EDO ENVIRONMENTAL DEFENDERS OFFICE (SA) INC

30 March 2017

DSD
Via email

Re: *Review of the Mining Act 1971*(SA) and *Mining Regulations 2011*

The Environmental Defenders Office (SA) Inc ("the EDO") is an independent community legal centre with twenty-five years of experience specialising in environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education.

We appreciate the opportunity to provide a submission in relation to the review of the *Mining Act 1971* (SA) ("the Act") and *Mining Regulations 2011* ("the Regulations") following on from our earlier brief comments. This Review provides a welcome opportunity to fix deficiencies in the Act, and improve the regulation of mining activity in this State. References to the Minister refers to the South Australian Minister for Mineral Resources and Energy.

Summary of Recommendations

In summary, our recommendations are as follows:

- That the Minister for the Environment has a right of direction over the granting of a mining lease where a proposed mining operation is likely to have significant impacts on the environment and community;
- That environmental assessment of mining projects be transferred from the Minister and the South Australian Department of State Development (the DSD) – noting that the Minerals Resources Division of the DSD has now been transferred to the Department of Premier and Cabinet (DPC), making DPC the mining industry regulator - to either the Environment Protection Authority (the

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EPA), or the South Australian Department of Environment, Water and Natural Resources (DEWNR);

- That an independent expert scientific committee be established to ensure decisions (whether about conventional or unconventional resource extraction) are informed by the best available science;

- That an office of Land and Water Commissioner be established to provide oversight and advice with respect to exploration across South Australia. The Commissioner would have the ability to review any exploration approval and advise the State government and the community whether projects have been assessed in accordance with the regulatory and legislative framework;

- Where there has been a failure to abide by a Program for Environmental Protection and Rehabilitation (PEPR) which results in material or serious environmental harm under the *Environment Protection Act* 1993 (SA) the Environment Protection Authority (EPA) should have the final decision on whether a lease or licence should be cancelled, renewed or suspended. In the alternative there should be a formal arrangement requiring conferral with the EPA on sanctions or with DEWNR if there's a breach of a PEPR in a protected area and;

- That the exploration licence renewals process in specially protected areas remain unchanged.

The Mining Act be amended to:

- make explicit reference to the need for the Minister to consider the principles of ecologically sustainable development when administering the Act;
- enhance the provisions for provision of information to the public, in order to maximise the opportunities for public participation in decision-making processes, increase the transparency and accountability of the DSD/PMC as the environmental regulator, and improve public confidence in the DSD/PMC as industry regulator including greater and more transparent

reporting by DSD to DEWNR of clearance of native vegetation resulting from mining activities;

- require consultation with respect to substantial new or increased impacts not considered in the original lease assessment;
- provide for community input into decisions regarding the lifting of exempt land status;
- include criteria to guide court decision making as to when it is appropriate for mining to be allowed to proceed at the expense of farming (as per native title);
- require mediation to foster early resolution of disputes;
- provide for costs orders where each party bears their own costs irrespective of the outcome;
- include a right of public enforcement where the Act has been breached;
- make a wider range of modern compliance and enforcement mechanisms available to the regulator, and strengthen existing mechanisms;
- include a fit and proper person test when decisions are made to grant tenements, with such a test to include mandatory consideration of Regulation 89 information together with the proponent's history under other regulatory regimes.

- strengthen provisions that will ensure land and water is rehabilitated, and legacy issues are addressed, including the provision of an industry fund for the rehabilitation of abandoned mines (in addition to bonds as a means of ensuring rehabilitation of current and future mines);
- make private mines subject to equivalent environmental protection provisions as mines operated under tenements and;
- repeal Part 8A, to ensure that special mining enterprises are not exempt from the environment assessment, approval and compliance and enforcement provisions of the Act.

1. The Regulatory System (Discussion Paper, p 73)

In South Australia, mining has been the subject of separate controls regarding environmental protection, under the Act. This means that a number of the key environmental statutes in South Australia – most notably the *Environment Protection*

Act 1993 (SA) and the *Planning, Development and Infrastructure Act 2016* (SA) (in the process of replacing the *Development Act 1993* (SA)) – do not generally apply to the assessment and approval of exploration and mining activities, nor to the regulation of exploration and mining activities undertaken pursuant to licences and leases under the Act. Other important legislation which doesn't apply includes the *Native Vegetation Act 1991* (SA). If clearance of native vegetation is associated with exploration or mining activities then it is exempt from approval under the *Native Vegetation Act 1991* (SA). This exemption applies regardless of the level of impact or consideration of the relative environmental, social or environmental impacts.

The Mineral Resources Division (MRD) of the DSD/PMC is responsible for promoting and regulating mining activity. This position was not changed when major amendments were made to the Act in 2010/11. The fact that the DSD has been responsible for both promoting and regulating mining raises the spectre of 'regulatory capture', which refers to the situation where the regulator develops relationships that are too close with the industry members it is meant to regulate, at the expense of stringent environmental protection. To prevent this from occurring, the MRD is divided into distinct areas with clearly defined functions and responsibilities in relation to the administration of the Act. However, quite apart from the risk of regulatory capture, the existing regulatory system contributes to a strong perception held by the general public that the MRD is concerned first and foremost with the promotion of mining, and less with community concerns about access to land and environmental protection. This question over the independence of the DSD contributes to a lack of trust in the DSD as industry regulator.

The fundamental structure of the regulatory system, whereby the DSD is both promoter and regulator of mining activity, has not been raised as open to review in the Discussion Paper; rather, the publicly-released aims of the review refer to 'strengthening' the "one Window to Government" model. The fact that the DSD is undertaking a Review in which its own role is not explicitly open for review, has done nothing to improve trust in the regulator. For example, Grain Producers SA has expressed the view that the Review should be undertaken by an independent third party, to ensure the independence of the Review, and to avoid the conflict of interest

between the DSD as promoter and regulator of mining.[1] We are also of the opinion that unless the fundamental regulatory structure forms part of a Review, by an independent third party, this review will simply result in another set of incremental changes to the Act based on certain identified deficiencies, rather than truly comprising a "Leading Practice" review into the legislative framework to take the state forward for the next decades.

