



Environmental Defenders Office

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11 September 2020

Resource Policy and Engagement

Department of Energy and Mining

Via email: DEM.MiningRegs@sa.gov.au

Re: Draft Mining Regulations 2020

Joint submission: The Environmental Defenders Office (EDO) and the Environmental and Natural Resources Law Research Unit (ENREL), Law School, University of Adelaide

The Environmental Defenders Office (EDO) is a legal centre dedicated to protecting the environment. The EDO assists people who want to protect the environment through law. Our services include legal advice and representation, legal education and law reform.

The Adelaide Law School's Environmental and Natural Resources Law Research Unit (<https://law.adelaide.edu.au/research/environmental-and-natural-resources-law-research-unit-enrel>) brings together a diverse range of scholars working on issues of law and policy relating to the environment, land use planning, heritage protection, human rights, sustainability, climate change, and energy and natural resources. It provides independent perspectives on law and policy issues relating to the environment, land use planning, heritage protection, human rights, sustainability, climate change, and energy and natural resources.

The EDO and ENREL appreciate the opportunity to provide comment on the draft Regulations (the Regulations).

COMMENTS AND RECOMMENDATIONS

1. Compliance and enforcement

We are pleased to see the strengthened compliance and enforcement mechanisms in the Act, and the Regulations give effect to those. However, it is disappointing to see there is no right of civil enforcement in the Act. A claim that the compliance and enforcement system is now 'best practice' is misleading, as this is a glaring omission from any legislation that claims

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to be 'best practice' environmental law. This is not strictly relevant to the consultation of the Regulations (although the lack of such a right is noted on p 21 of the Package 2 Explanatory Document) but the statements lauding the move to modern compliance and enforcement mechanisms, and their importance, are undermined by Parliament's deliberate omission of a right of civil enforcement in the Act, given the right of civil enforcement is a fundamental part of the right of public participation in matters affecting the environment. This is an issue that should be revisited again in the future.

2. Exploration

The *Mining Act 1971 (SA)*¹ allows the Minister to refuse an application at any time during the process taking into account the public interest and other matters.

Recommendation 1: that the Regulations include guidance as to the circumstances in which this may occur, particularly as to what is contemplated by matters in the public interest.

3. Environmental Impact Assessment (EIA)

The Regulations provide for more rigorous requirements with respect to a separate or stand-alone Social Impact Assessment (SIA) (other than the assessment of social impacts as part of the environmental impact assessment for a mining lease or miscellaneous purposes licence). We commend the DEM for its emphasis on the importance of SIA in the regulations. We perceive the purpose of SIAs to ensure that the impacts of mining on people and their communities are rigorously identified and assessed, so that negative impacts will be avoided, minimised, mitigated and/or managed, and positive impacts will be facilitated. However, we have several comments, questions and concerns, many of which arise from the separation of 'environmental' and 'social' impacts in the Regulations, and the resulting uncertainties in the legislative scheme, and possible (unintended) legal consequences that might arise. These are set out below.

3.1 Is the separation of 'environmental' and 'social' impacts justified?

In the *Mining Act 1971 (SA)*, 'environment' is defined to include 'ecosystems': s 6(4)(a). In other legislation, such as the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, 'ecosystems' includes people and communities: see s 528, which defines 'environment' to include ecosystems and their constituent parts, including people and communities, and their social, economic and cultural aspects.

Social impacts are generally understood to be a type of environmental impact, or a subset of environmental impact, as people and communities are part of ecosystems, and part of the environment. We submit that the definition of 'environment' s 6(4)(a) of the Mining Act, encompasses people and communities, as part of 'ecosystems'. We also submit that as the definition in the Mining Act is inclusive, even if 'people and communities' are not expressly

¹ Section 29(8).

stated as being as part of the environment, or are not understood as being part of 'ecosystems', there is still a very strong legal argument that the 'environment' would be understood today to include people and communities. Indeed, the fact that assessment of social impacts has been required by the DEM as part of an EIA is justified because people and communities are part of the environment.

If 'people and communities' are part of the environment, then the definition of 'social impact' is simply a type, or subset, of 'environmental impact'. It is therefore not clear to us why these impacts are referred to separately throughout the Regulations as 'environmental and social impacts'. The reference to 'environmental and social impacts' appears to create a legal dichotomy between these impacts. Working back from this, a logical inference from this dichotomy is that 'people and communities' are not part of the environment.

The accompanying documents do not explain or articulate why 'environmental' and 'social' impacts are treated separately in a number of places in the Regulations, and how they are different. The potential legal consequences of the dichotomy are not clear. Some of these will be raised in this submission.

