LOCK THE GATE ALLIANCE
AUSTRALIANS WORKING TOGETHER TO PROTECT OUR LAND, WATER, AND FUTURE

Submission: Draft *Mining Amendment (Standard Conditions of Mining Leases – Rehabilitation Regulation 2020*

Please accept this submission from Lock the Gate Alliance on the draft Mining Amendment (Standard Conditions of Mining Leases - Rehabilitation) Regulation 2020 and the associated mandatory requirements (hereafter referred to collectively as 'the reforms').

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Over-arching concerns

We are concerned that the reforms do not do enough to improve on the current Mining Operations Plan process through which rehabilitation is managed. Overall, we believe the reforms have been constrained by the minimalist definition of mining in the *Mining Act* 1992, which refers to *"the treatment or management of disturbed land or water for the purpose of establishing a safe and stable environment"*. To ensure the interests of tax payers, affected communities and landholders and future generations are protected, a much higher bar, framed by World's Best Practice, should be set, which includes returning the approximate original contour of the land, preventing any long-term impacts on water resources and ensuring the land is available for a productive land use post-mining.

We have several major concerns with the proposed reforms and suggest amendments to address them. They include the following:

1. **Consultation:** Community consultation throughout the proposed process is manifestly inadequate. Changes should be made to ensure community consultation is public, wide and early, including enabling it to occur before development consent is granted and throughout the life of a project.
2. **Progressive rehabilitation:** Progressive rehabilitation measures are inadequate and will, in practice, allow rehabilitation to be deferred for a considerable amount of time. Changes should be made to tighten constraints to ensure that all available land must be rehabilitated in the swiftest timeframe.
3. **Environmental considerations:** Environmental and public interest considerations are not sufficiently factored into the reforms. Environmental impacts, including the public interest, need to be prescribed as the chief concerns in approval of plans and other documents and the goal should be to return land to an approximate original contour, preventing any long-term impacts on water resources and ensuring the land is available for a productive land use post-mining.

4. **Final voids:** Going ahead with these reforms prior to developing a policy on final voids is effectively locking in the final voids already approved under development consents and the approval of further voids. Changes are needed to maximise the return of all voids to a productive post-mining land use – either biodiversity, agriculture or use for other public or private purpose. Rather than accepting the status quo, in the interests of NSW taxpayers, the onus must be reversed and the industry required to ensure all voids support a post-mining landuse in the first instance and in the event a proponent believes that this is not possible, it must justify leaving behind a perpetual liability.
5. **Amendments:** The reforms do not clearly identify the circumstances where amendment of plans, final landform and completion criteria are permitted or place any constraints on such amendments. This should be set out clearly for each measure, with public notification and approval required, and amendments should be limited so that they can only occur if they will result in a better environmental outcome.
6. **Complexity:** The reforms are extremely complex, with six different sets of plans of various sorts, which works against both community participation and accountability. Compiling more of the different components into a single upfront Progressive Rehabilitation and Closure Plan that includes completion criteria and objectives, and that is publicly notified, would substantially streamline the process and enable much stronger community involvement.
7. **Care and maintenance:** The reforms are largely silent on how the issue of care and maintenance will be dealt with. Given this is a loophole that mining companies frequently use to indefinitely delay progressive rehabilitation, we recommend that a policy is adopted to strictly limit its use to exceptional cases.

We appreciate that the Resources Regulator is seeking to increase enforceability with these reforms, by having the progressive rehabilitation obligation in the mining lease conditions, and requiring companies to achieve stated outcomes and report against progress.

However, we are concerned that the reforms do not differ much at all from the current requirements, which have demonstrably failed to deliver strong rehabilitation outcomes. Unfortunately, these reforms simply do not contain sufficiently strong policies and standards on mine rehabilitation, and the failure to ensure any meaningful community participation or require environmental considerations means that the outcomes will be driven principally by the mining industry whose principle drivers are cost reductions and the transfer of risk onto the NSW taxpayer with little or no consideration of the public interest.

Overall, it would be a great shame to miss this opportunity for significant reform to deliver better environmental outcomes in the public interest, merely to deliver better enforceability of a weak system.