We make several key recommendations to ensure the independence of the regulator, and to avoid the possibility of regulatory capture;

- Minister for the Environment to have a right of direction over a mining lease application where a proposed mining operation is likely to have significant impacts on the environment and community.
- Environmental assessment of mining projects, and compliance and enforcement be taken out of the hands of the Mining Minister and DSD/PMC, and be placed into the hands of an independent environment agency/department, as in Queensland, where the Department of Environment and Heritage Protection grants environmental authorities for mining and exploration under the *Environmental Protection Act* 1994 (Qld).
- Establishment of an independent expert scientific committee to ensure decisions (whether about conventional or unconventional resource extraction) are informed by the best available science and an office of Land and Water Commissioner to oversight and advise with respect to exploration across South Australia. The Commissioner would have the ability to review any exploration approval and advise the State government and the community whether projects have been assessed in accordance with the regulatory and legislative framework.
- Where there has been a failure to abide by a PEPR which results in material or serious environmental harm under the *Environment Protection Act* 1993 (SA) the Environment Protection Authority (EPA) should have the final decision on whether a lease or licence should be cancelled, renewed or suspended. In the alternative there should be a formal arrangement requiring

[1] Courtney Fowler and Margaret Whitehouse, *Mining act review: What does it mean for grain farmers across South Australia?*, ABC News, 6 February 2017, http://www.abc.net.au/news/2017-02-03/sach-mining-act-review/8239998 (accessed 18 February 2017).

conferral with the EPA on sanctions or with DEWNR if there's a breach of a PEPR in a protected area.

- That the exploration licence renewals process in specially protected areas remain unchanged.

If the DSD is to remain as both promoter and regulator of mining activity, our position is that it is imperative that the Act does as much as possible to ensure that the environment is not given a secondary role to economic considerations and decision making is transparent and accountable. In line with the *Environment Protection Act 1993* (SA), the Act must be amended to recognise the centrality of the principles of ESD; to ensure public access to information and allow for public enforcement of the Act, and to strengthen and improve the range of compliance and enforcement mechanisms available to the regulator.

2. Recognising the Need for Ecologically Sustainable Development (ESD)

In order that there is proper consideration of environmental factors in decision making, ecologically sustainable development (ESD) must be a key objective of the Act. Whilst the Act already makes provision for the Minister to consider the principles of ESD, through the legislative requirement that the Minister must consider the Objects of the *Natural Resources Management Act 2004* (SA), this reference is indirect, not easily visible, and does not clearly and transparently demonstrate what should be the central importance of ESD to the decision-making process.

ESD principles should be incorporated where possible throughout the Act, the Regulations and relevant policies There are at least two possibilities for incorporating a reference to ESD in the Act. One option is to draft an Objects section for the Act, and include a reference to ESD within the Objects. Where there is an express reference to the principles of ESD in Objects of an Act, these principles must be defined. The *Environment Protection Act 1993* (SA) sets out the Objects of that Act in section 10. One of these Objects is the promotion of the principles of ESD (sub-s 10(1)). These principles are set out in sub-s 10(1). The Act goes on to provide that the Minister, the EPA, and all other administering agencies and persons involved in

the administration of the Act, must have regard to, and seek to further, the objects of the Act (sub-s10(2)).

Other Acts which refer to ecological sustainability or ESD in their Objects include: the *Planning, Development and Infrastructure Act 2016* (SA), s 12; the *Mining Act 1992* (NSW), s 3A; the *Petroleum (Onshore) Act 1991* (NSW), s 2A; the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), s 3; and the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009, made under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), which refer to the need for petroleum activities to be carried out in a manner consistent with ESD, as defined in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Appendix 1 to this Submission sets out extracts from the various Objects clauses of state legislation, which make reference to ESD. Note that this selection does not include the environmental law of other states, which also refer to ESD.

A second option for transparently requiring the decision-maker to consider the principles of ESD is to include a new provision, similar to that in s 2A of the *Mineral Resources (Sustainable Development) Act 1990* (Vic). Sub-section 2A(1) of this Act, which is separate to the Objects provision, simply states that: "It is the intention of Parliament that in the administration of this Act regard should be given to the principles of sustainable development". Sub-section 2A(2) goes on to the define the principles of sustainable development. This approach does not require the inclusion of a new Objects clause in the Mining Act.

Unlike other industries, which require assessment and authorisation under the *Planning, Development and Infrastructure Act 2016* (SA) and the *Environment Protection Act 1993* (SA), mining is assessed and authorised under the Act (with some exceptions, for example, the requirement to obtain a water licence under the NRM Act). The Minister (whose powers are delegated to the MRD of the DSD) is responsible for environmental assessment and approval of mining activities, and for compliance and enforcement, and not the Environment Protection Authority. The Minister/DSD undertakes the role of environmental assessment, approval, and compliance and enforcement, that would otherwise be undertaken by the Planning Minister/EPA. The Act should make it absolutely clear, through an express provision,

that the Minister is obliged to consider the principles of ESD in the administration of the Act, as must the Planning Minister/EPA as the regulators of other development activity in South Australia.

Finally, the Act should include performance criteria on whether ESD principles are being applied, and whether objective environmental outcomes are being achieved.

3. Improving Public Access to Information, Public Consultation and Access to Justice (Discussion Paper, pp 25-27 50, 69, 73)

The EDO strongly encourages community engagement as a central feature of the Act. The public interest value and benefit of this must not be sacrificed simply to increase the speed of assessment and approvals. Genuine and meaningful community engagement has the benefit of empowering local communities, utilising local knowledge and improving decision making by assisting decision makers to identify public interest concerns.