Recommendation 2: Further consideration needs to be given to matters encompassed by the definition of 'environment', in particular, how the definition of environment and social impact work together. We recommend removing the dichotomy between environment and social impacts, recognising that people and communities are part of the environment, so that social impacts are environmental impacts. The regulations should clarify that the definition of 'environment' includes 'people and communities'; should clarify that an environmental impact is an impact on the 'environment'; and keep the definition of social impacts (being the impacts on people and communities) so that social impacts are clearly recognised as a type of environmental impact.

Where the Regulations currently refer to 'environmental and social impacts', this should then be amended to refer to 'environmental impacts, including social impacts'; and where the Regulations refer to 'environmental impact assessment and social impact assessment', this be changed to "environmental impact assessment, including social impact assessment" (see for example, Part 10 and reg 53 of the Regulations). In regulation 48(2), remove the word 'also' so that the regulation simply requires an assessment of the social impacts.

Recommendation 3: The DEM should consider drafting the regulations so that more rigorous/detailed SIA procedures/requirements, as part of the EIA process, will be required under the regs or Ministerial Determinations, with the thresholds for more detailed SIA (and what is required if thresholds are met) to be clearly spelled out.

3.2 Social impact assessment (SIA) is discretionary, not mandatory

The explanatory documents emphasise the need to meet modern expectations in relation to EIA and SIA, and yet the Minister has a discretion to determine whether SIA is required. If

SIA is important, then whether SIA takes place should not be at the discretion of the Minister; it should be mandatory, wherever an EIA is mandatory.

This is not to say that the same level of rigour and detail would necessarily be required in impact assessment: a scoping exercise should determine how significant the social impacts are likely to be, and the level of detail required in the assessment. The point is that an assessment of social impacts must always be mandatory. Currently, impacts on the environment must be assessed via a mining proposal (for a mining lease) and management plan (for a MPL), but the Ministerial Determinations distinguish the content, rigour, level of detail, etc of the mandatory EIA. SIA should be mandatory, but where a scoping exercise reveals the likelihood of significant social impacts (determined according to a threshold, in the Regs or Ministerial Determinations), then a more rigorous/detailed SIA would be required as part of the EIA process, than where scoping reveals the potential for social impacts that are not significant.

Recommendation 4: wherever EIA is mandatory under the Act (eg mining proposals and management plans) assessment of social impacts should be mandatory, not discretionary.

3.3 How will social impacts be assessed if there is no separate SIA, and on what legal basis?

Under the Regulations, it is not clear how policy or guidelines will define or require ‘social impact’ assessment where no separate SIA is required. Given the dichotomy between environmental and social impacts, if a separate SIA is not required by the Minister, then it is not clear whether an EIA could incorporate social impact assessment, or would be limited to environmental impacts that exclude social impacts.

Where there is no SIA, will Ministerial Determinations require social impacts to be assessed as part of an EIA, and if so, which section in the Act or Regs provides a legal basis for requiring social impact assessment as part of an environmental impact assessment? It appears the legal basis by which social impacts beneath a certain threshold could be required to be assessed, is as part of an ‘environmental’ impact assessment, on the basis that people and communities are part of the environment.

However, if social impacts beneath a certain threshold are required to be assessed as part of ‘environmental impacts’, then again, the Regulations will be inconsistent in their approach to whether social impacts are to be interpreted and treated as part of the environment impacts, or whether these are separate impacts.

See Recommendation 2

3.4 Ministerial consideration of the environment when determining tenement conditions

When determining the conditions to be placed on a tenement, the Minister must ‘give proper consideration to the environment’. Are people and communities part of the environment, or not? When the Minister gives consideration to the ‘environment’ under

the Act when deciding which conditions to place on a mineral tenement, would that include or exclude consideration of ‘people and communities’ as part of the environment?

See Recommendation 2

3.5 Social impact assessment and the link to ‘environmental outcomes’

First, the new provisions in s 37 test state the Minister— (a) must not grant a mining lease unless the Minister is satisfied (i) that there is a reasonable prospect that the land in respect of which the lease is sought could be effectively and efficiently mined; and (ii) that appropriate **environmental outcomes** will be able to be achieved; and (b) must not grant a mining lease if the Minister considers that sufficient investigations have not been carried out in order to enable the Minister to determine the terms and conditions on which the lease could be granted (emphasis added). If there is a dichotomy between environmental and social impacts, then it is not clear whether ‘environmental’ outcomes will include ‘social’ outcomes.

