Submission to the Northern Territory Parliament Scrutiny Committee

Environmental Protection Bill 2019

ASSOCIATION OF MINING AND EXPLORATION COMPANIES

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CONTENTS

Prepared by

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The Association of Mining and Exploration Companies (AMEC) is the peak national representative body for hundreds of companies in the mining and mineral exploration sector, many of which have projects in the Northern Territory.

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EXECUTIVE SUMMARY

Industry cares about the environment and wants to make sure it achieves the best possible, sustainable outcomes. Industry understands the community expectation to meet high standards of environmental stewardship.

Mining provides all the minerals necessary for renewable energy, carbon efficient technologies and electric vehicles. Mining also delivers jobs and opportunities in remote areas applying cutting edge technology.

Mining underpins a large portion of the economy and offers a pathway to unlock future economic growth and investment across the Territory.

The Northern Territory Environmental Protection Bill will determine how development proceeds across the Territory. This Bill is the first of at least two parts of environmental legislative reform and is occurring as a part of a range of other wide sweeping reforms.

It is important for the Scrutiny Committee to acknowledge that this legislative reform does not occur in isolation. The Territory Budget faces constraints and there is a clear need for greater private investment.

For Industry, the cost of doing business, the length of whole of Government timeframes for approvals and the complexity of regulation are all factors that shape their engagement with the Territory. This Bill is likely to increase the costs and timeframes faced by potential investors in the Territory.

The Scrutiny Committee has a vital role in robustly examining the impact of this legislation.

The key issue in this legislation is the premise that the Environment Minister will be the final decision-making authority on mining approvals. With the current drafting of the legislation, the Minister will not be obliged to weigh the economic benefits that mining brings to the Northern Territory in their decision.

The Environment Minister will be bound to respond to the advice from the Northern Territory Environmental Protection Authority (NT EPA). This Act gives the NT EPA the responsibility of advising whether a project is environmentally acceptable or otherwise. Following this recommendation, without a requirement for the Minister to weigh other considerations, it is then practically and politically difficult, to go against the recommendation of the EPA. In essence, this puts the EPA in a decision-making role, not an advisory role.

The current draft Bill invests considerable power in the NT EPA to determine what is environmentally significant, and ultimately whether a project proceeds.

What environmental impact is considered significant has not been clarified. For Industry this is a considerable concern as the quantum of significance will determine the resources and time necessary for approval. This will determine whether projects are invested in.

This Bill includes wide reaching provisions that will reshape how business is undertaken. The expansion of criminal liability to partners and occupiers of the approval holder will impact how joint ventures are organised in the Territory. This will have ramifications for the financing of projects and may turn away some companies. While the additional grounds of 'reasonableness', which AMEC called for, are a welcome improvement, there are additional improvements that can be made such as defining the hierarchy of liability.

This submission directly comments on a number of other specific concerns within the draft Bill. A final overarching concern is that due to the manner in which the reforms are being undertaken,

a lot of details remain unknown. For example, Part 8 refers to Practitioners and Auditors, and entirely depends on the yet to be seen redrafted regulations this could be a benefit or a detriment for the Territory.

The Territory Government commissioned a Regulatory Impact Statement to explore many of the concerns raised by Industry. This document should be publicly released and discussed.

This draft legislation demands the close attention of the Scrutiny Committee.

REGULATORY REFORM PROCESS SO FAR

Scale of reform

As Industry has made clear multiple times during the consultation process, there are substantial concerns regarding the breadth of the reform process. The Northern Territory Government is undertaking changes across environmental, water, climate change, and a proposed social policy. The sheer number of reforms and have raised concern that insufficient attention from business can be given to the environmental changes proposed.

Changes between drafts

The legislation tabled in Parliament differs from the legislation consulted upon with Industry. From one perspective, this is positive. A number of the reforms were called for by AMEC, such as the reduction of those considered to have standing for injunctions and merit's-based reviews.

However, an apprehension of Industry is that areas that attracted criticism have not been addressed as part of the Bill.

As AMEC have outlined in previous submissions to the Government, the currently proposed (at least) two stage process to environmental reform feeds this concern. It is difficult to track the consequential impacts of reforms to legislation in a single piece of legislation, let alone when it is done over two Bills and over two years. The Government's decision to postpone drafting regarding general environmental duty, establishment of environmental protection policies, and residual risk payment frameworks is politically expedient.

Furthermore, the regulations were initially consulted upon with the original consultative draft. The decision has been taken to delay the entry of the Regulations into Parliament. As many parts of the Act shift the mechanics to the regulations it is difficult to ascertain the impact of the wording choice in the legislation. This is a considerable frustration for Industry.

