it clear that rehabilitation planning should incorporate two elements. The first what is known as the final concept

plan which outlines expected end use/s of the site and its general characteristics at the completion of rehabilitation. The final concept plan seeks to provide the basis for rehabilitation activities throughout the life of the project. End uses for mine sites will depend upon the nature of the mining process but options include landfill, agricultural purposes, native vegetation and industrial/commercial use. The guidelines seek an end use that is practical and achievable and which involves the land become more productive. The submission does not focus upon reform options for the final concept plan, as this is not regarded as having a direct connection to the outbreak of the Hazelwood fire.

The second element of a rehabilitation plan is the progressive plan. The progressive plan needs to outline, in detail, the proposed rehabilitation works, how and when they are to be undertaken, and what standards of 'completion criteria' are to be satisfied. The guidelines indicate that it is generally not sufficient to merely comply with licence conditions or regulatory agencies requirements. Typical matters incorporated into the rehabilitation plan include: native revegetation, plant growth, plant density, species diversity productivity of rehabilitated agricultural land final slopes of pits, waste dumps, dam walls, etc.chemistry and levels of suspended solids of runoff waters. The submission focuses entirely upon the regulatory problems connected with the progressive plan as the failure to monitor and enforce progressive rehabilitation obligations can be directly connected to public safety concerns and possibly, to the outbreak of the Hazelwood coal fire.

The progressive plan can either cover the entire licence period or a shorter period with updates being submitted at a later time. The progressive plan should include a site plan so that the location of

proposed rehabilitation is clear. Presumably this is to ensure that progress is satisfactory.

Generally the objective of a rehabilitation plan is to achieve: revegetation, but it is also to ensure that roads and tracks are decommissioned, equipment, plant – esp underground facilities such as pipes and storage tanks and rubbish are removed.

Significantly for the purpose of this submission, the guidelines make it clear that mining and exploration sites must be left in a condition of safety to the public. This may include safety and stability of pit faces and water bodies as well as the landscape generally.

The guidelines also make it clear that a rehabilitation plan needs to be monitored. In particular, performance against the defined ‘completion criteria’ that licensees set for themselves is suggested and the guidelines propose that licensee construct schedules for maintenance and monitoring.

3. What are the Deficiencies of the Regulatory Framework for Rehabilitation Plans and how has this contributed to the Hazelwood Coal Fire?

There are two core problems with the existing regulatory framework regarding rehabilitation plans under the MRSD: monitoring and enforcement.

First and foremost, the existing framework lacks any effective external monitoring by specifically appointed officials with proper expertise. It

also lacks any clear requirement for progressive maintenance and monitoring outcomes to be either registered or submitted to a public body and therefore made available for public inspection. The same concerns relate to the rehabilitation plan itself, as the MRSD does not require rehabilitation plans to be made publically available. In this respect, the public is precluded from having any knowledge of the rehabilitation process associated with the mining operation despite the fact that this process has a significant connection to the ongoing public safety of surrounding communities.

The guidelines make it clear that any maintenance and monitoring schedule should be incorporated as an internal process and should (but not must) be monitored by the mining licensee. This means that the licensee that has prepared the rehabilitation plan and outlined the completion criteria also monitors and enforces those criteria. This is an unacceptable conflict and creates significant potential for public safety hazards.

Whilst the exact cause of the Hazelwood fire is not clear, it is possible that rehabilitation processes were either inadequate or subjected to poor internal monitoring. Rehabilitation processes that could, if ignored or done inadequately, be connected to a coal fire include: a failure to properly clear grass and dry fuel from coal mining areas and a failure to provide proper coverage to a coal seam once extraction from that seam is completed. An open cut mine, such as Hazelwood, involves an initial removal of the overburden from the coal seam and the roof of the seam is cleaned using bulldozers so that it can be drilled and blasted. Once this extraction process is removed, sufficient coverage of the coal seam is imperative so that if a fire does occur, the prospect of the coal seam being

incorporated into the fire and the fire becoming catastrophic, is significantly reduced.

Second, the existing regulatory provisions in the MRSD do not provide sufficient sanctioning for a breach of the rehabilitation plan against a non-compliant licensee. This difficulty is inexorably connected to the first problem because if the rehabilitation criteria are not externally monitored, it is difficult to determine whether a breach has occurred and this may only become apparent once a catastrophic event such as a coal fire occurs. This is clearly contrary to the preventative aims of the rehabilitation plan in the first place.

