15 February 2018

The Secretary
Department of Planning and Environment (NSW)
GPO Box 39
Sydney NSW 2001

Dear Secretary,

Response to
Improving Mine Rehabilitation in NSW
Discussion Paper

This Union seeks to make a brief submission to the Department's Discussion Paper on this matter. The submission is intended to be a public document.

The Construction, Forestry, Mining and Energy Union consists of three Divisions, namely the Construction and General Division, the Forestry and Furnishing Products Division, and the Mining and Energy Division. We are the major Union in these industries and represent approximately 110,000 Members across Australia.

In particular we represent the majority of production and maintenance workers employed in the coal mining industry – nationally and in NSW.

The CFMEU has always supported the regulation and practice of good mine rehabilitation.

Improvement over last three decades

It is well-known that the Australian mining industry had an extremely poor record in the rehabilitation of mine sites until at least the 1980s. Expenditure on rehabilitation was not even regarded by the Australian Taxation Office as a legitimate deductible operating expense until that time. There is also the

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infamous story that the former Premier of Queensland, Johannes Bjelke-Petersen, threatened to raise the royalties paid by coal mining companies if they wasted money on rehabilitation!

In the 1989-92 period the Hawke and Keating Governments conducted the Ecologically Sustainable Development Working Group process, which included a focus on mining. Mining was portrayed as a temporary land use, with mine sites able to have other uses – agricultural, conservation, etc. – before and after the mining phase. "*Multiple and sequential land use*" was the buzz phrase.

The mining industry has certainly improved its performance substantially on rehabilitation over the last three decades, and has also sought to portray its performance that way. Globally and within Australia, the industry and government agencies have developed extensive capabilities, best practice guidelines, and significant regulation.[1]

However, the Discussion Paper notes that, despite requirements for mine rehabilitation planning in the assessment phase, and for progressive rehabilitation as mining proceeds, and associated monitoring, that some have observed that "*development applications for mining projects often do not contain sufficient information on rehabilitation or proposed post-mining land uses and lack rigorous justification and risk assessments*" (page 9).

The Union concurs with that view.

Less than full rehabilitation

A 2013 presentation from the NSW Dept of Primary Industries[2] indicates that the record of the industry in establishing robust and durable soil and vegetation profiles after mining is patchy. That is, the landforms, soil and vegetation established post-mining are often not as resilient as that which existed prior to mining, and is therefore more subject to deterioration and decline. Lack of robustness / resilience lessens the opportunity for other

[1] See, for example: https://www.industry.gov.au/resource/Programs/LPSD/Pages/default.aspx
http://www.minerals.org.au/leading_practice
http://www.icmm.com/en-gb/environment/mine-closure/land-rehabilitation

[2] Jo Powell (2013), Presentation on Strategic Land Use Policy to University of New England Mining in a Sustainable World conference, 13-15 October.

activities to be undertaken. Mining becomes less of a temporary land use and more of an enduring one.

Recent research published by The Australia Institute indicates that, in New South Wales, there have been almost no relinquishments of mining leases that show mining is totally concluded and the site fully available for other purposes. Most mine sites not in active production tend to be placed on "*care and maintenance*".[3]

It is also known that the management plans for many open cut mines do not provide for complete rehabilitation – there will be at least 45 final voids left in NSW.

It is obviously preferable that mine sites be rehabilitated to the point of being genuinely available for other uses – including conservation uses, or other industrial purposes. If the science and economics of rehabilitation is still at the stage of being unable to fully rehabilitate mine sites than that should be acknowledged and planning should be on that basis.

Perpetual maintenance of a site is not desirable, if for no other reason than that it is difficult to achieve certainty that any maintenance activity can occur indefinitely. However, the mining industry is not alone in having this problem – there are many other industrial processes and human activities that do not provide for, or are incapable of, the restoration of the site to its natural form. Most heavy industry falls into this category, and so do most human settlements.

It is noted that the closure of the German black coal mining industry – now in its final stages, provides for some continuing management of the disused mine sites indefinitely.[4] This includes an ongoing workforce and various support services. In a future context where mining activity is being reduced or ended, the ongoing management of sites can be seen as mitigating the employment losses and assisting in the transition to other activities.

[3] The Australia Institute (2017), Dark side of the boom – what we do and don't know about mines, closures and rehabilitation in New South Wales.

[4] Norbert Maus (2016), German Black Coal Phase Out, Presentation to ACTU Just Transition Forum, 8 November https://www.dropbox.com/s/s23vjy3kqd2j2tc/Norbert_Maus-German_black-coal_phase-out_nov2016.pdf?dl=0

Responses to Discussion Paper proposals

Proposal 1 – Adoption of policy principles to guide the regulation of mine rehabilitation – **is broadly supported**.