The EDO strongly encourages broad access to information. The EDO receives many enquiries, and listens to many concerns and complaints, regarding the inadequacy of information that is provided by mining companies/ entities/tenement holders to landowners and to the local community. In particular, many complaints and concerns are raised when people are not able to view PEPRs, and much anxiety (that might otherwise be avoided) is caused when mining proponents refuse to make PEPRs available or they are not released by the Minister on public interest grounds. Failure to release PEPRs forces landowners and members of the local community to make Freedom of Information applications, which adds another layer of distress and anxiety, and requires additional (unnecessary) costs. FOI applications also unnecessarily tie up the resources of the MRD, which would be better spent on other regulatory matters. In one instance the EDO had to apply for a court order to obtain a copy of a PEPR. In a recent case for waiver of the benefit of exempt land before the Environment, Resources and Development Court, the respondent only received a copy of the PEPR during the court proceedings.[2]

[2] *Marmota Energy Ltd v NG & JK Harrop, Marmota Energy Ltd v Clinpara P/L* [2016] SAERDC 39.

The right of landowners and the local community to receive information about planned mining activities, and expected environmental and social impacts, and how these will be mitigated and managed, is absolutely crucial to ensuring mining receives a "social licence to operate". People need and deserve to know the activities that are being planned for the land/local areas, and if they cannot obtain that information, it breeds fear, anxiety and distrust of both the mining tenement holders, and the regulator. Receiving information is a prerequisite to effective participation in the decision-making process. Giving landowners and the community the right to access to a wide range of information is also necessary to maximise transparency in the decision-making processes, and by so doing to achieve better outcomes by ensuring the accountability of decision-makers, thereby improving confidence in the regulator.

The Act must be amended to ensure the public is entitled to access to the widest possible range of information from industry and government, to ensure there is effective participation in the decision-making process, to ensure better environment and social outcomes, and, by improving accountability and transparency, to help improve trust in the regulator and mining industry. The information that must, at a minimum, be made publicly available, includes the following:

- submissions regarding public consultation (although consideration may need to be given to those who request their submission to be confidential, in particular individual landowners or community members who fear reprisal should a submission be made public);
- PEPRs (including management plans);
- the terms and conditions of authorisations;
- information on financial assurance and insurance;
- information relating to compliance and enforcement, including: incident and compliance reports; notices for failure to comply; and compliance and rehabilitation directions.

Closely related to the issue of what information should be made publicly available, is the issue of which information should be made available on the Mining Register (not merely, for example, available on the internet). Currently only registered claims,

leases and licences and other registered instruments are required to be kept on the Mining Register and there is no requirement that there be free online access to the Register.[3]

The Register should be used as a tool for recording, and electronically searching, the entire history of a tenement. For the Register to properly serve this role, the Act must be amended to ensure the information listed above is required to be published on the Register (with the exception of public submissions during public consultation procedures). This is not a controversial or unique requirement, but has a precedent under the *Environment Protection Act 1993* (SA). The equivalent types of information that arise in relation to other non-mining development/industrial activities regulated under the *Environment Protection Act 1993* (SA) must be recorded in the Public Register maintained under s 109 of that Act. The EDO strongly recommends that the Register be linked to relevant websites such as SARIG and to other registers such as the Lands Titles Office. Generally speaking, full versions of documents should be available rather than summaries, for example with respect to public submissions.

The EDO also recommends wide access to information about mine financial assurances. In the US, some states explicitly require the information to be disclosed. For example, the state of Colorado, which faced a very significant clean up from the defunct and under-bonded Summitville Mine in the early 1990s, does not permit mine operators to claim that reclamation bond amounts are confidential information. According to state laws governing mine reclamation permits, there is a presumption that all permit information other than the mineral deposit location, size, or nature is subject to disclosure.

The state of Nevada, which supports a major metal mining industry, discloses reclamation bond information and allows the public to participate during the bond calculation process. An applicant for a metal mining permit must include a complete plan for reclamation and estimate of the cost of executing the plan for reclamation. Information in the permit application is presumed to be available for public review unless the mine operator shows "to the satisfaction of the Division that the information contained in the application for a permit is entitled to protection as a

[3] *Mining Act 1971* (SA), s15A.

trade secret": Nev. Admin. Code § 519A.170(2). "Trade secret" is narrowly defined and only applies to information identifying the location of drill holes or information concerning methods, formulas, techniques, or processes that derive independent economic value (present or future) from being not readily known to or ascertainable by others: Nev. Admin. Code § 519A.170(5). During the mine permit application process, the public has 30 days to review and comment on material in the permit application, including the reclamation plan and cost estimate: Nev. Admin. Code § 519A.185

While this is not necessarily a matter for legislative amendment, we also suggest that the MRD/DSD website be used as a 'hub' of knowledge, for disseminating to the public information regarding all applications, draft programs and plans together with policy documents concerning best practices in environmental, community and social issues. We do note that there is already a good body of information on the website, for example reports, ministerial determinations but we think this could be improved. Other information which would be helpful particularly to landowners would be examples of any successful land access agreements. While we acknowledge that there may be concerns about confidential financial information, there is no databank or transparency in relation to land access agreements that can help to educate and inform landowners and communities. Making available 'model' or real land access agreements could help landowners to see the types of matters that can or should be negotiated. In addition, publishing examples from Wardens' court cases or ERD Court cases that demonstrate the types of conditions that have been placed on tenement holders, may also help to inform and empower landowners.

In addition, publishing positive information about a range of matters could help to improve consultation and outcomes, and improve trust in the industry. This could include matters such as: where and how mining and agriculture have successfully co-existed; how companies and communities together have successfully managed community concerns; information on environmental benefits and offsets; and information on social benefits.