The absence of strong, rigorous sanctions for rehabilitation breaches means that licensees lack incentive to comply with the completion criteria that they have established for themselves. Under the existing regulatory framework, the MRSD sets out that if a rehabilitation plan is not complied with, the Minister 'may' take action to either rehabilitate or further rehabilitate the land. However, such action can only be taken if the Minister has requested the licensee to rehabilitate the land and they have failed to do so after a reasonable period of time. There is no provision in the existing MRSD for any specific monetary penalty for a failure to rehabilitate or, in particular, for any cancellation or suspension of the mining licence.

The only incentive that the licensee has to comply with the progressive completion criteria that they have imposed upon themselves regarding progressive rehabilitation responsibilities is the possibility that the rehabilitation bond they have paid at the outset will either not be returned, or will be depleted.

The amount of a rehabilitation bond is fully determined by the Minister at his or her discretion. There is no external assessment of the adequacy of the bond and there is no regulatory requirement that the amount of the bond be specifically outlined within the rehabilitation plan. There is some discretion in the MRSD to require a licensee to enter into a further rehabilitation bond but this is also at the discretion of the Minister and once again there is no requirement for this to be set out within the terms and conditions of the rehabilitation plan.

The difficulty with this situation is that if a licensee determines that the cost of conducting extensive, proper and adequate rehabilitation is more than the cost of losing the rehabilitation bond, there is nothing in the existing regulations to stop the licensee from breaching the criteria in the rehabilitation plan. The failure to address this negative externality has significant ramifications. Proper and effective sanctioning influences behaviour. The absence of a strong regulatory structure for compliance and enforcement of, in particular progressive rehabilitation criteria suggests that the plan itself is treated by the MRSD more in the nature of an administrative requirement or hurdle rather than an ongoing and imperative working document, intricately connected with the licensees continuing mining authority. Ultimately, if mining licensees are not compelled to comply with rehabilitation obligations, public safety is put at risk.

An effective sanction could come in the form of the imposition of a more extensive rehabilitation bond, however if that is regarded as a disincentive to the commencement of mining operations (note that the 2012 Inquiry into Greenfields Mineral Exploration and Project

Development in Victoria resulted in the State government focusing on the economic barriers that large rehabilitation bonds can cause for mining development. The government recommended a new start-up bond scheme reducing rehabilitation bonds by up to 50% for the first five years of mine operation) then it may be preferable to canvas other additional sanctioning options that provide a more effective behavioural incentives.

4: Reform Suggestions

To improve public safety standards and minimize the risk that a complete or inadequate failure to perform progressive rehabilitation obligations contributed to the Hazelwood coal fire the following regulatory reforms are suggested:

1. The inclusion of mandatory public recording of all rehabilitation plans – this would include both the final and progressive elements of those plans as well as the amount of the rehabilitation bond that is paid, including any additional rehabilitation bond that may be imposed.
2. The establishment of an external authority, specifically authorised to monitor and investigate ongoing rehabilitation obligations and to ensure that those obligations are progressively carried out to an acceptable standard. This would necessarily involve the abolition of internal rehabilitation monitoring and therefore remove the conflict of interest concerns.
3. The introduction of further and more rigorous sanction provisions

in the MRSD to deal specifically with the consequences of a breach of a rehabilitation plan. These sanctions should be in the form of provisions that give the Minister, or preferably the external authority mentioned in (2) above, the specific authority to either suspend or cancel a mining licence where rehabilitation plans are seriously breached through either non-compliance or inadequate compliance or, alternatively, to impose maximum monetary penalties that significantly exceed the rehabilitation bond and therefore provide a strong incentive against licensee non-compliance.

4. The introduction of clear and articulated rules that set out exactly what must be included within a rehabilitation plan that go beyond simply outlining the broad need to ensure that the plan relates to the nature of the land etc as is currently the case under the existing MRSD provisions (see outline above). This will go some way to mitigating the arbitrariness of the existing provisions regarding the type of criteria that may be included within rehabilitation plans and will also reduce the breadth of Ministerial discretion and therefore remove the sense of arbitrariness that is currently associated with the creation and enforcement of rehabilitation plans under the MRSD. The introduction of particularized rules setting out the content requirements for rehabilitation plans, particularly progressive rehabilitation obligations is vital given their direct link to public safety. Hence, it is suggested that all rehabilitation processes that may connect with a coal fire including: land clearance, coverage of coal seams to a safe level and removal of

any potentially explosive plant or equipment need to be expressly mandated as obligatory inclusions within a rehabilitation plan under the MRSD.

The adoption of such reforms will improve public safety, incentivize rehabilitation processes, improve public and community participation and confidence and moderate the existing breadth and scope of the Ministerial discretions and therefore held to minimize potential for arbitrary and ad hoc decision making in this area.