In addition, these reforms should not have to rely on the good will of the Secretary to make good decisions around approvals without mandatory considerations – they should set policies and standards which must be met by the mining industry and have to be applied by the Secretary and enforced by the regulator.

We also note that some key elements of the reforms are already required under the current failed system, or have been promised since at least 2013 but not delivered, including making the mapping of rehabilitation areas public available in a digital portal. The community has little confidence in when, or in what format, this data will finally be made available.

Consultation

We are very concerned at the complete absence of public notifications of key steps in the approvals process and the extremely limited community consultation required by these reforms. Without strong community participation in these reforms they will simply continue the historical pattern of mining companies pushing outcomes that benefit their bottom line regardless of community impacts. Mine rehabilitation requires community acceptance to secure the industry's social licence, especially in landscapes that have been severely modified by mining, like the Hunter Valley. It is unreasonable and unfair to think that major decisions about mine rehabilitation can be undertaken in consultation with the industry without community input. We contend that it simply will not work and will lead to major problems for the NSW Government and the industry going forward.

In particular we note the following deficiencies with regard to public consultation in the draft of the *Standard Conditions Regulation 2020:*

- In 31C (1), the matters that must be taken into account are limited and don't include any community feedback or the public interest.
- There is no opportunity for review of decisions.
- There is no public exhibition required for rehabilitation plans, final landforms or forward programs.
- There is no requirement for draft documents provided to the Secretary for approval to be made publicly available or publicly exhibited.
- There is no requirement for the Department to publish a statement describing its reasons for the Secretary's approval decisions.
- There are no constraints on rehabilitation plans being over-ridden by subsequent planning approvals, and in fact the regulation specifies that the leaseholder does not even need to notify the Secretary if it applies for a modification to its development consent for state significant developments (which generally includes most large mines) .

In relation to the form and way documents, we note that the community consultation on final land use and final land use options is limited to the '*NSW Resources Regulator, other government agencies, land holders and local Aboriginal Land Councils'.*

Similarly, stakeholders consulted to develop rehabilitation objectives and completion criteria is limited to '*the consent authority, local government authority, landholders for any part of the mining area, and any other regulatory agency associated with any regulatory requirement for rehabilitation listed in section 2.1'*. We also note that if a leaseholder proposes to change objectives and criteria, there is no mandatory consultation even with this limited list.

We are seeking the following changes:

- Draft documents submitted to the Secretary for approval should be made publicly available and a statement by the Department published describing its reasons for the Secretary's approval decision.
- There should be a public notification and submission process and wide stakeholder consultation on all key documents prior to approval, including particularly the completion criteria, rehabilitation objectives and the final landform and rehabilitation plan. The Secretary must be required to take public submissions into account.
- The list of stakeholders who must be consulted should be broadened to include a far greater cross section of the community, including all other relevant First Nations bodies, land owners within a 50km radius, local communities and relevant community groups and local/regional environment groups.
- Any material changes to rehabilitation plans and criteria after approval should go back for public notification and community consultation.
- There should be amendments to the relevant Acts to prevent an application for modification of development consent automatically over-riding prior rehabilitation plans.

As an idea of the type of community engagement mandated in other jurisdictions, we refer you to the Queensland requirements on stakeholder engagement for Progressive Rehabilitation and Closure Plans, which require that:

> *"In accordance with section 126C(1)(j) of the Act, the PRC plan must also include the following information:*
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> - *A Stakeholder Engagement Register identifying the consultation undertaken in developing the PRC Plan. This must be submitted in the format identified in the approved form.*
> - *A Stakeholder Engagement Plan detailing how ongoing consultation will be undertaken in relation to the rehabilitation to be carried out under the PRC plan.*
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> *The Stakeholder Engagement Register must include:*
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> - *consultation date(s)*
> - *Identification of each stakeholder*
> - *description of consultation type (workshop, quarterly meetings, etc.)*
> - *information provided to stakeholders*
> - *issues raised/discussed by stakeholders*

- *how issues have been considered and commitments made by the proponent. EA holders should update and maintain the stakeholder engagement register. For existing mines, the details of any Legislative requirement In accordance with section 126C(1)(c)(iii) and (iv) of the Act, the Rehabilitation Planning Part of the PRC plan must include:*
- *details of the consultation undertaken by the applicant in developing the proposed PRC plan; and*
- *details of how the applicant will undertake ongoing consultation in relation to the rehabilitation to be carried out under the plan.*