There are various levels of public consultation allowed under the Act. The Act does not require public consultation with respect to applications for exploration licences

and retention leases. In relation to mining leases the Minister is required to give public notice of the application describing the land to which the application relates, specifying a place where the application may be inspected and inviting members of the public to make written submissions in relation to the application to the Minister within a specified period of not less than 14 days. The Minister is also required to give notice to the owner of land on which the application relates[4] and where the application is made for a mining lease in respect of land within the area of the Council, to the Council.[5] Whilst the Minister is generally required to have regard to public submissions[6] criteria for decision making tend to be limited[7], reasons are not required and not all decisions are notified publicly.[8]

A key area of concern is access to lack of consultation on PEPRs. Many of our clients are concerned by the loss of native vegetation and the habitat it supports as a result of mining operations. However unless a mining operation is declared a major project under the *Development Act 1993* (SA), the Native Vegetation Council and the public more broadly have no opportunity to make comment in relation to the proposed clearance. Where a mining activity has not been declared a major project the Council can only review the significant environmental benefit for the activity. For activities under the Act, details regarding clearance of native vegetation and associated fauna habitat are usually contained in mining proposals and PEPRs.

In our view the Act should be amended to allow greater consultation and feedback on public submissions. Consultation should be allowed for at least 28 business days with respect to all applications for leases and licences, draft PEPRs (including management plans) and draft tenement conditions. The Act's consultation provisions are much more limited compared with the provisions in the *Petroleum and Geothermal Energy Act 2000* (SA) (PGE Act). The PGE Act prescribes the following measures to comply with its object of establishing consultative processes involving people affected by regulated activities:

[4] *Mining Act 1971* (SA), sub-s 35A(1a).
[5] Sub-section 35A(2).
[6] Section 35A.
[7] Section 35(2).
[8] Section 35B.

- Other than the requirement to negotiate conjunctive land access in accordance with the *Native Title Act 1993* (Cth), there are no other community consultation processes in the first stage of approval under the PGE Act.
- The second and third stages of the process requires community consultation, depending on the identified level of impact of the activity. It is an offence against to carry out regulated activities in the absence of an approved statement of environmental objectives (SEO).[9] The penalty is $120,000. An SEO for low or medium activities is prepared on the basis of an environmental impact report (EIR).[10]
- If the activity is regarded as high impact, the SEO is prepared on the basis of an environmental impact assessment under Pt 8 of the *Development Act 1993* (SA)[11]. Instead of a SEO the proponent must submit one of the following: Environmental Impact Statement (EIS), Public Environmental Report (PER) or a Development Report (DR). The decision on the level of the assessment is made by the Development Assessment Commission on referral by the Minister. Public submissions for an EIS, PER and DR must be lodged within 30, 30 and 15 business days respectively from the date of notice. The Minister determines the impact level of the activity from the EIR and any criteria which the Minister has established for determining the impact of the regulated activity.[12]
- If an environmental impact report is required under Part 12 (Environmental Protection), it must include information on any consultation that has occurred with the owner of the relevant land, any Aboriginal groups or representatives, any agency or instrumentality of the Crown, or any other interested person or parties, including specific details about relevant issues that have been raised and any response to those issues.[13] Information and material provided under this regulation must be kept

[9] Ibid s96
[10] Ibid s 99(1)(a).
[11] Ibid s 99(1)(b).
[12] Ibid s 98.
[13] *Petroleum and Geothermal Regulations 2013* (SA) reg 10(1)(f).

available for public inspection in accordance with directions of the Minister.[14]

- One of the criteria for assessing the environmental effects of the regulated activity is the interests and views (if any) of any interested person or party.[15]
- These SEOs are central to the assessment process under the PGE Act and the regulator will not approve a SEO until it can be shown that genuine community concerns will be managed. It is at stage two of the process, in the development of the SEO, where community consultation takes place, with the intention that the community helps to set the objectives in the SEO.

A similar consultation process could be applied to the Act together with a requirement that public submissions made with respect to any processes under the Act must be considered when decisions are made. The EDO further supports broad community consultation with respect to substantial new or increased impacts not considered in the original lease assessment.

The Act should also be amended to provide for input by the broader community regarding decisions concerning the lifting of exempt land status and to include criteria to guide the court decision making as to when it is appropriate for mining to be allowed to proceed at the expense of farming (as per native title).

A final important community issue is access to justice. The EDO strongly supports a review of the interaction of the Act and land use legislation and policy. Issues in this area have changed dramatically since the introduction of the Act. In our view it is important to look more broadly at competing uses of land and not confine to the court system the resolution of disputes which can affect significant public assets such as water resources. Where it is appropriate for there to be private litigation the EDO supports access to fast and inexpensive resolution of these matters without significant barriers. This includes having access to early mediation and a costs provision where each party bears their own irrespective of the outcome.

[14] Ibid reg 10(5).
[15] Ibid reg 11(1)(e).

4. Compliance and Enforcement (Discussion Paper, pp 46-50)

The Discussion Paper has raised the issue of improving the available compliance and enforcement mechanisms under the Act. We agree that the following mechanisms suggested in the Discussion Paper would improve the ability of the Regulator to ensure compliance with the Act:

- introducing uniform obligations on surrender and expiry of tenements;
- the discretion to prohibit operations until statutory obligations for financial assurance have been complied with, or until there has been compliance with administrative directions;
- the discretion to prohibit tenement renewal, cancellation, surrender or transfer until all outstanding obligations are paid; and
- the discretion to delay approvals if the operator is not compliant in SA or other state jurisdictions.

