



# Mine rehabilitation & closure

Minimising risk and achieving  
relinquishment



The 'social licence' for mining in Australia is increasingly linked to environmental outcomes and what land uses can be made available following mine closure. As a result, the sufficiency of mine rehabilitation practices across Australia, and in particular the extent of progressive rehabilitation being undertaken, has attracted increasing scrutiny over the last few years.

The rehabilitation and closure of mines is more heavily regulated than ever before, with greater levels of accountability and enforcement being called for by community and environmental groups. The reputational stakes have also never been higher for mine operators who fail to meet regulator and community expectations in relation to rehabilitation outcomes and post-mining land uses.

Complete rehabilitation and relinquishment of tenure for former mine sites is difficult to achieve and extremely rare. Only a handful of examples exist across Australia. To date, no large, open cut mines in Australia have achieved full relinquishment.<sup>i</sup>

While end of mine life and closure may be many years away, early planning for rehabilitation and mine closure and regular review of closure plans throughout a mine's operational life represents best practice and is increasingly entrenched in legal requirements.

Effective forward planning for rehabilitation and closure can improve the efficiency of rehabilitation and assist in achieving full relinquishment, while minimising residual risk.

In the following pages, we explore a range of considerations that should be factored into planning for mine rehabilitation and closure, including:

- identifying regulatory requirements and setting clear objectives, including in relation to post-mining land uses;
- managing progressive rehabilitation;
- the evolution of mine closure plans;
- considerations for mines in care and maintenance;
- seeking the return of rehabilitation bonds;
- staying abreast of recent and upcoming reforms;
- requirements under contamination and Commonwealth environment laws;
- minimising long-term legal risk;
- managing stakeholder expectations; and
- establishing commercial frameworks to support successful rehabilitation.

## KEY TAKEAWAYS

1. Regulators are looking very closely at progressive rehabilitation practices and outcomes – regularly audit your operations to ensure compliance.
2. Rehabilitation standards and community and regulator expectations in relation to rehabilitation and post-closure land uses are rapidly evolving – stay abreast of developments and regularly test your mine closure plan against the current standards to ensure it meets best practice and legal requirements.

Close to **200**  
Australian mines are  
**projected to close**  
in the next 10 years<sup>ii</sup>



Approximately **75% of**  
**mine closures**  
in Australia are  
unplanned or  
'premature'<sup>iii</sup>

**Less than 30**  
Australian mines have  
ever achieved **complete**  
**closure and**  
**relinquishment**<sup>iv</sup>



More than **200**  
major Australian  
mines are currently in  
**care and**  
**maintenance**<sup>v</sup>

There are at least  
**50,000**  
mines with **legacy**  
**environmental**  
**issues** in Australia<sup>vi</sup>



Australian governments  
collectively hold over  
**\$10 billion**  
in **rehabilitation**  
**bonds**<sup>vii</sup>



# Why does this matter?

There are two key objectives that can be achieved through good rehabilitation practices and sophisticated mine closure planning.

## 1. ACHIEVING RELINQUISHMENT

Achieving complete relinquishment following mine closure means being able to surrender all tenements, having all security bonds returned and, to the greatest extent possible, having nil ongoing liabilities in relation to the former mine site or operations.

Having clear, identified end points for mine rehabilitation at closure, while a fairly obvious requirement, has been the most complex problem for mine operators to resolve with regulators. Engaging early with regulators to agree the post-mining land use and milestones for progressive rehabilitation provides the most effective pathway to achieving full relinquishment.

