

1 August 2014

Dr Beth Clouston
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Environmental Policy and Planning
Department of Environment and Heritage Protection
By email only: Beth.Clouston@ehp.qld.gov.au

Dear Dr Clouston

EDO Qld submission on the *Reform of Queensland's financial assurance system discussion paper*

Thank you for the opportunity to make a submission on the Reform of Queensland's financial assurance system discussion paper ("the Discussion Paper"). We commend DEHP for undertaking a public consultation on the proposed reform.

Who we are

The Environmental Defenders Office Qld Inc (EDO Qld) is a non-profit community legal centre which helps disadvantaged people in coastal, rural and urban areas understand and access their legal rights to protect the environment. EDO Qld has over 20 years of experience in interpreting environmental and planning laws to deliver community legal education and to inform law reform.

Summary

In 2012, the Queensland Commission of Audit estimated that Queensland's 15,000 abandoned mines are a A\$1 billion liability on the state. Yet despite these extraordinary figures, the Discussion Paper proposes a model that could *increase* the State and taxpayer's liability for future mine failures by removing the need for operators to provide security of 100% of the estimated cost of rehabilitation.

In summary, EDO Qld's main concerns with the Discussion Paper are:

1. There is a need for evidence-based reform, however no data is provided to substantiate the basis for reform;

2. Removing financial assurance provisions in the EP Act would expose the State to additional risk;
3. Any reform should be centred on minimising exposure risks for the State including incentivising progressive rehabilitation and mine closure planning;
4. The Northern Territory model that combines a pooled fund to address existing liability, and a 100% financial assurance to address future liability, has not been adequately explored and aspects of the Western Australian model have been overlooked;
5. Calculation of risk, threshold limits and contribution rates are unsubstantiated and any ceiling limit should be 100% of the State's potential liability;
6. Governance, administration of the fund needs to be transparent and met with appropriate monitoring and enforcement; and
7. The Abandoned Mines Lands Program requires transparent reporting and there should be a financial audit of the State's liability for all mines that are abandoned or in 'care and maintenance'.

EDO Qld would welcome the opportunity for further input into this important policy. If you wish to discuss this matter, please contact Jo Bragg or Rana Koroglu on (07) 3211 4466.

Yours faithfully

Environmental Defenders Office (Qld) Inc

A handwritten signature in dark ink that reads "Jo-Anne Bragg." The signature is written in a cursive, flowing style.

Jo-Anne Bragg
Principal Solicitor

EDO Qld's submissions on the Reform of Queensland's financial assurance system discussion paper

1. Need for evidence for reform

Requiring upfront security assists in implementing a fundamental principle of best practice environmental law – the ‘polluter pays’ principle. If industry wishes to engage in commercial activities that are harmful to the environment, the State must ensure that it holds sufficient funds from that operator should it fail in its environmental management obligations or to rehabilitate the site should the industry fail in its rehabilitation obligations.

There is no clear evidence in the Discussion Paper that the pooled fund model will reduce the Queensland's Government risk of future liability for rehabilitation. Any proposal for a pooled fund model needs to be substantiated with data showing that this option will be effective in encouraging industry to effectively plan for rehabilitation and closure, as well as progressively undertake rehabilitation during the life of the project. Without such evidence, it is unclear how the policy will protect the State and the community from further liabilities.

For example, the Landroc report referenced in the Discussion Paper regarding a comparative analysis of financial assurance appears to be heavily relied upon, however as a stakeholder it is difficult to have confidence in such reliance when the report is not publically available. The need for a publically available evidence base is especially warranted given the heavy reliance on the WA model in the Discussion Paper and that almost all international and national jurisdictions adopt the current form of financial assurance requiring a “a security of some form for 100% of the rehabilitation liability.”ⁱ

A further example is the ‘financial analysis’ referred to on page 11 of the Discussion Paper, which has clearly formed the basis of proposed variable rates of contributions. Such rates undoubtedly require various assumptions to be made, yet the financial analysis has not been made publically available to consider the basis of those assumptions or the means of analysis.