Where there has been a failure to abide by a PEPR which results in material or serious environmental harm under the *Environment Protection Act* 1993 (SA) we recommend the EPA have the final decision on whether a lease or licence should be cancelled or suspended. In the alternative we recommend that there be a formal arrangement requiring conferral with the EPA on sanctions or with DEWNR if there's a breach of a PEPR in a protected area

As well as these mechanisms, we recommend that a range of other amendments be made to update the compliance and enforcement provisions, to ensure the full range of mechanisms currently found in modern environmental legislation are available to the regulator.

a. Preventative tools

One way in which legislation can prevent environmental harm from occurring is through the use of independent, external audits. These may be of a tenement holder's environmental management system (EMS), or of environmental performance (for example, audits of how well a tenement holder is complying with its outcomes under a PEPR). The Regulations currently explicitly empower the Minister to request an audit of environmental outcomes (Regulation 67). However, there is no specific power for the Minister to request an independent, external audits of a

tenement holder's EMS (or the EMS of an applicant for a tenement). Both internal and external audits of environmental management systems are recognised as not merely good practice, but essential practice, by the industry. There should be a specific power in the Act or Regulations to require an internal review, and independent, external audit of, applicant and tenement holders' environmental management systems.

b. Compulsive tools

Introduce a multi-level offence system. The Act has an extremely simple offence system. It imposes only a monetary figure as a maximum criminal penalty for breach of the Act. For example, the maximum penalty for illegal mining, or for breaching a tenement condition, is $250,000. The Act does not distinguish offences based on fault, nor on the level of harm caused. Modern environmental statutes use multi-level offence systems, which typically range from:

i. high end criminal penalties and imprisonment for intentional, reckless or negligent behaviour;
ii. mid-tier strict liability offences, where intention is not relevant (suitable for corporations); and
iii. lower level 'absolute liability' offences, where there is no defence for a breach.

Mining is exempt from the authorization provisions of the Environment Protection Act, and the Environment Protection Act does not apply to wastes disposed of to land in the area of mining lease (ML) or miscellaneous purposes licence (MPL) in accordance with the ML or MPL. However, should there be an incident where environmental harm is caused by contravention of the licence that does not involve waste being disposed of in the tenement area – for example, polluting a water resource, where water moves beyond the tenement area – then the tenement holder may be prosecuted under the *Environment Protection Act 1993* (SA), and the multi-level offence structure in ss 79, 80, 82 of the Environment Protection Act would apply.

Introducing a multi-level offence system into the Act would raise questions of the relationship between the offence provisions of the Act and the Environment Protection Act. However, in our opinion it is possible to draft particular multi-level

offences to be included in the Act – for example, causing serious/material environmental harm by breaching a licence condition, or by breaching a PEPR, or by a failure to rehabilitate land. These could operate in addition to the general offences under the Environment Protection Act. In the USA, after the Macondo well blowout, BP was liable under a suite of different state/federal laws for the same incident, including federal/state tort laws, water laws, and oil pollution laws.

Increase existing penalties. The maximum penalty for breaching a PEPR/licence condition is $250,000. The level of fault and severity of harm are taken into account when the court hands down the penalty; this means most penalties are likely to be much lower, as maximum penalty would apply to the most egregious contravention. The penalty structure itself does not distinguish fault-based offences, or the level of harm caused. Again, for serious harm beyond the tenement area, the tenement holder may face prosecution under the *Environment Protection Act 1993* (SA). However, given the potential severity of environmental harm, and the importance of ensuring compliance with the Act, we recommend that a fault-based system be introduced, and the maximum penalty be increased for the most egregious offences. We note too that as the Act does not use a penalty unit system, the real value of the penalty will have fallen since 2011 because of inflation. Provision should be made in the Act for maximum penalties to be reviewed at regular intervals.

Introduce civil penalties. The Act could be amended to impose civil penalties for a contravention of the Act. This could be done in one of three ways: by

- imposing only civil penalties for certain offences;
- imposing both criminal and civil penalties for certain contraventions, and allowing the regulator to pursue either (see, for example, s 571B of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), which imposes criminal and civil penalties for failure to comply with a remedial direction).
- allowing the regulator by negotiation with the tenement holder, or on application to the Court, to recover civil penalties in lieu of criminal proceedings (see, for example, s 104A of the *Environment Protection Act 1993* (SA), and s 225 of the *Planning, Development and Infrastructure Act 2016* (SA)).

Introduce individual liability for breaches of the Act and imprisonment as a penalty. Where individuals are liable for environmental offences, the maximum criminal penalty may include a term of imprisonment, in particular for fault-based offences (intention, recklessness). The *Environment Protection Act 1993* (SA) and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) both include imprisonment as criminal penalties. On directors' liability, see sub-heading (c) below.

Introduce continuing offences. Currently, there are no additional penalties for each day that a tenement holder continues to contravene the legislation. Continuing offences/penalties provide an incentive to cease a contravention, by prescribing a penalty for each day during which an act or omission continues, for example, failing to abide by a compliance or rehabilitation direction, or failing to review a PEPR.

c. Directors liability, and 'fitness' to hold a mining tenement

The Act must be amended to incorporate directors' liability for contravening the legislation. As not all miners are corporations, the imposition of individual liability needs to be expressed in such a way that small non-corporation operators may also be individually liable for breaches of the Act, particularly those resulting from intentional/reckless/negligent actions. The specific issue of mine closure and rehabilitation is addressed separately in this submission.

As noted above, the paper has suggested the possibility of introducing a Ministerial discretion to delay approvals if the operator is not compliant in SA or other state jurisdictions. Other requirements along a similar theme ('fitness-for-purpose' or 'good citizenship') could include a more comprehensive suite of disclosure obligations regarding past performance (where relevant) and fitness-for-purpose requirements to be a tenement holder. In addition to expressly making mandatory the information in Regulation 69, the proponent's history under other regulatory regimes should also be disclosed.