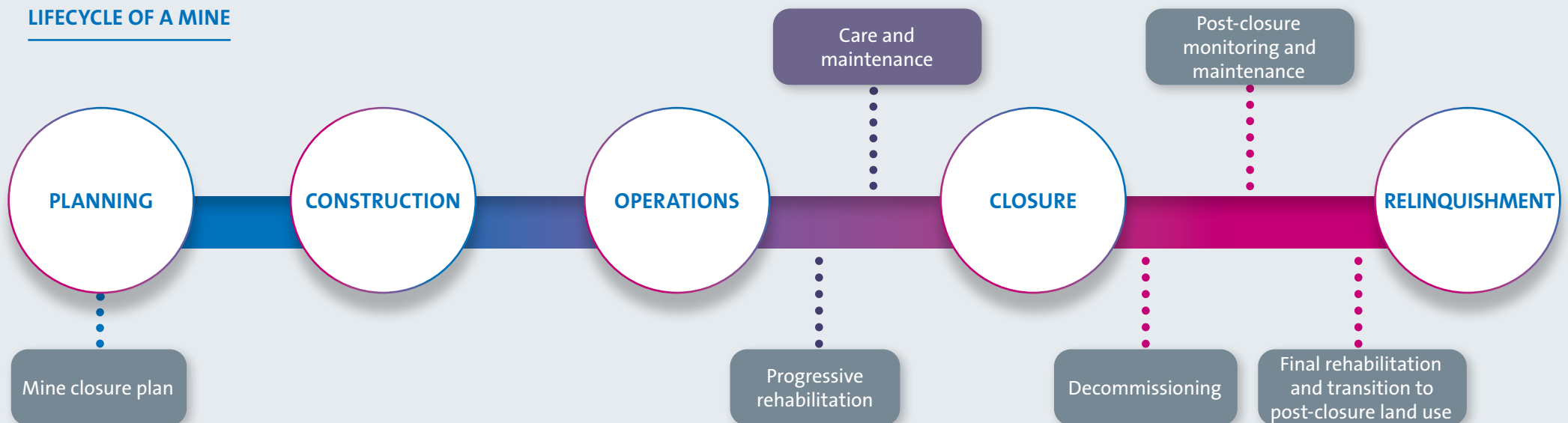
## 2. MINIMISING RESIDUAL RISK

The ultimate goal is to achieve a closure outcome which requires little (if any) ongoing management costs and presents little or no ongoing risk of liability to the former operator.

This involves minimising any residual environmental impacts to the greatest extent possible, and achieving post-mining land uses that can be handed over to new landowners, or function as self-sustaining environmental outcomes where possible.

Identifying and managing any ongoing public safety risks, in addition to environmental risks, can significantly reduce potential exposure to liability, including civil claims post-closure.

### LIFECYCLE OF A MINE



# Planning for rehabilitation and closure

Effective mine rehabilitation and closure planning can be a 'win / win' for operators and stakeholders. When executed well, it can:

- reduce financial risk and liabilities;
- reduce costs in relation to environmental bonds / security deposits; and
- improve regulator and stakeholder confidence.

Early planning can also reduce future costs by ensuring operations are conducted in a way that facilitates and maximises the efficiency of rehabilitation. For example, there are significant costs in undertaking major land reprofiling such as relocating mine elements (eg waste dumps) if they do not conform with required rehabilitation outcomes.

Poor rehabilitation and mine closure planning can lead to environmental, social and economic legacy issues, which may require regulatory intervention and result in financial uncertainty, reputational damage, potential liability and difficulties obtaining approvals and finance for future projects.

## IDENTIFYING REGULATORY REQUIREMENTS

Mine rehabilitation and closure is primarily regulated by state and territory governments, although as discussed below, the Federal Government also has a role to play.

Regulatory requirements vary between Australian jurisdictions. There is a lack of clarity in some jurisdictions in relation to the standard of rehabilitation required to achieve partial and full tenement relinquishment, with operators instead having to discuss expectations with regulators on a case-by-case basis.

Some jurisdictions have also taken steps in recent years to clarify rehabilitation standards and expectations.

Queensland has introduced a requirement for a Progressive Rehabilitation and Closure Plan and Schedule, which must clearly identify the condition to which the land must be rehabilitated before the mining authority may be surrendered.

The Western Australian Government has released guidelines for the preparation of mine closure plans, which include guidance on the standard of rehabilitation required, and has endorsed a framework for developing mine site completion criteria. New draft codes of practice / guidelines to clarify rehabilitation requirements in New South Wales are also expected to be released imminently.

## SETTING OBJECTIVES

Full relinquishment is typically the end goal of rehabilitation. However, as noted above, there are few examples of successful mine site relinquishment in Australia.<sup>viii</sup> A key obstacle to successful relinquishment is agreeing appropriate completion criteria for the mine site with regulators and then agreeing when those completion criteria have been met.

Regulators across Australia have, understandably, taken a cautious approach to relinquishment, as this is generally the point at which some, if not all, risk of liability for the mine site transfers from the operator to the relevant government or subsequent landowner.

Identifying clear rehabilitation objectives and completion criteria upfront, with established performance metrics, is essential to manage regulator expectations and reduces uncertainty in relation to achieving full relinquishment and the return of rehabilitation bonds. While having more qualitative objectives can provide flexibility, this also carries a greater risk of dispute and can make it more difficult to satisfy the regulator that those objectives have been achieved.





## IDENTIFYING POST-MINING LAND USES

A key consideration for setting site-specific standards for rehabilitation is identifying the intended post-closure land use.

While regulators have conventionally accepted 'passive' post-closure land uses (ie ensuring that the site is stabilised, sufficiently revegetated and self-sustaining), there is increasing community expectation that rehabilitation will be undertaken to a standard which will support active post-mining land uses across large parts of mine sites. Typically, the intention is to integrate former mine sites into surrounding land uses, which commonly involves rehabilitating to a standard to support agricultural uses.