Recommendation: EDO Qld considers in the absence of evidence or data for the reform, the DEHP has not demonstrated that a pooled fund model will hold sufficient funds to match its future liability as well as its existing liability for abandoned mines. EDO Qld submits DEHP should undertake further research (including considering independent research) in order to gather the information needed to inform this policy and then make such research publicly available. This will assist public confidence of the evidence base for any policy change.

2. Removal of financial assurance provisions in the EP Act would expose the State to additional risk

EDO Qld does not support the removal of the provision allowing financial assurance to be used to address any non-compliance with a condition of approval (s.292(1)(b) and s.298(b))

EP Act). Although there are other enforcement actions available to DEHP, this provision allows for circumstances in which the operator does not have the funds to comply (including circumstances where there is a mortgagee in possession). For example, if an operator claims impecunity in failing to undertake and/or complete an environmental audit, investigation or transitional environmental program, part of the financial assurance could be called on to meet the State's cost of ultimately securing compliance with the EA. (We note that over the longer term, this could actually be of potential benefit to both industry and government (in the form of mining royalties) as it would maximise the chance for operations to continue as a going concern.)

Further, it may reduce the need for DEHP to take further, resource-intensive, enforcement action (such as seeking court orders under s.505 EP Act, or prosecution) where there has been non-compliance with those statutory tools, all while ensuring the EA conditions are met, environmental outcomes are achieved and the State's costs are recovered.

Whilst this section may not have been used, it further acts as an incentive for compliance (both with an EA and any DEHP statutory compliance tool used) for viable operators if there is a possible threat of a financial assurance being realised. Removing this section exposes the State to further financial risk, and minimises options for both DEHP and the operator to ensure a continuation of compliant operations without further enforcement actions or a cost to the State.

Recommendation: EDO Qld does not support the removal of these provisions.
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3. Reform must be centred on minimising exposure risks for the State including incentivising progressive rehabilitation and mine closure planning

Under 'Financial impacts to the resources industry' in the Discussion Paper, no concrete analysis using data is provided to substantiate industry's complaints that bank guarantees actually (not potentially) impede their ability to source capital and that this 'can' represent a barrier to market entry affecting competition. This major reform proposal to move to a pooled fund - which would effectively result in a *reduction* of funds compared with the amount of financial assurance currently held – should not progress without open and transparent data and modelling demonstrating these anecdotal claims.

Furthermore, the concept that reform is needed as due to a hypothetical future “reluctance of financial institutions to increase its financial exposure to the (petroleum and gas) sector” is of great concern – if financial institutions or insurers become reluctant to increase exposure to the petroleum and gas sector, why should the State Government and ultimately the community increase their risk by not requiring bank guarantees?

In terms of reducing the State's exposure to risk, mine closure planning is not legislated and is not holistically incorporated into each plan of operations, an issue which DEHP should investigate further. There is inadequate assessment of the entire life of mine costs (including

rehabilitation and closure obligations) in the environmental impact assessment process with no enforcement of progressive rehabilitation.

Having a readily available pool of funds is attractive to the State, especially where the interest can be reinvested into the Abandoned Mines Lands Program. It is clear that one of the main aims of the pooled fund model is to secure the ongoing \$6.5 million per year in funding for the Abandoned Mine Lands Program. Whilst this is a necessary and important program for human health and safety, it appears to primarily be focussed solely on human safety and does not undertake rehabilitation of the natural values of a site. Furthermore, securing funds for legacy mines should not be at the expense of increasing risk of future liability.

It appears that the Northern Territory has a 100% financial assurance requirement *in addition* to a 1% levy to address legacy mine issues. 33 per cent of the levy goes towards a Mining Remediation Fund.ⁱⁱ It therefore appears the intention of the NT's dual approach is to:

1. Minimise the NT's **future** risk: incentivise behaviour of operators to undertake rehabilitation as once all rehabilitation obligations are completed, the bank guarantee is discharged in full; and
2. Assist the NT to deal with **existing** liability: by making funds available to the NT administration to undertake rehabilitation on legacy and abandoned mines.