Secondly, SIA requires an outline of measures to manage limit or remedy negative impacts, or facilitate or ensure positive impacts. There is currently no clear link between SIA and ‘environmental outcomes’ or any outcomes to be achieved in a PEPR. PEPRs refer only to the achievement of ‘environmental outcomes’, not ‘social’ outcomes. Do ‘environmental outcomes’ include measures the proponent has outlined to manage limit or remedy negative social impacts, or facilitate or ensure positive social impacts? Logically, if environment and social impacts and outcomes are separate matters, there is nothing to require proponents to limit or remedy negative impacts, or facilitate or ensure positive impacts, in their PEPR.

The Minister could presumably place conditions on a tenement in relation to the measures the proponent has outlined to manage limit or remedy negative social impacts, or facilitate or ensure positive social impacts, but this still does not remove the ambiguity about whether ‘people and communities’ are part of the ‘environment’, and hence relevant to the ‘environmental outcomes’ that must be established in PEPRs, and achieved.

See Recommendation 2

3.6 The compliance and enforcement mechanisms apply to ‘the environment’

If ‘environment’ does not include people and communities, then can any of the compliance mechanisms that refer to ‘the environment’, such as environmental directions, be exercised in relation to negative social impacts ie negative impacts on people and communities?

See Recommendation 2

3.7 Additional information on a tenement application: a statement that demonstrates ‘appropriate environment outcomes will be able to be achieved’

The requirement for a statement that demonstrates ‘appropriate environment outcomes will be able to be achieved’ applies only to an application for a mining lease (see reg 30(1)(e)(ii)). It is not clear why this requirement does not apply to a RL and MPL. Surely an application for a MPL and RL should include this statement, given the requirements to set environmental outcomes etc are essentially the same as for MLs

Moreover, this omission appears inconsistent with the requirements regarding a ‘change in operations’ under reg 53(1)(c)(ii), which require that where there is a ‘change in operations’, a statement demonstrating that ‘appropriate environment outcomes will be able to be achieved’ will be required for a ML, RL and MPL (as per s 56R(1)(b)(i) and s 56Q(2)).

Recommendation 5: The requirement for a statement that demonstrates ‘appropriate environment outcomes will be able to be achieved’ apply also to a RL and MPL.

3.8 Consultation regarding a ‘change in operations’ (s. 56S and reg 55)

Where there is a ‘change in operations’, reg 55 specifies the Minister is required to undertake consultation where there is an additional or different impact ‘to the environment’, and the impact is significant. Does this requirement to consult also apply to a significant social impact? Again, the dichotomy between environmental and social impacts throughout the Regulations means this is not clear. The requirement to consult should apply to significant additional social impacts

If ‘environment’ includes people and communities, then Reg 55 will apply to social impacts, but if environmental and social impacts are separate impacts, then arguably the requirement for consultation in Reg 55 does not apply to additional significant social impacts – surely this could not be intended. It would not reflect the expectations of communities.

Recommendation: See Recommendation 2

3.9 Exploration licences, PEPRs and the meaning of ‘environment’

Regulation 61 provides that PEPRs for ELs require a description of the ‘natural environment’. First, it is not clear why PEPRs for ELs need only refer to the ‘natural environment’ ie why the other elements in paras (b)-(d) of the definition of ‘environment’ eg cultural artefacts, heritage and buildings etc are not required to be described in a PEPR.

Recommendation 6: remove the reference to the ‘natural’ environment in reg 61, and simply requiring a description of the ‘environment’.

We note again that ecosystems are part of the natural environment, and people and communities are part of ecosystems, so that PEPRs for ELs should require a description of people and their communities, and consider how impacts on people and communities

(‘social impacts’) can be managed. If social impacts are not required to be assessed as impacts on ecosystems/the natural environment, then this is contrary to the modern understanding of ‘environment’.

See also Recommendation 2

3.10 Cumulative impact

Recommendation 7: The Regulations should ensure that any EIA/SIA should contain an assessment of cumulative impacts. The impacts of one development on people and communities, water, native vegetation, biodiversity, to name but a few, may not be as severe as the cumulative impacts of a number of activities.

3.11 Climate change

Recommendation 8: that the Ministerial Determinations require an assessment of greenhouse gas emissions for mines of a certain threshold.

4. Mining Register

Recommendation 9: To enable greater transparency and accountability we recommend that items be listed on the Register unless the Registrar determines it is not to be listed for specified reasons rather than an unfettered discretion as currently provided for. For similar reasons items must be listed within a particular time frame, for example, 14 days, complete versions of items be listed unless exceptional circumstances apply and historic versions of items be included.

Should you have any questions on the above, please do not hesitate to contact Dr Alex Wawryk via email at alex.wawryk@adelaide.edu.au or Melissa Ballantyne via email at melissa.ballantyne@edo.org.au

Yours sincerely

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