However, expectations also appear to be emerging for former mine sites to be made available for other uses, including recent examples of regulators seeking rehabilitation to be carried out to a standard to support recreational or conservation-related uses. This not only sets an extremely high bar for rehabilitation, but may give rise to public safety risks if rehabilitation is not undertaken to a suitable standard.

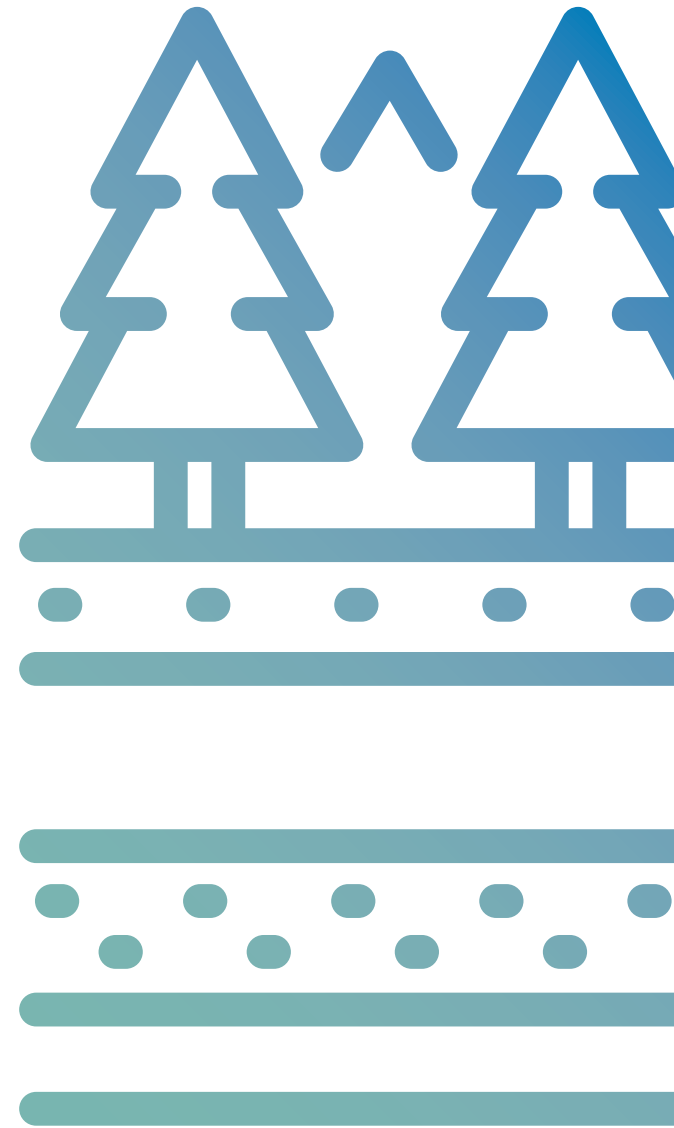
Expectations in relation to final pit voids is another evolving aspect of rehabilitation standards. For many years it was considered acceptable for a rehabilitated site to include residual voids as part of a passive post-mining land use. More recently, state government policies have started to shift, with Queensland no longer accepting the retention of final pit voids where situated wholly or partially in a floodplain.

A Discussion Paper on mine rehabilitation released by the NSW Government in November 2017 sought feedback on a policy framework under which final voids will not be considered acceptable unless:

- they cannot feasibly be removed;
- the void can be beneficially re-used in the future; and
- environmental, community and visual impacts have been minimised.<sup>ix</sup>

This shift in approach is consistent with the findings of the 2019 Senate Committee report into mine rehabilitation, which identified the acceptability of pit voids as a final landform as an issue that is particularly important to stakeholders.

The Victorian Government has recently released a proposal to fill Latrobe Valley mine pits with water as a rehabilitation solution that would support post-mining land uses and mine pit stability. The rehabilitation strategy recognises the significant challenges to achieving this goal in a 'drying climate' scenario. The Government has committed to exploring alternatives to using the Latrobe Valley river system and aquifers as a water source, including desalination, recycled water and treated stormwater.



# Progressive rehabilitation

There is increasing pressure for mine operators to undertake progressive rehabilitation. In their submissions to the Senate Committee, a significant number of stakeholders called for regulatory standards for progressive rehabilitation to be raised.<sup>x</sup>

Progressive rehabilitation brings forward some of the cost of rehabilitating the mine site and can be inefficient where a mine plan subsequently changes, resulting in mining of previously rehabilitated areas.

On the other hand, maximising progressive rehabilitation can assist with maintaining a 'social licence to operate' and minimise end-of-mine rehabilitation challenges at a time when there is limited scope to alter post-mining landforms or rehabilitation objectives, as well as reduced cash flow.

