

IN THE MATTER OF THE HAZELWOOD MINE FIRE INQUIRY

REPLY TO THE FURTHER SUBMISSIONS OF THE STATE OF VICTORIA DATED 23 JUNE 2014

1. GDF Suez Australian Energy (“**GDFSAE**”) responds to the further written submissions of the State of Victoria to the Board of Inquiry contained in VGSO’s letter dated 23 June 2014 (“**State’s Further Submissions**”) as set out below.
2. References are to the numbered paragraphs of the State’s Further Submissions.

THE FIRE IN THE MINE AND THE RESPONSE

(Paragraphs 9 – 45)

3. As regards paragraphs 9 and 10, at no time did GDFSAE submit that it is without responsibility for suppression of fire at the Mine, and nor did GDFSAE make any submissions which are inconsistent with the duties contained in section 34 of the *Country Fire Authority Act 1958* (Vic) (“**CFA Act**”).
4. The State’s submission misrepresents GDFSAE’s submissions dated 17 June 2014 (“**GDFSAE’s Written Submissions**”). Paragraph 119 of GDFSAE’s Written Submissions concerned the 45 day fire fighting operation at the Mine, which was led by the Country Fire Authority (“**CFA**”) as the party with statutory powers and responsibilities with respect to fires under the CFA Act. Paragraph 119 referred to Hazelwood’s heavy involvement in the fire fighting activities at the Mine, in conjunction with the CFA, as follows:

The joint fire-fighting effort

119. *The CFA had statutory responsibility for the suppression of the fire activity at the Mine which commenced on 9 February 2014. Notwithstanding this, employees and contractors of the Mine continued to be heavily involved in the suppression effort with the CFA.*

This is correct. It is also consistent with the CFA taking formal control of the response on the evening of Sunday, 9 February 2014.¹

5. Further, as regards Hazelwood’s efforts to suppress the fire activity at the Mine on Sunday, 9 February 2014:

¹ Statement of Craig Lapsley (Exhibit 1), [95]; Lapsley, T51.14 - 17.

- evidence was provided by a range of Hazelwood witnesses including David Shanahan, James Mauger, Steven Harkins, Romeo Prezioso and James Faithful, regarding the efforts of the Mine employees and contractors;
- George Graham, Asset Manager, in his evidence on 13 June 2014 stated that “*we do understand that the CFA may be committed at different times to different events and more stretched than others*”²; and
- as outlined in various documents tendered to the Inquiry³, and in the evidence of David Shanahan, Robert Dugan, Steven Harkins, Romeo Prezioso and James Faithful, the Mine’s operations are conducted in reference to detailed fire and emergency policies and procedures, the Mine maintains extensive fire services infrastructure (fixed and mobile) which is deployed in the event of a fire, and the Mine has a workforce trained in responding to fires. These resources and systems are in place at Hazelwood, in acknowledgement of its responsibilities in relation to fire suppression.

6. As regards paragraph 11, GDFSAE submits that:

- the evidence is clear that there were limited CFA resources available to assist with fire suppression at the Mine on Sunday, 9 February 2014 due to other demands, something which the State itself has emphasised before the Inquiry (including because of the threat posed by the Hernes Oak fire to Morwell and the fire at Jack River)⁴;
- the limited assistance from the CFA on Sunday, 9 February 2014 was one of four principal reasons for the failure to contain the fires within the Mine, outlined in paragraph 101 of GDFSAE’s Written Submissions;
- Steven Harkins gave evidence that:
 - the multitude of individual fires within and around the Mine on Sunday 9 February 2014 (particularly between 2pm and 5pm) reduced the number of Mine personnel at each fire location⁵; and
 - Mine personnel alone were unable to contain the fires on the overburden dump, Northern batters and Southern batters⁶;

² T2243.17 – 23.

³ See for example Exhibits 11, 12, 66.

⁴ Lapsley, T110.10 – 111.11; T113.

⁵ First Statement of Steven Harkins (Exhibit 10), [109].

⁶ First Statement of Steven Harkins (Exhibit 10), [110].

- David Shanahan gave evidence that the fires on the Northern batters and Southern batters fires grew significantly in size between 2:30pm and 6:30pm⁷, which was a period during which minimal CFA assistance was provided;
- James Mauger gave evidence that the Mine workforce were overwhelmed by the extent of the northern batters fire⁸; and
- a CFA volunteer gave evidence that by the time he arrived at the Mine on Sunday 9 February 2014, the fires were so extensive that he considered they would take months to put out⁹.