The Stakeholder Engagement Plan must include:

- *the stakeholder engagement aim*
- *how stakeholders will be engaged*
- *proposed engagement frequency*
- *what information will be released for stakeholder engagement*
- *how feedback/comments will be considered."*

Progressive Rehabilitation

The mining industry has a long and sorry history of failure in relation to delivering on progressive rehabilitation in a timely manner. This increases the risk that taxpayers will ultimately be left to rehabilitate the site, as large players sell to minor players who then go into liquidation, and the state is then left to cover the backlog of rehabilitation, in terms of both cost and implementation.

The proposed reforms state that progressive rehabilitation is only required '*as soon as reasonably practicable after the disturbance occurs'*. This wording is used in both the draft regulation and the form and way documents. However, the term reasonably practicable is not defined, and in our experience it is construed very broadly by mining companies who take it to mean any impediment in delivery, such as economic or financial factors, or even speculative future potential mineral resource within the site making it 'impracticable' to rehabilitate.

In the form and way documents, the life of mine schedule only requires the progressive rehabilitation schedule in 5-yearly intervals. This provides an enormous amount of leeway right from the outset, which is likely to lead to substantial slides in delivery towards the back-end of the period.

We believe the constraints on progressive rehabilitation need to be significantly tightened. We recommend that:

1. The requirement on progressive rehabilitation is changed to require rehabilitation 'as soon as active mining has ceased' and that 'active mining' is clearly and tightly defined.
2. If any leeway is provided on progressive rehabilitation in relation to possible future mineral reserves, this should also be tightly constrained, such that only JORC compliant 'Proved Ore Reserves' qualify for any deferral.

3. The life of mine schedule should require a progressive rehabilitation schedule in 2-yearly intervals.

Environmental considerations

The reforms fail to properly require environmental considerations in key decisions. Most notably, s31C of the Regulation requires that when determining the rehabilitation objectives, criteria and the final landform and rehabilitation plan, the Secretary must ONLY take into account whether they are consistent with the final land use for the mining area and any other matters they consider relevant. There is no mandatory consideration of the environment.

Nor is there any requirement to consider Ecologically Sustainable Development principles, which would introduce the fundamental principle of intergenerational equity, which is essential when considering long-term mining legacies. There is no requirement to consider the environmental record or rehabilitation record of the leaseholder, which given the appalling history of many companies in delivering on rehabilitation commitments, should be a mandatory consideration.

Similarly, in relation to determining the final land use or conducting a final land use options assessment, the form and way document for large mines does not make any reference to the environment or the public interest. It is extraordinary that decisions on final voids, for example, would be made without environment being a mandatory consideration.

We would like to see the following changes:

1. S31C amended to require mandatory consideration of the environment, ESD principles and the rehabilitation record of the leaseholder when the secretary determines objectives, criteria and the final landform and rehabilitation plan.
2. Make the further matters for consideration under Clause 4 of Schedule 1B of the *Mining Act 1992*, which currently applies to applications for titles or renewal of titles, mandatory for considerations by the Secretary under the Regulation.
3. Require that the environmental performance of the leaseholder must be submitted in accordance with Clause 25 of the Mining Regulation 2016 and becomes a factor that must be taken into account in the Secretary's decisions under s31.
4. Amend s2.3 and 2.4 of the form and way document for large mines to require that the final land use does not cause environmental harm and leads to improved environmental outcomes in the public interest, and to specify that a final land use options assessment must identify options that will not cause environmental harm for current or future generations.

Final voids

The major concern is that these reforms are entirely subservient to the planning process with regard to final voids and final land use, because they require final land use to be consistent with the development consent (via s31c of the proposed regulation and s.2.2 of the form and way document for large mines). This is particularly disturbing because there

are no policy constraints placed on final land use in the planning process, and extensive final voids are routinely approved that will deliver permanently unusable lands and environmentally hazardous outcomes. In that light, these reforms simply 'lock-in' existing final voids and will do nothing to prevent further final voids going forward. It is effectively lumping final voids into the 'too hard' basket.