Most governments now require mine sites to be progressively rehabilitated during the life of the mine, through the imposition of conditions on environmental and planning approvals and mining tenements. In 2019, the Queensland Government introduced a requirement for Progressive Rehabilitation and Closure Plans, which must specify binding milestones for progressive mine rehabilitation. It is likely that regulation of progressive rehabilitation will be the subject of ongoing focus across Australian jurisdictions.

Where available, progressive rehabilitation certification is a useful mechanism which can assist to demonstrate successful achievement of progressive rehabilitation and enable early partial relinquishment. Notable successful examples of certified progressive rehabilitation include:

- **Westside Mine (Glencore)** – 38 hectares of rehabilitated land certified by the New South Wales Government (we understand this was the first coal mine to be certified in New South Wales);
- **Newlands Mine (Glencore)** – 73.5 hectares of land associated with part of an overburden dump certified by the Queensland Government (this was the first time that rehabilitation of coal mine overburden spoil has been certified);
- **Gregory Crinum Mine (BHP Mitsubishi Alliance)** – 1,176 hectares of rehabilitated land certified by the Queensland Government; and
- **Rolleston Mine (Glencore)** – 220 hectares of rehabilitated land certified by the Queensland Government.



# Evolution of a mine closure plan

Closure planning typically evolves over the life of a mine to reflect changes to the overall mine plan. Recognising the need for this, operators are generally required to review their mine closure plans at set intervals.

The more frequently a mine closure plan is reviewed, the more likely the mine operator will be able to integrate mine rehabilitation into planning and avoid inefficiencies, such as changes to a mine plan impacting on land that has already been rehabilitated.

## Care and maintenance

A mine site placed on 'care and maintenance' has a different set of regulatory requirements, and is managed differently, to a mine at end-of-life.

Engagement with government, community and other relevant stakeholders ahead of (if possible), and during, care and maintenance is critical to ensure regulatory compliance, security of tenure and ongoing community support.

There is likely to be increased community and regulator interest and scrutiny going forward in relation to:

- the circumstances in which an operator places a mine into care and maintenance;
- the length of time an operator intends to leave the mine in care and maintenance; and
- the obligations on operators during the care and maintenance period.

The 2019 Senate Committee report identified significant stakeholder concern that the practice of placing mine sites into care and maintenance indefinitely can be used by operators to deliberately avoid their rehabilitation obligations. While such conduct, if it is occurring, is likely to be limited to a small number of operators, it is important when placing a mine into care and maintenance for the operator to affirm their commitment to rehabilitation and manage any perception that they are somehow seeking to avoid rehabilitating the site.





# Securing rehabilitation obligations

Another area which has evolved significantly in recent years is the method by which regulators secure the performance of rehabilitation obligations.

Traditionally, these obligations have been secured by way of bonds (typically cash bonds or bank guarantees). This approach has attracted criticism from both operators, whose funds and/or borrowing capacity are tied up in maintaining the relevant securities, and regulators, where bonds have at times proven insufficient to fully secure rehabilitation obligations. An August 2020 report of the Victorian Auditor-General's Office found that Victoria has significant problems with its bond collection process, with bond amounts being insufficient and rarely reviewed.<sup>xi</sup>

Some Australian jurisdictions have now moved to a pooled rehabilitation fund model based on annual levy contributions (eg Western Australia<sup>xii</sup>) or a hybrid approach of bonds and a pooled fund (eg Queensland and the Northern Territory).

The Western Australian experience with its Mining Rehabilitation Fund shows both the upsides and downsides of a pooled fund approach. On the one hand, the regulator is able to use interest generated from the fund to rehabilitate historical abandoned mine sites, and mine operators do not have cash resources tied up or their borrowing capacity impacted by the need to provide rehabilitation bonds.

On the other hand, a system solely reliant on pooled funds is exposed if too many operators do not fulfil their rehabilitation obligations, particularly in the case of operator insolvency.

In 2015, shortly after the introduction of the Mining Rehabilitation Fund, the operator of the Ellendale Diamond Mine entered liquidation. Liquidators disclaimed the mining lease and associated rehabilitation liability (estimated to be approximately \$40 million).<sup>xiii</sup> Rehabilitation liability reverted to the Western Australian Government, which would have had to make a considerable drawdown from the Mining Rehabilitation Fund, had a new operator not been found to take over the tenements.

The Queensland Government has recently introduced a hybrid system, rather than relying solely on a pooled fund. This involves a pooled fund backed by sureties from operators with an aggregate rehabilitation liability exceeding \$450 million or who are rated as 'high risk'.

# Seeking the return of rehabilitation bonds

Australian states and territories have different processes for the return of rehabilitation bonds. However, similar considerations are applied when determining whether a bond should be released, including whether:

- applicable rehabilitation objectives and completion criteria have been met;
- all other legal obligations relating to the environment and safety have been met; and
- satisfactory arrangements are in place for ongoing management of the site, if required.