7. As regards paragraph 18, GDFSAE submits that:

- there is a range of essential infrastructure within the Latrobe Valley in addition to the Mine such as the Loy Yang mine, Yallourn mine and potentially the Australian Paper Mill that would benefit from CAFS in the event of a fire;
- it would be far more efficient for the State of Victoria's fire fighting authorities to have appropriate mobile firefighting equipment such as CAFS available for deployment within the Latrobe Valley where needed in the event of fire, rather than for each individual mine and relevant business to have the equipment. CFA witnesses before the Inquiry gave evidence that fire fighting agencies in Tasmania, ACT and NSW have CAFS equipment (some of which was made available to the CFA for the purposes of the present Mine fire)¹⁰;
- Hazelwood pays a substantial fire services levy to the State of Victoria, as detailed in Attachment A to GDFSAE's Written Submissions. The owners of the other essential infrastructure within the Latrobe Valley likely do the same. A portion of these levies could be directed towards the procurement of appropriate mobile firefighting equipment such as CAFS for the Latrobe Valley; and
- Commissioner Lapsley himself gave evidence that:
 - there is a need to increase the availability of first response equipment in the Latrobe Valley to include CAFS and thermal imaging cameras¹¹; and
 - there needs to be an improvement in the current capability of first response vehicles to provide aerial appliances (elevated nozzles)¹².

⁷ Statement of David Shanahan (Exhibit 7), [79], [84], [90].

⁸ Statement of James Mauger (Exhibit 8), [42] – [43].

⁹ Lalor, T450.3 – 10.

¹⁰ Barry, T567.15 - 27, T568.2-7; Lapsley T74.13 - 24.

¹¹ Statement of Craig Lapsley (Exhibit 1), [207.1].

8. As regards paragraph 27:

- as outlined in GDFSAE's Written Submissions at paragraphs 48 – 66, the evidence is clear that the only Phoenix modelling which GDFSAE received was a model date/time stamped Monday 10 February 2014 at 1:59am, which was forwarded to Alan Roach late on the afternoon of Saturday 8 February 2014 by a third party, Nick Demetrious, the Chairman of the Central Gippsland Essential Industry Group (“**CGEIG**”);
- contrary to the State's submission, Alan Roach did seek an explanation of the single Phoenix model forwarded to him by Mr Demetrious on the evening of Saturday 8 February 2014¹³ - in particular from the person who sent it to him. Mr Roach sought a better understanding of what it meant from Mr Demetrious on the evening of Saturday 8 February 2014¹⁴, and sought further information from Mr Demetrious on the following morning¹⁵; and
- the criticism that appears to be levelled at Hazelwood is misplaced given that Mr Jeremiah, the Incident Controller at the ICC, left it to a third party such as Mr Demetrious to pass on the modelling.

ISSUES OF REGULATION

(Paragraphs 117 – 136)

9. As regards paragraph 125, the evidence before the Board is that the Mine was in compliance with the 1994 Fire Service Policy¹⁶. Further, GDFSAE submits that:

- it was not put to any of the GDFSAE witnesses that Hazelwood is not compliant with the 1994 GV Fire Service Policy and Code generally or with respect to the northern batters; and
- it is a requirement of the 2009 Work Plan Variation, that the Mine conduct its operations in general compliance with the 1994 GV Fire Service Policy and Code¹⁷. Kylie White, Executive Direction of the Earth Resources Group at the Department of State Development, Business and Innovation, stated in her evidence that she was unaware of any instances of non-compliance with the Work Plan (as regards

¹² Statement of Craig Lapsley (Exhibit 1), [207.3].

¹³ Roach, T635.15 – 636.24.

¹⁴ Roach, T636.16 – 36.

¹⁵ Roach, 638.2 –7; T639.2 – 7; T641.21 – 642.9.

¹⁶ Polmear, T2060.23 – 2061.6; Graham, T2272.1 - 18.

¹⁷ Work Plan Variation, Mining Licence 5004, approved 11 May 2009, section 5.4.4, page 5-17 (Exhibit 66, Tab 6).

progressive rehabilitation)¹⁸, or with the *Mineral Resources (Sustainable Development) Act 1990* (Vic)¹⁹.

10. As regards paragraphs 126 and 127, GDFSAE submits that:

- Mr Neist is the Executive Director of Health and Safety at the Victorian WorkCover Authority (“VWA”). As a VWA senior executive, he no doubt possesses a high degree of familiarity with the interpretation and practical application of section 23 of the OHS Act. When giving evidence, Mr Neist expressed no need to have recourse to legal advice on the interpretation of section 23 of the OHS Act. Indeed, he demonstrated a willingness to engage in subtle analyses of circumstances in which a fire in the worked out batters of a mine may or may not enliven section 23 – including by reference to the question whether the fire in question originated within or outside the mine and the nature of its impact on the mine and others²⁰;
- the State’s Further Submissions do not explain what legal advice has been obtained by the State in relation to the interpretation of section 23, and whether, if such legal advice exists, it contradicts Mr Neist’s evidence with respect to the application of the provision;
- it is, in any event, unlikely that is necessary for the Board to express a concluded view with respect to the interpretation of section 23 of the OHS Act, it being a legal question and one likely to admit of different possible answers in different circumstances; and
- no such legal advice was put to Mr Neist or any other witness.