Finally, a provision could be inserted in the Act that is similar to s 55 of the *Environment Protection Act 1993* (SA), permitting the Minister to disqualify the holder of a tenement that is cancelled for certain reasons (such as misconduct), or, if the holder is a body corporate, disqualify any director of the body corporate, from obtaining any tenement, or a tenement of a specified kind, permanently or for a

specified period, or until the fulfilment of specified conditions, or until further order of the Mining Minister.

d. Innovative/additional court orders

The Act should be amended to empower the Court to make a range of additional orders where the Court finds a contravention of the Act has occurred. Section 133 of the *Environment Protection Act 1993* (SA) sets out a range of orders the Environment, Resources and Development Court and/or Supreme Court may make where a contravention of the Act has occurred. A number of these are also contained in other state environmental legislation including the *Planning, Development and Infrastructure Act 2016* (SA) and the *Native Vegetation Act 1991* (SA). These could include:

- Environment Protection Orders (issued to ensure tenement holders comply with their responsibilities under the Act). Section 74A of the Act empowers a landowner to apply to the ERD Court for a compliance order, where mining is carried out on their land without authorisation, but this could be expanded to allow any person, or the regulator, to apply to the Court for an EPO, particularly where mining activity is not being conducted in accordance with a PEPR or tenement condition;
- enforceable undertakings; for example, in relation to a failure to abide by a compliance or rehabilitation direction, or failing to review a PEPR.
- order to pay investigative costs;
- adverse publicity orders; and
- monetary benefit orders (orders to make a payment for any economic or financial benefit received through contravening the Act).

e. Public enforcement

The Act should be amended to expand civil enforcement of the Act beyond the current provision in s74A, pursuant to which a landowner on whose property unauthorised mining is taking place may apply to the ERD Court for a compliance order. A range of environmental statutes across Australia allow for various degrees of public enforcement of the legislation. For example, the *Environmental Planning*

and Assessment Act 1979 (NSW) allows any person to take action to enforce the Act where there has been a contravention of the legislation. Section 104 of the *Environment Protection Act 1993* (SA) allows the possibility of civil enforcement and civil remedies, where the person has a 'special interest'. The *Native Vegetation Act 1991* (SA) permits any person with an interest in land, which may be affected by a contravention of the Act, to institute enforcement proceedings.

We recommend that the broadest possible provision be included, to allow any person to seek a court order to ensure compliance with the Act, where there has been a breach of a PEPR or any unauthorised mining activity. Arguments regarding opening the 'floodgates' to litigation, which usually form the basis for restricting public enforcement, are a fallacy. The open standing provisions of the *Environmental Planning and Assessment Act 1979* (NSW) have not led to floods of lawsuits by 'busybodies'. The prospect of financial costs, the technical evidence required, and the emotional cost mean that people do not enter litigation lightly, while the ability to enforce the Act provides a fundamental reassurance of the public right to participate in environmental protection. Alternatively, the Act could define a more limited right to enforce the Act that would at least cover members of local communities who may be affected by a breach of the Act, by defining a right to enforce the Act for those with a 'special interest'.

We also recommend the Act be amended to permit the merits review of mining lease approvals which have significant impacts on the environment and local community.

5. Mine Closure - Rehabilitation and Legacy Issues (Discussion Paper, p 52)

The Act must be amended to provide better tools to achieve satisfactory closure and rehabilitation outcomes, and to address legacy issues.

Financial assurance. We agree that a mix of private security for rehabilitation and an industry levy to address rehabilitation and legacy issues should be introduced. Using only industry funds or levies raise the problem of 'free riding', where individual tenement holders do not have the incentive to comply with rehabilitation requirements, as the fund can be accessed to fix any issues that arise. Private security such as bonds have the benefit of allowing the regulator to use money for progressive rehabilitation.

Introducing a levy and fund is also a useful initiative to provide insurance for rehabilitation should companies become insolvent, and to address legacy issues. Should a tenement holder fail to pay due monies to the fund in contravention of the Act, we recommend that the Mining Act make 'related bodies corporate' liable to pay the levy: see *Environment Protection Act 1993* (SA) s 137.

Rehabilitation directions. Rehabilitation directions are currently limited by a reference in s 70F to rehabilitate land 'in accordance with the requirements of a PEPR'. If the PEPR is not of a high standard, then the direction may not be sufficient to ensure rehabilitation is of an acceptable standard. This can be contrasted with Remedial Directions under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), which are not linked to the underlying Environment Plan. Rather, under ss 587 and 587B, NOPSEMA or the Commonwealth Minister respectively may direct the relevant person to do any or all of the following things within the period specified in the written notice, which includes directions:

(a) to plug or close off, to the satisfaction of the responsible Commonwealth Minister, all wells made in the vacated area by any person engaged or concerned in those operations;

(b) to provide, to the satisfaction of the responsible Commonwealth Minister, for the conservation and protection of the natural resources in the vacated area;

(c) to make good, to the satisfaction of the responsible Commonwealth Minister, any damage to the seabed or subsoil in the vacated area caused by any person engaged or concerned in those operations:

so long as the direction is given for the purposes of:

(d) resource management; or

(e) resource security.

We recommend that the Act be amended to remove the requirement that rehabilitation directions be issued in accordance with the requirements of a PEPR. Rather, the Minister should be empowered to issue rehabilitation directions to achieve certain outcomes, as in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

Closure liability accounting and reporting. There should be a legal obligation for closure liability accounting and reporting on a site-by-site basis, to be included in annual financial statements and as a separate line item in company balance sheets. As this involves issues of federal corporate law, it would need to be taken to the Council of Australian Governments (COAG).

Directors liability: The regulator should have powers at least equivalent to those in the *Environment Protection Act 1993* (SA) to pursue directors, operators or other relevant individuals for a failure to fully undertake rehabilitation obligations after a tenement has expired. We also recommend the Mining Act be amended to impose individual/directors' liability where a company is stripped of its assets and wound up, in order to avoid being issued with a rehabilitation order, or to avoid obligations imposed by a rehabilitation order (see *Environment Protection Act 1993* (SA) s 103G).

Rehabilitation and insolvency.

We support close examination and possible adoption of chain of responsibility legislation as has been introduced recently in Queensland. This law prevents polluters evading clean-up responsibilities by restructuring their affairs or going bankrupt. It allows the Department of Environment and Heritage Protection to target "a related person" of a financially-distressed or high-risk companies, so taxpayers aren't left to bear the costs of managing pollution at abandoned or closed sites. That definition includes parent companies, directors, their relatives if they received lucrative payments from the company and, in certain circumstances, landowners. It can also include others with a "relevant connection" such as banks and shareholders that have a major stake in the company and have held positions of influence within it during the previous two years. However, simply having a relevant connection is not enough, as the related entity must also be considered culpable for the actions of the company.