Proposal 2 – Develop a policy framework for the assessment of final voids – **is broadly supported**.

The statement that " [If] *it is not feasible to remove the final void*" on page 12 is not completely accurate; it is rarely technically unfeasible to remove a final void. It may be *economically* unfeasible, or may not be warranted given the calculation of economic, social and environmental costs and benefits. The thrust of the proposal - that a final void is undesirable, and should not be part of normal mine rehabilitation unless it can meet various criteria, including being part of a proposed beneficial land use – is supported.

It is noted that sometimes voids are left for a number of years because the lease holder is seeking an extension of mining operations and the existing void is part of the proposed new mine plan. Where that extension is not approved the lease holder should have an alternative plan for the final void consistent with what is proposed in the Discussion Paper.

Proposal 3 – Improve consideration of rehabilitation and closure in the early stages of mine planning – **is broadly supported**.

Although it goes beyond the scope of the Discussion Paper, the Department might also consider the extent to which rehabilitation and closure planning is part of other development approval processes. The mining industry could justifiably have a view that it is being singled out for more stringent processes than are applied to other developments. This is because mining is regarded as a temporary land use – even if a mine may last for many decades – while other developments are regarded as permanent or indefinite when there is ample experience they are not. Virtually all human land use changes over time – often only in decades – including most urban land uses.

Proposal 4 – Ensure rehabilitation requirements are clear and enforceable – **is broadly supported**.

Proposal 5 – Ensure that regulatory processes that occur once a mine has been approved are transparent and deliver consistent rehabilitation outcomes – **is broadly supported.**

There are well-known cases where mine rehabilitation has clearly lagged. This appears to be part of cost-cutting practices when times are tough in the industry, and can be an ongoing practice when a company is either financially stretched or when senior management of a large company has simply lost interest in the particular asset.

There could be reasonable grounds for delaying some mine rehabilitation due to tough temporary economic / market circumstances. But the regulatory frameworks should require authorisation for temporary delays to progressive rehab requirements, and the delays should not result in longer-term adverse outcomes.

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It is somewhat disturbing that the Discussion Paper contains no Proposals or Proposed Improvements with respect to the post-closure phase of a mine, though this concern is mitigated by the list of actions already underway.

Related matters

Transfer of mine leases and associated rehab liability to smaller firms

Where rehabilitation costs have been underestimated, it follows that sale of the mine to another party will involve inadequate recognition of the liability in the sale price.

This should always be a concern, but where the sale is to a much smaller company with a much smaller balance sheet, the concern is magnified. During the recent downturn after the end of the resources investment boom, a number of mines were sold by large multinational corporations to much smaller companies.

Again, this is not a problem that is solely the province of the mining industry. It occurs in other industries in decline, or in a declining phase – larger businesses sell assets to smaller businesses – and sometimes do so in order to escape liabilities. While in many cases the smaller businesses genuinely intend to run

the business profitably, they have lesser capacity to ride through market turbulence and are more likely to fail. This has adverse implications for workers' entitlements as well as for site rehabilitation.

In this situation, the larger business that sold the mine or business has limited its losses by offloading an asset at a price that did not fully reflect the liabilities attached.

It is particularly important that, where mine sites are being sold, the estimation of the rehabilitation liabilities has been robust, and the financial assurances are adequate.

Even where it is the case that mine rehabilitation costs have been accurately identified and provided for in the transfer of a mine lease, there is a need for the regulator to play a role in determining the suitability of the new lease holder for the tasks that must be undertaken in respect of mine rehabilitation (among other mine operating aspects).

The Department should consider:

- What due diligence requirements *the regula*tor should pursue to determine that a new mine lease holder is of satisfactory skills and capability, and with a history of regulatory compliance, in addition to adequate financial resources.

- What due diligence should be required of *mine lease holders* in selling or transferring a lease to another party with respect to ensuring that the receiving party is fully able to shoulder the responsibilities that the vendor is seeking to assign.

Given that what is at stake here – apart from environmental impacts – is a private liability falling back onto the public, consideration should be given to requirements that the vendor remains liable for rehabilitation where they have failed to undertake appropriate due diligence in selling / transferring a mine lease.

Mine rehabilitation done on the cheap more likely to be deficient

Whether or not there has been under-provision for rehabilitation there will be substantial pressure to mitigate costs with respect to rehabilitation. Rehabilitation is not a profit generating activity for the mine lease holder (though it presumably is for companies sub-contracted to do the work).

The Union has already witnessed situations where mining companies have declined to enter into collective agreements with the Union for the post-mining rehabilitation phase (even where the Union recognised that the rehabilitation task would not be a for-profit activity). The mining company has preferred the course of tendering out the rehabilitation task with a view to finding the lowest cost option.