11. As regards paragraph 130 (and noting the correction recently made to the closing Submissions of Counsel Assisting with respect to regulation 5.3.8)²¹, GDFSAE submits that:

- neither Professor Cliff, Mr Incoll, Inspector Hayes nor Mr Neist opined that GDFSAE had contravened Regulation 5.3.8 either by reason of its approach to rehabilitation or otherwise;
- it was not put to any witness of GDFSAE that it had contravened regulation 5.3.8 either by reason of its approach to rehabilitation or on any other basis;
- the relevant requirement under regulation 5.3.8(1) of the *Occupational Health and Safety Regulations 2007* (Vic) is for the operator of a mine to adopt risk control measures that eliminate so far as is reasonably practicable risks to health or safety

¹⁸ White, T1678.10 – 20.

¹⁹ White, 1642.19 – 22.

²⁰ Neist, T1814.4 – T1824.10.

²¹ Justine Stansen’s email dated 19 June 2014 notified the parties of an error in Counsel Assisting’s outline of submissions distributed on 17 June 2014, whereby at paragraph (34)(b) of section 4.1 and at paragraph (1)(b) of section 4.3, the reference to regulation 5.3.7(3) should be a reference to regulation 5.3.8.

associated with any mining hazards at the mine, or if it is not reasonably practicable to eliminate those risks, reduce those risks so far as is reasonably practicable. This is in contrast to a duty to implement the “most effective approach”, as suggested in the State’s Further Submissions;

- Mr Neist in his evidence acknowledged that “*given the cost or feasibility of rehabilitation, given the likelihood of a fire and degree of harm that might result from it, rehabilitation is unlikely to be considered a “reasonably practicable” control measure for dealing with this particular hazard in the context of occupational health and safety*”²²; and
- there was no evidence put before the inquiry to contradict Neist or otherwise support a finding that Hazelwood breached this regulation.

12. In relation to paragraph 134, the evidence of Kylie White and James Faithful exposed that there are issues in relation to the proper interpretation of the requirements within the 2009 Work Plan Variation as regards the progressive rehabilitation of the Mine (and in particular whether certain rehabilitation works need to be commenced, or completed by 2019). GDFSAE submits that there is no basis upon which the interpretation put forward by Mr Faithful could be said to be “not justifiable”. GDFSAE further refers to paragraph 296 of GDFSAE’s Written Submissions.

13. As regards paragraph 136:

- GDFSAE has not suggested that an assessment of fire risk reduction be undertaken jointly with regulators. Instead, George Graham indicated that a review will be undertaken by external consultants working with Hazelwood personnel of the current pipework and condition in the areas of the Mine other than the eastern section of the Northern batters, and that the outcome of the review would be made known to DSDBI and VWA²³;
- it is difficult to understand how it is said that GDFSAE has failed “*to recognise that the list set out in the second State submission is not definitive...*”, in circumstances where the second State submission was only supplied to GDFSAE after all of the evidence had been adduced, and GDFSAE’s written and oral submissions had been provided;
- GDFSAE is not focussed on only meeting explicit legal requirements as regards the Mine. Evidence was adduced throughout the course of the Inquiry on Hazelwood’s focus on continual improvement²⁴. Further, evidence was adduced concerning

²² Statement of Neist (Exhibit 70), paragraph 29.

²³ *Mine fire inquiry: proposals for improvements* (Exhibit 94), Fire risk mitigation, Pipework, p.5.

²⁴ Graham T2272.8 – 2273.21.

improvements in Hazelwood's systems and processes for managing the risk of fire within the Mine, including:

- regular training exercises with the local CFA²⁵;
- the introduction of the *Guidelines and Checklist for Season and Period Specific Fire Preparedness and Mitigation Planning*²⁶;
- the introduction of the regular inspections of known hot spots within the Mine²⁷;
- the use of thermal imaging cameras²⁸;
- the procurement of 30,000L tankers, to be available during high risk periods²⁹;
- the introduction of weekly reports to senior management on a range of fire preparedness measures³⁰; and
- the expansion of the Annual Audit of fire services infrastructure to include worked out batters³¹.

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²⁵ Statement of Robert Dugan (Exhibit 13), [23], [35].

²⁶ Statement of Romeo Prezioso (Exhibit 93), [53].

²⁷ Statement of Romeo Prezioso (Exhibit 93), [99] – [102].

²⁸ Statement of Romeo Prezioso (Exhibit 93), [43], [103].

²⁹ Statement of Robert Dugan (Exhibit 13), [25].

³⁰ Statement of Romeo Prezioso (Exhibit 93), [113]; Statement of Robert Dugan (Exhibit 13), [34]; First Statement of Steven Harkins (Exhibit 10), [18]-[19].

³¹ Statement of Romeo Prezioso (Exhibit 93), [106]-[108].