6. Private Mines (Discussion Paper, p 56)

The legal provisions for the environmental regulation of private mines are completely inadequate. The community expects that all mines will be operated according to minimum environmental standards, and expects the regulator will be able to, and will

act to, ensure these environmental standards are met. The fact that the regulator is limited in its powers in relation to private mines not only undermines trust in the mining industry, but also in the regulator.

Private mines must be regulated to the equivalent standard as mines operating under a mining lease. Ideally the operators should be required to hold a defined mining tenement to conduct operations, and be subject to conditions on the mining tenement. In particular, as a minimum, the operators must be required by law to prepare a PEPR (which must be available to the public), and they must be subject to the full range of compliance and enforcement mechanisms under the Act, for example, for failing to operate in accordance with the PEPR.

7. Special Mining Enterprises (SMEs) (Discussion Paper, p 87)

In our opinion, the provisions regarding special mining enterprises should be abolished, to ensure that all mining enterprises are subject to all the provisions in the Act that are designed to protect the environment, including requirements in relation to the provisions of information to the public, and the full range of compliance and enforcement mechanisms. We do note however that no SMEs have been declared to date.

As described in the Discussion Paper, the justification for Part 8A is to provide "flexibility and security of tenure" for SMEs. Matters of tenure typically include matters such as duration of lease, royalty, fees and payment etc. We note that the flexibility of tenure is a question raised in the Discussion Paper. For example, the current maximum term for mining leases is 21 years, rather than based on the expected life of a mine, which for a mine of major social/environmental/economic significance may well exceed 21 years. In our opinion, issues concerning flexibility of tenure are best addressed in the licence/lease provisions of the Act.

Currently, Part 8A allows the Minister to exempt a SME from *any* prescribed requirement under the Act, except for the native title provisions in Part 9B. This power goes well beyond providing for flexibility in matters of tenure. It allows the Minister to exempt companies from the environmental requirements and regulatory oversight that exists in relation to all other mining enterprises operating under a mining lease. If the environmental assessment and protection provisions are as good

as claimed in the Paper – and indeed, the point is made in the Paper that the EPBC Act accreditation is evidence of the current provisions being best practice - then there is no justification for exempting any mining enterprise from these provisions. Furthermore, administering mines under a separate set of requirements places an additional administrative burden on the regulator.

As a final point, we note that if a SME is exempt from the environmental assessment provisions of the Act, it is not clear which process would take its place. It would seem logical that a proposal for a SME should have to be referred by the Mining Minister to the Planning Minister under ss 160/161 of the *Planning, Development and Infrastructure Act 2016* (SA), but there is no formal requirement for this to be done. Indeed, there is no formal link at all between Part 8A of the Act and ss 160 and 161 of the Planning Act. The two Acts together do not provide a clear, certain and transparent process for EIA for mining enterprises that may be "special" mining enterprises under the Act and/or mines of major economic, social or environmental significance under the Planning Act. Should Part 8A be retained, then the link between it and the Planning Act should be formalised, for example, by clarifying that an SME that is exempt from environmental impact assessment under the Act must be referred for environmental impact assessment under the Planning Act.

Please advise if you require clarification of any of the matters raised in this submission.

We would also appreciate the opportunity to comment on the draft Bill in due course.

Yours faithfully

Melissa Ballantyne
Coordinator/Solicitor
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APPENDIX 1

***Environment Protection Act 1993* (SA)**

Part 2—Objects of Act

10—Objects of Act

(1) The objects of this Act are—

(a) to promote the following principles (***principles of ecologically sustainable development***):

(i) that the use, development and protection of the environment should be managed in a way, and at a rate, that will enable people and communities to provide for their economic, social and physical well-being and for their health and safety while—

(A) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and

(B) safeguarding the life-supporting capacity of air, water, land and ecosystems; and

(C) avoiding, remedying or mitigating any adverse effects of activities on the environment;

(ii) that proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement; and

(b) to ensure that all reasonable and practicable measures are taken to protect, restore and enhance the quality of the environment having regard to the principles of ecologically sustainable development, and—

(i) to prevent, reduce, minimise and, where practicable, eliminate harm to the environment—

(A) by programmes to encourage and assist action by industry, public authorities and the community aimed at pollution prevention, clean production and technologies, reduction, re-use and recycling of material and natural resources, and waste minimisation; and

(B) by regulating, in an integrated, systematic and cost-effective manner—

- activities, products, substances and services that, through pollution or production of waste, cause environmental harm; and
- the generation, storage, transportation, treatment and disposal of waste; and

(ia) to establish processes for carrying out assessments of known or suspected site contamination and, if appropriate, remediation of the sites; and

(ii) to co-ordinate activities, policies and programmes necessary to prevent, reduce, minimise or eliminate environmental harm and ensure effective environmental protection, restoration and enhancement; and

(iii) to facilitate the adoption and implementation of environment protection measures agreed on by the State under intergovernmental arrangements for greater uniformity and effectiveness in environment protection; and

(iv) to apply a precautionary approach to the assessment of risk of environmental harm and ensure that all aspects of environmental quality affected by pollution and waste (including ecosystem sustainability and valued environmental attributes) are considered in decisions relating to the environment; and

(v) to require persons engaged in polluting activities to progressively make environmental improvements (including reduction of pollution and waste at source) as such improvements become practicable through technological and economic developments; and

(vi) to allocate the costs of environment protection and restoration equitably and in a manner that encourages responsible use of, and reduced harm to, the environment with polluters bearing an appropriate share of the costs that arise from their activities, products, substances and services; and

(vii) to provide for monitoring and reporting on environmental quality on a regular basis to ensure compliance with statutory requirements and the maintenance of a record of trends in environmental quality; and

(viii) to provide for reporting on the state of the environment on a periodic basis; and

(ix) to promote—

(A) industry and community education and involvement in decisions about the protection, restoration and enhancement of the environment; and

(B) disclosure of, and public access to, information about significant environmental incidents and hazards.