In contrast, the community expects that the mining industry should be required to return all land to a productive land use – be that biodiversity, agriculture or some other public or private use.

Therefore, we recommend that:

1. A final voids policy which is relevant to both the Mining Act 1992, the Environmental Planning and Assessment Act 1979 and these reforms is released which prohibits final voids and requires the return of an approximate original contour.
2. The proposed reforms are changed to allow final land uses to be amended vis a vis the development consent where the change will deliver a stronger environmental outcome.
3. At the very least, any existing voids should be categorised as 'non-use management areas' on which strict new standards are set to limit permanent impacts, reduce slopes and landscape disruption and which come with clearly articulated residual risks and hefty constraints on leash relinquishment.

Amendments

Part 6 of the draft Regulation appears to provide no constraints on when and how the Secretary may approve amendments to rehabilitation outcomes, completion criteria and final landform and rehabilitation plans. This raises major concerns that amendments can and will be used, as has historically been the practice, to retrospectively rubberstamp poor rehabilitation performance.

We note that the rehabilitation regime in Queensland sets the following constraints on amendments to progressive rehabilitation milestones:

> *A minor (non-publicly notifiable) change to the progressive rehabilitation milestone should be defined as a change which does not have a material impact on the proponent's capacity to deliver the subsequent milestones. All other amendments should be regarded as major and publicly notified. EA holders should be permitted one application to make a major change to a milestone in any one planning period. Should an EA holder seek a second major amendment to a milestone in this period then this would trigger an independent audit and a departmental review.*

We request that:

- Part 6 of the draft Regulation is amended to place constraints on any amendments to the rehabilitation objectives and criteria, and the final landform and rehabilitation plan, such that it cannot be amended unless it results in improved environmental outcomes.

- Public notification and community consultation are required on any proposed amendments.
- A constraint is set on any amendment to progressive rehabilitation targets such that they are only allowed without notification and approval if they do not have any material impact on the proponents capacity to deliver the subsequent milestone.

Complexity:

The system that is proposed is very complex, with numerous different plans and approval points, which makes it incredibly difficult for any genuine community participation. At the very least, we want to see the rehabilitation objectives, completion criteria and the final landform and rehabilitation plan compiled into a single upfront plan that is subject to community consultation and must be approved by the Secretary. This would also substantially streamline the process and create efficiencies for the department.

In Queensland, Progressive Rehabilitation and Closure Plans go out for public comment before an Environmental Authority is issued and must be done at the same phase of the project as the Environment Impact Statement. An environmental authority, a pre-requisite for the commencement of mining, cannot be issued if an PRCP has not been completed.

We recommend that the entire emphasis of the reforms is shifted further upfront in the process, so that a final landform and rehabilitation plan that includes objectives and completion criteria is produced in the lead up to a development consent, and that a development consent cannot be granted without one.

Care and maintenance

The reforms are largely silent on the vexed issue of care and maintenance, which leaseholders frequently use as loophole to enable progressive rehabilitation measures to be put on hold. We recommend that clear constraints are set on care and maintenance, so that it is not used deliberately to avoid rehabilitation requirements and to minimise its use to only the most exceptional circumstances.

We recommend that a clear timeframe and assessment process should be set so that only legitimate care and maintenance is permitted. As a matter of principle, there should be a prohibition on mines be placed in care and maintenance unless there is evidence based exceptional circumstances. Companies applying to have sites placed in care and maintenance should be required to;

1. Justify the action on the site's financial viability based on an independent assessment of the ore body status, production costs, additional investment required against accepted projected commodity prices;
2. Continue to progressively rehabilitate the site to maximise the area of rehabilitation and ensure that there are zero discharges from all tailings dams, voids and waste rock dumps;
3. Accept mandated directions from the department as to the scale of progressive rehabilitation that must be undertaken during care and maintenance;
4. Maintain maintenance and monitoring programmes and report results publicly;

5. Submit an annual status report a) justifying the status of the site should care and maintenance be extended and b) report on progressive rehabilitation, maintenance and monitoring;
6. Every two years be subject to an independent site economic status review by the department that will determine whether or not the site should remain in care and maintenance or whether it should be permanently closed and rehabilitated.