It is unclear why a detailed analysis of the NT model is not presented in the Discussion Paper. The comparative analysis of jurisdictions should be made public along with a detailed analysis of the efficacy of the new NT approach.

All elements of the WA model should be considered. For example, WA has a Closure guideline where the respective environment and mining departments have agreed on a mine closure process, and have legislated for closure planning. However Queensland is lacking the same mine closure planning framework that exists in WA. In Queensland, there is:

- No clarity over closure planning and relinquishment;
- No public or formal agreement between DEHP and DNRM regarding same; and
- Importantly, no legislative requirements for mine closure planning.

Recommendation: The consideration of the WA approach is narrow as it does not consider other legislative requirements that incentivise operator behaviour. DEHP should make publically available its comparative analysis including the NT and all components of the WA framework. Independent evidence that substantiates industry's anecdotal claims is necessary.

4. Calculation of risk, threshold limits and contribution rates are unsubstantiated

The Discussion Paper proposes a very simple calculation of risk using credit ratings. No evidence is provided to support this proposal that it is an appropriate means of calculating a

default on rehabilitation and closure obligations, which may occur in 5-20 years from the commencement of a plan of operations. It does not take into account the possibility of market collapses which is even more pertinent given the operating environment of some sectors, particularly thermal coal.

QAO said that EHP was to calculate assurances that appropriately reflect estimated rehabilitation costs. It is unclear how any of the \$50,000 threshold limit, the contribution rates or calculation of risk will improve the current situation, that is, reduce the State's exposure to liability.

Recommendation: In the absence of transparent research to support the calculation of risk, threshold limits and contribution rates, EDO Qld does not support the proposals outlined in the Discussion Paper.

5. Ceiling limit on fund should be at 100% of the ongoing liability

Further details are required on the proposed policy objective to “ensure the Queensland Government holds sufficient money to cover the risk that a resource operator will default on their rehabilitation obligations”. It is clearly based on the idea that not all mines will fail at once. However it also ignores the risk of widespread natural disasters or that entire industries sometimes collapse. In a low-carbon economy, there is a risk that numerous and large abandoned coal mines in Queensland will present a significant burden for future Queenslanders.

If multiple mines fail to extract the value expected in the operational phase due to market factors and there are no funds to achieve successful rehabilitation and closure, it is unclear how the fund will have sufficient resources to respond if an arbitrary ceiling is imposed. We note the original intent of these provisions were to “ensure that the public does not have to pay the costs for remediation of environmental problems.”ⁱⁱⁱ

The current financial assurance held by the State is approximately \$6.3 billion. Should the model be adopted (which EDO Qld does not support), a ceiling limit of 100% of the total rehabilitation liability of all participants should be adopted, rather than just the largest participants. It appears to be artificial to set a ceiling at the cost of the largest participant failing, as if the largest participants are to fail it would probably signify a serious risk of smaller and mid-sized operators also failing. Additionally, the real costs of rehabilitation will increase in the future and there is already doubt over the how accurate rehabilitation costs are currently estimated (even with the new financial assurance calculator).

The QAO report stipulates that the DEHP has failed in its role to monitor and enforce rehabilitation and FAs. This means that replacing the current system with the less financially stringent Pool Fund system would further reduce its financial capacity to meet the shortfall left by proponents.

Recommendation: Should the model be adopted (which EDO Qld does not support), a ceiling limit of 100% of the total rehabilitation liability of all participants should be adopted, rather than just the largest participants.

6. Governance, administration of the fund needs to be transparent and met with appropriate monitoring and enforcement

In respect of the proposed pooled fund model, the QAO indicated the issues that must be addressed included better administration of the request, collection and management of the funds from EA holders and firm and timely action against EA holders who fail to make the required payments. EDO Qld notes that severe public service staff cuts of approximately 15-20% across the Queensland State public service during 2012 are likely to hamper ongoing essential legislative implementation and enforcement.^{iv}

Outsourcing the management of the fund is proposed as the more cost-effective means of administration. As DEHP is aware, the monitoring and enforcement of operators failing to pay their financial assurance has been identified as a significant problem by the QAO. However there is no consideration in the Discussion Paper of the reporting mechanisms from the third party fund manager back to DEHP when participants do not provide their contributions, enforcement actions against the operator when DEHP receives that information, or whether outsourcing this function will lead to more transparent and effective administration of the fund.