(2) The Minister, the Authority and all other administering agencies and persons involved in the administration of this Act must have regard to, and seek to further, the objects of this Act.

***Natural Resources Management Act 2004* (SA)**

Chapter 2—Objects of Act and general statutory duties

Part 1—Objects

7—Objects

(1) The objects of this Act include to assist in the achievement of ecologically sustainable development in the State by establishing an integrated scheme to promote the use and management of natural resources in a manner that—

(a) recognises and protects the intrinsic values of natural resources; and

(b) seeks to protect biological diversity and, insofar as is reasonably practicable, to support and encourage the restoration or rehabilitation of ecological systems and processes that have been lost or degraded; and

(c) provides for the protection and management of catchments and the sustainable use of land and water resources and, insofar as is reasonably practicable, seeks to enhance and restore or rehabilitate land and water resources that have been degraded; and

(d) seeks to support sustainable primary and other economic production systems with particular reference to the value of agriculture and mining activities to the economy of the State; and

(e) provides for the prevention or control of impacts caused by pest species of animals and plants that may have an adverse effect on the environment, primary production or the community; and

(f) promotes educational initiatives and provides support mechanisms to increase the capacity of people to be involved in the management of natural resources.

(2) For the purposes of subsection (1), ecologically sustainable development comprises the use, conservation, development and enhancement of natural resources in a way, and at a rate, that will enable people and communities to provide for their economic, social and physical well-being while—

(a) sustaining the potential of natural resources to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacities of natural resources; and

(c) avoiding, remedying or mitigating any adverse effects of activities on natural resources.

(3) The following principles should be taken into account in connection with achieving ecologically sustainable development for the purposes of this Act:

(a) decision-making processes should effectively integrate both long term and short term economic, environmental, social and equity considerations;

(b) if there are threats of serious or irreversible damage to natural resources, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) decision-making processes should be guided by the need to evaluate carefully the risks of any situation or proposal that may adversely affect the environment and to avoid, wherever practicable, causing any serious or irreversible damage to the environment;

(d) the present generation should ensure that the health, diversity and productivity of the natural environment is maintained or enhanced for the benefit of future generations;

(e) a consideration should be the conservation of biological diversity and ecological integrity;

(f) environmental factors should be taken into account when valuing or assessing assets or services, costs associated with protecting or restoring the natural environment should be allocated or shared equitably and in a manner that encourages the responsible use of natural resources, and people who obtain benefits from the natural environment, or who adversely affect or consume natural resources, should bear an appropriate share of the costs that flow from their activities;

(g) if the management of natural resources requires the taking of remedial action, the first step should, insofar as is reasonably practicable and appropriate, be to encourage those responsible to take such action before resorting to more formal processes and procedures;

(h) consideration should be given to Aboriginal heritage, and to the interests of the traditional owners of any land or other natural resources;

(i) consideration should be given to other heritage issues, and to the interests of the community in relation to conserving heritage items and places;

(j) the involvement of the public in providing information and contributing to processes that improve decision-making should be encouraged;

(k) the responsibility to achieve ecologically sustainable development should be seen as a shared responsibility between the public sector, the private sector, and the community more generally;

(l) the local government sector is to be recognised as a key participant in natural resource management, especially on account of its close connections to the community and its role in regional and local planning.

***Marine Parks Act 2007*(SA)**

Part 2—Objects of Act

8—Objects

(1) The objects of this Act are—

(a) to protect and conserve marine biological diversity and marine habitats by declaring and providing for the management of a comprehensive, adequate and representative system of marine parks; and

(b) to assist in—

(i) the maintenance of ecological processes in the marine environment; and

(ii) the adaptation to the impacts of climate change in the marine environment; and

(iii) protecting and conserving features of natural or cultural heritage significance; and

(iv) allowing ecologically sustainable development and use of marine environments; and

(v) providing opportunities for public appreciation, education, understanding and enjoyment of marine environments.

(2) For the purposes of this Act, ecologically sustainable development comprises the use, protection, conservation, development and enhancement of the marine environment in a way, and at a rate, that will enable people and communities to provide for their economic, social and physical well-being and for their health and safety while—

(a) sustaining the potential of the marine environment to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacities and processes of the marine environment; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the marine environment.

(3) The following principles should be taken into account in connection with achieving ecologically sustainable development for the purposes of this Act:

(a) decision-making processes should effectively integrate both long term and short term economic, environmental, social and equity considerations;

(b) if there are threats of serious or irreversible harm to the marine environment, lack of full scientific certainty should not be used as a reason for postponing measures to prevent harm;

(c) decision-making processes should be guided by the need to evaluate carefully the risks of any situation or proposal that may adversely affect the marine environment and to avoid, wherever practicable, causing any serious or irreversible harm to the marine environment;

(d) the present generation should ensure that the health, diversity and productivity of the marine environment is maintained or enhanced for the benefit of future generations;

(e) a fundamental consideration should be the conservation of biological diversity and ecological integrity;

(f) environmental factors should be taken into account when valuing or assessing assets or services, costs associated with protecting or restoring the marine environment should be allocated or shared equitably and in a manner that encourages the responsible use of the marine environment, and people who obtain benefits from the marine environment, or who adversely affect or consume natural resources, should bear an appropriate share of the costs that flow from their activities;

(g) if the management of the marine environment requires the taking of remedial action, the first step should, insofar as is reasonably practicable and appropriate, be to encourage those responsible to take such action before resorting to more formal processes and procedures;

(h) consideration should be given to Aboriginal heritage, and to the interests of the traditional owners of any land or other natural resources;

(i) consideration should be given to other heritage issues, and to the interests of the community in relation to conserving heritage items and places;

(j) the involvement of the public in providing information and contributing to processes that improve decision-making should be encouraged;

(k) the responsibility to achieve ecologically sustainable development should be seen as a shared responsibility between the State government, the local government sector, the private sector, and the community more generally.