# Watch this space – recent and upcoming reforms

Queensland is at the forefront of regulatory change, with its hybrid approach to financial assurance, the introduction of Progressive Rehabilitation and Closure Plans and chain of responsibility reforms. Reforms have also been foreshadowed or are currently being implemented in a number of other states.

Given the rapid pace of reform in this space, it is important for operators to stay on top of developments and regularly review their rehabilitation objectives and mine closure plans to ensure they comply with the applicable legal requirements.

## QUEENSLAND REHABILITATION REFORMS

The Queensland Government recently passed reforms to provide for:

- the statutory appointment of a Rehabilitation Commissioner to provide advice on rehabilitation and best practice management of land, and facilitate better public reporting on rehabilitation, amongst other functions. The Rehabilitation Commissioner will provide guidance and raise awareness; they will not have a decision-making role; and
- amendments and clarifications to the residual risk framework to better manage risks on sites after an environmental authority for a resource activity has been surrendered. Important elements are being developed in a 'Residual Risk Assessment Guideline'.

## NSW AND VICTORIAN REHABILITATION REFORMS

The NSW Resources Regulator consulted on a series of rehabilitation reforms in 2018, including mandatory, best practice rehabilitation standards in the form of codes of practice, new mining lease conditions relating to rehabilitation and Guidelines for Rehabilitation Risk Assessment, Record Keeping and Rehabilitation Controls. The regulator is expected to release updated consultation drafts of these reforms by September 2020.

A new, first-of-its-kind Rehabilitation GIS Portal has also been established in New South Wales for the purpose of enabling the regulator to track rehabilitation progress across individual sites.

Victoria is also currently implementing a series of reforms to clarify the process for approval, implementation and assessment of rehabilitation. Mine rehabilitation plans are now required to define post-mining land uses and objective completion criteria, and respond to clarified requirements for progressive rehabilitation.

## CHAIN OF RESPONSIBILITY

Since 2016 in Queensland, where a mine operator cannot meet its rehabilitation obligations, 'related persons' of the company can be held responsible.

The regulator can pursue a holding company or other entity that either receives a significant financial benefit from the operator (which could potentially extend to financiers or investors in some circumstances) or is in a position to influence the operator's compliance with environmental laws, such as directors or managers. Such persons may be required to provide financial assurance or personally make good the rehabilitation obligations of the operator. This creates significant exposure for these persons in an insolvency scenario.

The Northern Territory has indicated that it proposes to introduce similar 'chain of responsibility' reforms.

## POTENTIAL FUTURE REFORMS

It remains to be seen to what extent other states and territories will adopt similar reforms and take steps to strengthen rehabilitation requirements.

Given the extent of stakeholder concern identified by the Senate Committee regarding the incorporation of pit voids into final landforms and the level of progressive rehabilitation being undertaken, these areas are likely targets for future regulatory change. As noted above, Queensland has recently introduced reforms regarding pit voids on floodplains.

Other issues considered by the Senate Committee which could be potential areas for reform include the independence of assessments of mine closure costs and public reporting of rehabilitation liabilities.

A key risk for operators to monitor is where new standards and requirements are proposed to apply to existing mines which were approved under different (and likely less onerous) regimes.



# The interface between mine rehabilitation and...

## CONTAMINATION LAWS

Many mining operations pose risks of pollution or contamination of land, either through business as usual operations (such as the storage of tailings or stockpiles on site) or unplanned incidents. Managing and remediating any contamination that has occurred during mine operations is an important step in rehabilitating the site.

While mine rehabilitation and closure requirements are primarily administered through the conditions of planning approvals, environmental licences and mining tenements, additional requirements can be imposed under state and territory contamination laws.

These laws confer broad statutory powers on regulators to issue statutory notices to compel mine operators (in their capacity as 'polluters', or the owners or occupiers of land) to investigate, notify and clean-up contamination or pollution in soil, surface water or groundwater within or emanating from a mine site. In practice, these notices are typically used as a compliance tool where a mine operator has failed to meet its rehabilitation obligations, or to target a specific environmental issue or incident. Statutory clean-up notices are also commonly used to manage the closure and rehabilitation of infrastructure associated with a mine, such as power stations and other industrial facilities.

## COMMONWEALTH ENVIRONMENTAL LAWS

In addition to state and territory level approvals, a number of mines are subject to approvals under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**).

EPBC Act approvals may impose additional rehabilitation requirements upon the closure of a mine. Typically, rehabilitation conditions in EPBC Act approvals are targeted at managing impacts on a specific 'matter of national environmental significance' (eg Commonwealth listed threatened species and ecological communities), rather than managing general rehabilitation activities at a mine.