It is clear that the policy intention of the pooled fund model is to accrue sufficient interest to fund the Abandoned Mines Land Program, however no financial modelling is provided of how long that may take based on the variables proposed in the Discussion Paper – page 14 of the Discussion Paper states, “it would take a number of years”. EDO Qld requests DEHP to disclose the analysis of how long it would take to achieve the policy objective.

EDO Qld submits that a governing board would need to include an experienced representative from the conservation sector (for example, as nominated by the Queensland Conservation Council) and from experts such as the Centre for Mined Land Rehabilitation.

Recommendation: If a pooled fund model is introduced (which EDO Qld does not support), there must be appropriate monitoring and enforcement of the required contributions. Experienced representatives from the environment and conservation sector should be included in the governing board.

7. Rehabilitation incentives are essential but should go further

There is a risk that some operators will find winding up their entity after mining operations without fulfilling rehabilitation duties is a more attractive option than rehabilitation, as there is no longer a risk of losing a substantial bank guarantee. This is identified in the Discussion Paper and we have addressed this risk earlier in these submissions.

The potential mechanisms to address this risk are set out on page 14: a one-off refundable security component and reverting to a bank guarantee requirement where there is non-compliance with rehabilitation obligations. However, no data or evidence is provided to suggest that either of these mechanisms would incentivise operator behaviour to the same extent that the current risk of forfeiting a bank guarantee for the full rehabilitation costs. We further note that rehabilitation requirements in EAs can be variable and that there is no legislative requirement for closure planning or implementing progressive rehabilitation, so it is unclear how the second mechanism would be given effect. This is in contrast to the WA position where such legislative requirements for closure planning exist.

EDO Qld submits that in order to incentivise behaviour, the EP Act be amended to include requirements for implementing progressive rehabilitation and mine closure planning, and that compliance with the requirements be appropriately monitored and enforced by DEHP.

Recommendation: implementing progressive rehabilitation and mine closure planning should be mandatory under the EP Act (including in the environmental impact assessment), in order to incentivise behaviour of operators and reduce the State's exposure to risk. DEHP would need adequate monitoring and enforcement of such provisions to ensure compliance.

8. Abandoned Mines Land Program requires transparent reporting

EDO Qld submits there should be a full inventory of abandoned mines, mines in care and maintenance, risk analysis of those mines and the State's liability for those mines. The results of such an inventory should also be made public, and the State's liability should be included in the State of the Environment Report.

Transparent reporting of the Abandoned Mines program itself is also essential and EDO Qld considers it is appropriate to review whether the program has sufficient funding at \$6.5 million per year to adequately meet its existing liability, which could be as high as \$1 billion in rehabilitation costs.^v

Recommendation: A full audit or inventory of abandoned mines and mines in 'care and maintenance' should be undertaken and made publically available. Transparent reporting of the Abandoned Mines Lands Program is essential.

ⁱ Discussion Paper, page 9.

ⁱⁱ Woollard, J. "Overcoming the challenges of legacy mines in the Northern Territory" *AusIMM Bulletin*, June 2014.

ⁱⁱⁱ Explanatory Notes, Environmental Protection Bill 1994 (Qld) 1, 21-22.

^{iv} Many long term (expert) environmental staff 'voluntarily' left the Queensland Government to work for industry in 2012. A large portion of those 'took voluntary redundancies'. Figures at the time put total job losses close to 14,000 people across Queensland's public service. In the environmental arena, changes of departments make figures difficult to quantify but as at September 2012, approximately 220 staff were said to be cut from EHP, 130 from DNPRSR and 360 from the Department of Natural Resources and Mines. Brisbane Times, *Job Cuts by Portfolio* (11 September 2012) <http://www.brisbanetimes.com.au/queensland/list-job-cuts-by-portfolio-20120911-25px8.html> (accessed 31 January 2014).

^v Queensland Audit Office, *Environmental regulation of the resources industry*, 2014, p.1