Of immediate concern to the Union is that permanent mining jobs are transformed into casual and poorly paid jobs. The use of poorly-paid and insecure labour has implications for the quality of the rehabilitation work done. As a consequence, and also as a result of cost-cutting in other parts of the process, the rehabilitation outcome is likely to be worse.

The Union suggests that appropriate standards be set for the conduct and outcome of minesite rehabilitation projects. It is noted that the tendency with respect to environmental approvals is to specify environmental outcomes.

The Union is well aware that many government departments and regulators seek to separate the specific outcomes or issues for which they are responsible from the social, employment and industrial relations aspects that are associated with them.

But just as it is well-known that mining contractor workers generally have worse occupational health and safety performance than directly-employed workers, it is likely to be that case that mine rehabilitation work done by sub-contractors who win tenders competing solely on price will under-achieve on required outcomes.

With respect to the issue of modern slavery and other human rights abuses in supply chains, it is being gradually recognised that modern slavery is not just a risk factor in "*contracting out*" but rather that the latter is a direct causal factor of the former.

Attention should also be paid to the processes, including employment practices, through which the mine rehabilitation outcomes are achieved.

The longer term – mine rehabilitation may become a major industry in communities transitioning to post-mining futures

In addition to the intrinsic merit of mine site rehabilitation being undertaken through the provision of decent (i.e. fairly paid, secure) work, it has implications for the transition of mining communities and regions to the post-mining period.

Mine closures are inevitably a traumatic loss for a region where mining is usually a major activity and a source of much employment and economic demand. The post-mining phase of rehabilitation is a major means by which the transition to life after mining may be managed. The sudden and large loss of jobs is mitigated if there is significant rehabilitation employment. This mitigates the social and economic impact of sudden major unemployment and gives the regional community more time to adjust. Rehabilitation projects, just like most mining projects themselves, are generally not long term, but their good management in a manner that benefits the local community can be a significant contributor to the transition process.

It should be acknowledged that rehabilitation activities could become quite long term in some cases – stretching over decades – and that some aspects may require indefinite activity.

It is already the case that coal mines primarily associated with coal power stations in Australia face a limited future as all coal power stations already have closure dates or are likely to be closed (and not replaced) due to climate constraints and the emergence of increasingly cheaper alternative energy technologies (including energy efficiency).

The global market for thermal coal for power generation is already being affected by climate policies and that trend will continue. While thermal coal will be required for decades yet – and there is a longer term requirement for metallurgical coal for steelmaking – it seems inevitable that demand for

thermal coal will eventually decline.[5] This will lead to more coal mine closures and a greater mine rehabilitation task.

The task of improving mine rehabilitation in NSW should therefore not be seen or approached as only one of improving local or regional environmental outcomes, but also as a part of a suite of tools to enable mining regions to become more economically diverse and resilient in the event of a long term decline in demand for the product. This is especially so with respect to thermal coal.

This means that there should be an "*industry development*" component to the Department's work in this area, not just a focus on improved physical / environmental rehabilitation outcomes.

Measures to control abuses of mine leases in the post-mining phase

There are legitimate reasons why mines may be placed on care and maintenance for some years – notably commercial viability in response to periods of low prices. Lease holders may also be awaiting the development of more efficient mining technology, or the development of infrastructure that may serve several mines, or engaged in protracted processes with neighbouring lease holders to consolidate leases and operations to improve production costs.

But, as has been noted, many closed coal mines appear to be on indefinite care and maintenance with little or no effort to fully rehabilitate them and surrender the lease back to the government. Beyond a certain number of years, this becomes an avoidance of rehabilitation responsibilities.

This issue reinforces the position canvassed in the Discussion Paper – that there should be minimum site rehabilitation progress requirements. This should include mines that are on care and maintenance, with progress requirements being ramped up over time.

There is an associated issue with respect to "*sitting on leases*" where companies with deep pockets attempt to "*wait out*" their neighbouring lease

[5] In this context, it is instructive to note that the new chairman of the port of Newcastle – the largest coal port in the world – says that the port and the region needs to diversify away from coal. Australian Associated Press, 18 December 2017 – "Coal port looks to switch up its business".

holder in an attempt to force a merger or consolidation of leases and operations on terms more favourable to the former. It is beyond the scope of a mine rehabilitation framework to address this problem, but a requirement to progressively rehabilitate a mine on care and maintenance will provide incentive to lease holders to not sit on a lease indefinitely.

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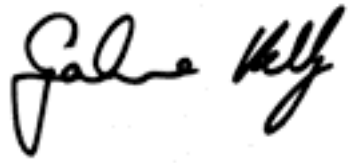
If you wish to discuss these matters further, the relevant point of contact in the first instance is Peter Colley, National Research Director, at pcolley@cfmeu.com.au

Yours sincerely,



Grahame Kelly
General Secretary