The works required to achieve rehabilitation and closure of a mine may also require separate approval under the EPBC Act. The majority of Australian mines currently in the rehabilitation phase were approved prior to the commencement of the EPBC Act, which limits the application of the Act to those mines. However, EPBC Act approval for rehabilitation activities may be required for:

- pre-EPBC Act mines, where the proposed activities fall outside the scope of the action authorised prior to commencement of the EPBC Act; and
- mines approved under the EPBC Act, where the scope of rehabilitation activities now proposed goes beyond what is contemplated in the EPBC Act approval.

Since the implementation of the EPBC Act, there have been 118 mining and resources projects approved subject to conditions relating to rehabilitation<sup>xiv</sup>





# Minimising long-term legal risk

## MINIMISING LONG-TERM PUBLIC SAFETY RISKS

Public safety risks are an important consideration in mine decommissioning and closure. These risks can arise from unauthorised or accidental public access to the former mine site. Public safety risks may also arise if infrastructure (eg waste dumps, stockpiles, tailings or water dams) is poorly managed. It is important that these risks are identified in mine closure planning and appropriate mitigation measures implemented.

Appropriate safety measures to minimise long-term public safety risks will depend on the nature of the mining operation. Potential measures for restricting (as far as possible) unauthorised pedestrian and vehicle access to the mine site may include construction of bunds around mine pits, fencing, security monitoring and ensuring appropriate hazard signs are displayed.

## MINIMISING ENVIRONMENTAL RISKS

Minimising ongoing environmental risks is a key outcome for successful mine closure and to reduce the operator's post-closure exposure to additional costs and liability. For example, preventing acid rock drainage and ensuring any voids act as groundwater sinks and not as sources of potential contamination, are important outcomes.

Unless it can be demonstrated that environmental risks have been minimised to the greatest extent possible, achieving complete relinquishment is likely to be extremely difficult.

Insufficient management of post-mining environmental risks may also result in a refusal by the regulator to release environmental bonds, reputational damage and/or civil action by third parties (eg where contaminated water has migrated offsite).

## MINIMISING CIVIL LIABILITY RISKS

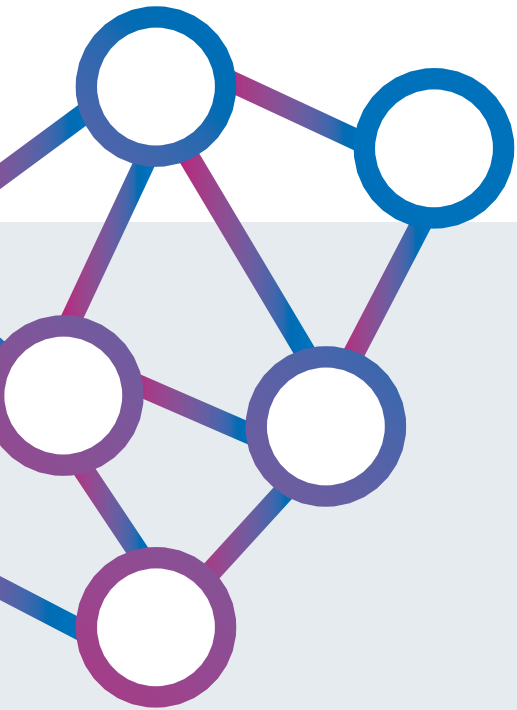
Effective mine closure practices are important to minimise the risk of civil action; eg a claim of negligence, nuisance, trespass or breach of statutory duty. Civil liability might potentially arise in a number of circumstances, including where dam water escapes or dust from areas which have not been adequately rehabilitated blows onto neighbouring properties.

Poor closure practices may expose the operator to civil claims subsequent to completion of closure activities and relinquishment occurring. In some Australian states, there is specific legislation providing for continuing liability. For example, in Western Australia, section 114B of the *Mining Act 1978* (WA) provides that the surrender of a mining tenement does not affect the tenement holder's liability for any act or omission which occurred prior to that surrender.

Properly planned and implemented mine closure practices will assist operators to demonstrate that reasonable precautions have been taken to prevent or reduce impacts to third parties. This in turn may mitigate the risk of a successful civil claim.



# Managing stakeholder expectations



## COMMUNITY EXPECTATIONS

Given the potential impact of mine closure on local communities, which may rely on the mine for employment and other economic and social benefits, it is helpful for mine operators to consider the impacts of mine closure on the local community early in the closure planning process and engage with the community leading up to and throughout the rehabilitation and closure phase.

The Australian Government's *Leading Practice Handbook for Community Engagement and Development*<sup>xv</sup> is a useful resource regarding best practice for engaging with the community.

A number of states and territories have mandated community consultation requirements. For example, in New South Wales, the standard planning approval conditions for 'State significant' mining projects require the operator to establish and maintain a Community Consultative Committee for the duration of operations and at least six months following completion of operations.

## LANDOWNER EXPECTATIONS

Mine operators may be subject to specific rehabilitation obligations under existing compensation and access agreements with landowners. Usually these obligations will not extend beyond statutory rehabilitation obligations but, occasionally, operators may need to take additional steps to rehabilitate land 'to the satisfaction of the landowner'.

Mine operators may be able to reduce their rehabilitation obligations by way of further agreement with landowners. For example, certain infrastructure that benefits landowners (eg water bores, hardstand areas) may be left in situ if the landowner agrees.

Usually, this will require the mine operator to demonstrate to the regulator that the landowner understands their responsibilities and liabilities, most often by obtaining explicit, written acknowledgment from the landowner accepting any mining legacy obligations.

Ideally, a closure planning committee should be established well in advance of when closure is planned, to consult with the community and manage community relations. The committee should conduct a closure social impact assessment to determine how closure will affect local communities and the options for the future use of project land and facilities.

There may also be a need to proactively manage the impact of payments to community funds and businesses drawing to a close. Providing as much certainty as possible to the community as to when the mine is likely to close and having an effective communications strategy around the cessation of payments can be helpful in managing these impacts.

The Federal Government recently announced funding for a new Cooperative Research Centre which will support communities reliant on mining to find sustainable post-mining economic futures.

## TRADITIONAL OWNER EXPECTATIONS

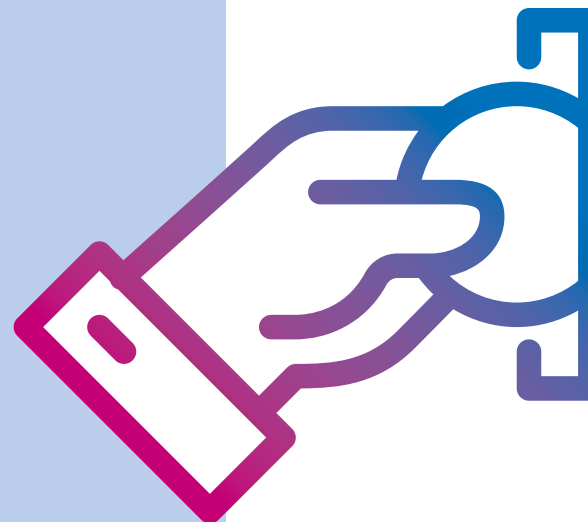
Many mines are located on land subject to Indigenous interests and rights. Traditional Owners are important stakeholders in any mine rehabilitation and closure process and the rights, knowledge and interests of Traditional Owners should be recognised and taken into consideration in planning for mine closure.

Specific consultation requirements may apply under the terms of any applicable native title agreements and cultural heritage agreements. These agreements should be reviewed for any relevant requirements and complied with.

Impacts of mine closure on local Indigenous communities need to be carefully managed, particularly where a large proportion of community members are employed at the mine or are reliant on mine-related infrastructure (eg townships, airports and electricity).



# Commercial frameworks to support successful rehabilitation



## CONTRACTING FOR REHABILITATION WORKS

A mine operator may choose to undertake rehabilitation works itself, or may contract some or all of these works. If contracting these works, the mine operator will need to mitigate the risk of poor or delayed rehabilitation by the contractor that may delay the return of rehabilitation bonds, as this will have a direct financial impact on the mine operator.

Key considerations will include whether a single contractor is able to 'wrap', and assume contractual risk for, all of the rehabilitation works or whether and how multiple contractors (and possibly the owner or mine operator) will undertake these works.

In addition, the mine operator should consider if it requires security for delay and what warranties and indemnities it requires from the contractor and is willing to provide itself. As the mine operator will have substantial knowledge of the site not shared by the contractor, a full pass through of some risks to the contractor may be difficult.

## TAX TREATMENT OF REHABILITATION EXPENSES

Mining companies can generally claim rehabilitation expenses as a deduction where there is a sufficient connection between the expenditure and work undertaken as part of the mine site rehabilitation. This is pursuant to an express provision in the Australian tax legislation that overcomes the general rule that expenses of a capital nature are not deductible.

Complexities commonly arise around timing, such as where there is a claim for a large lump sum deduction for a payment that is intended to meet future rehabilitation obligations. The Australian Taxation Office will be particularly concerned if the payment is to an offshore or related entity.

Difficulties may also arise in the sale context, particularly around the assumption by purchasers of rehabilitation obligations (which might not go to the purchaser's cost base) and any payments made to the purchaser relating to those obligations (which might not be deductible for the vendor).





## PROVIDING THIRD PARTY ACCESS TO REMAINING MINERALS

Where there are remaining minerals on site which are still capable of being exploited, the operator may seek to sell the mine to a third party and transfer responsibility for undertaking rehabilitation and closure. This can deliver positive outcomes for the outgoing operator, purchaser and state, as well as local communities through the continued development of remaining resources.

While this may be an attractive option, it is important to ensure risk is properly transferred to the purchaser. The sale agreement should identify precisely the extent of rehabilitation activities that have already been undertaken and clearly delineate responsibility for future rehabilitation obligations as between the outgoing operator and purchaser. Appropriate indemnities and releases should be sought from the purchaser to manage the risk of claims against the outgoing operator arising from a failure by the purchaser to properly remediate going forward, particularly where the asset being sold is in Queensland (in light of the chain of responsibility legislation).

The transfer of a mine to a third party ahead of completion of rehabilitation can attract significant regulatory scrutiny, particularly where the purchaser is a little known or relatively small company in comparison to the outgoing operator. Demonstrating suitable arrangements are in place between the parties for the provision of ongoing rehabilitation bonds can assist to allay regulator concerns. It is not unusual for the outgoing operator to provide some transitional support towards the cost of rehabilitation, as occurred in the sale of the Gregory Crinum Mine in 2019.

## MANAGING MINE REHABILITATION AND CLOSURE DURING INSOLVENCY

When a mine operator becomes insolvent and is placed into administration, there are generally three options open to the administrator:

1. seek to identify a purchaser for the asset (either immediately or after some 'mothballing' period if market conditions are anticipated to improve);
2. take steps to close the mine; or
3. put the company into liquidation, in which case the liquidators may be able to disclaim the mining tenements and any associated land, but only if the property qualifies as an 'onerous asset' (eg because the land is burdened with an onerous covenant or the costs of rehabilitating the tenements would exceed the proceeds of any realisations).

For as long as a company remains in administration, the administrators may be personally liable for any breaches of requirements under the relevant mining tenements, including rehabilitation obligations, where they knew or ought to have known that the breach was occurring and failed to take reasonable steps to prevent the breach. This means administrators must ensure that rehabilitation activities continue to be undertaken by the company during any period of administration, where required.

If a viable purchaser cannot be identified who is able to assume liability for rehabilitation and closure and the company is not able to complete rehabilitation itself, it is open to the regulator to step in and call on the company's rehabilitation bonds (if any). Alternatively, the administrator may agree to oversee rehabilitation if this is likely to deliver a better outcome for creditors than forfeiting rehabilitation bonds.



# About Allens

Allens has one of the leading mining practices in Australia, having advised numerous Australian and international resources companies on major mining projects in all states and territories. Allens' planning and environment experts have extensive experience assisting clients to obtain state and federal approvals for major mining projects, and advising on the management of environmental incidents and risk, rehabilitation requirements and tenement issues.

## HOW WE CAN HELP

We would be happy to provide further information regarding the regulatory requirements for mine rehabilitation and closure, and to work with you to develop strategies for minimising residual risk, tailored to your business and specific assets.

## TO SPEAK TO ONE OF OUR EXPERTS, PLEASE CONTACT:



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## ENDNOTES

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- ii Vlado Vivoda, Deanna Kemp and John Owen, 'Regulating the social aspects of mine closure in three Australian states' (2019) 37(4) *Journal of Energy & Natural Resources Laws* 405, 409.
- iii Senate Environment and Communications References Committee, Parliament of Australia, 'Rehabilitation of mining and resources projects and power station ash dams as it relates to Commonwealth responsibilities' (Report, March 2019) 16.
- iv Campbell et al (n i) 10.
- v Ibid 8.
- vi Senate Environment and Communications References Committee (n iii) 56, citing research by C Unger et al, 'Mapping and prioritising rehabilitation of abandoned mines in Australia', Life-of-Mine Conference 2012, 7. (Note: This research suggests there are over 50,000 abandoned mines within Australia, but notes that what is categorised as an 'abandoned mine' varies from state to state and that some states include individual shafts as sites. We also understand that some data sets may include not only mines that have been abandoned, but also mines with any legacy environmental issues).
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- ix NSW Government, 'Improving mine rehabilitation in NSW', (Discussion Paper, November 2017) <<https://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Mine-Rehabilitation-Discussion-Paper>>.
- x Senate Environment and Communications References Committee (n vi) 44.
- xi Victorian Auditor-General's Office, 'Rehabilitating Mines' (Independent assurance report to Parliament, August 2020) 4.
- xii Western Australia has retained bond requirements for certain 'high risk' mine sites, however, the majority of mine operators in Western Australia are not required to provide rehabilitation bonds.
- xiii Senate Environment and Communications References Committee (n iii) 96.
- xiv Commonwealth Department of Environment and Energy, 'Submission No 1 to Senate Environment and Communications References Committee, Rehabilitation of mining and resources projects and power station ash dams as it relates to Commonwealth responsibilities' (5 April 2017) 1.
- xv Australian Government (n viii).