Cumulative impact of the regulatory reforms

The proposed environmental legislation must be considered in the context of the broader Northern Territory economy. In December 2018, the Government announced that it was in $4million a day deficit and that reform was needed to the Budget. John Langoulant AO was engaged to prepare a *Plan for Budget Repair*, this document outlined a number of recommendations to address the 'exceptionally challenging circumstances' faced by the Territory.

The first two recommendations were particularly relevant to this legislation:

- *Recommendation 2.1: Reform the current major projects process to expedite and improve the efficiency of project approvals;*
- *Recommendation 2.2: Develop a microeconomic reform roadmap with the key objective of making the Territory a globally competitive capital investment destination.*

This suite of environmental reform had its genesis before the formulation of the *Plan for Budget Repair*. There may be a temptation to consider environmental approvals in isolation. However, for a company considering whether to invest in the Territory, all approvals and costs must be considered cumulatively.

It would be appropriate for the Scrutiny Committee to independently analyse how this legislation will fit with the pre-existing approvals process.

A foundation for this analysis would be Regulatory Impact Statement that the Territory Government undertook considering the effect of these reforms on the pre-existing Territory regulatory framework. Given the importance of these reforms to Industry across the Territory. The tabling of this RIS in Parliament before the Scrutiny Committee would provide an answer to the question of the impact of the environmental legislation on the efficiency of project approvals.

It should be logical to assume that whatever concerns were raised in the RIS are answered by the latest draft of the legislation. Therefore, the publication of this document for reason of transparency and accountability should be acceptable.

SPECIFIC CONCERNS WITH THE DRAFT LEGISLATION

The following concerns are listed as they occur throughout the legislation.

Part 1

Expansion of the Objects of the Act

The objects of the Act have expanded since the consultation draft was circulated.

In the second Object, (b), the term "wellbeing" is used for its only time in this Act. It is a highly ambiguous and subjective term. The Merriam Webster dictionary defines wellbeing as: "*the state of being happy, healthy, or prosperous*"[1].

The definition of environment includes the terms "social, economic and cultural". A definition that AMEC opposes as being far too broad. However, if the Government insists on such a broad definition of environment, it should correspondingly balance all parts of its definition of environment within the objects.

AMEC recommends that the Government amend Clause B to insert the "social, economic and cultural" as adjectives to greater definer the term 'well being'. This will reduce ambiguity and elevate the consideration of these important aspects.

Significance

How level of environmental assessment is determined is not answered in this draft legislation or the associated guidance material since published. The Government has consistently refused to provide specifics around the thresholds stating that every proposal would be considered on a case by case basis.

The lack of case studies, information or guidance explaining what is considered significant, and what is not, is a pivotal concern for industry.

This Bill offers no clarity or 'significance test' of what will be significant and what will not be.

[1] https://www.merriam-webster.com/dictionary/well-being (Accessed 12.06.2019)

Since the consultation draft, a new concept of “material environmental harm” has been introduced. This is for environmental harm that is ‘less serious’, it is difficult to quantify how the Government will interpret and implement this.

Definition of the Environment

The definition of the Environment underpins this legislation. Industry considers that this definition of environment is too broad and should focus only on the natural environment. The current definition is inclusive of physical, biological, economic, social and cultural aspects.

This definition does articulate a clear boundary of what is considered. It does not provide certainty, as almost any matter can be considered under the current definition of environment. These matters are not then considered in the decision-making principles articulated in Part 2.

It also gives the impression that the EPA has seriously considered the economic and social benefits of a proposal, when it is does not have sufficient expertise to do so.

Part 2

Principle of economic competitiveness

In the original draft legislation, the Government included an economic principle under the Principles of Environmentally Sustainable Development, in Part 2, Division 1.

AMEC questioned the choice of wording of the ‘Principle of the economic competitiveness’ that appeared in the first draft of the Bill as a broad, difficult to measure, collection of motherhood statements. This draft of the Bill does not include a principle of economic competitiveness at all. This principle needs to be included and clearly articulated.

A principle of economic competitiveness should be included that stipulates that the NTEPA must enumerate the estimated costs, jobs, potential royalties, taxes and comparative advantage such a development will create in the Territory.

As discussed earlier, currently the term “economic” is included in the definition of environment. Throughout the legislation there is no other guidance to how the NT EPA should weigh this important factor. However, the importance of the economic and social benefits of a proposal, should be required to be considered by the Minister in weighing the final decision. If necessary, the Minister should be able to separately access expert advice from other relevant agencies and departments. To exclude these elements from expert advice would lead to suboptimal decision making.

Principles of Ecologically Sustainable Development

The Principles outlined in Division 1 of Part 2 are very broad. Clause 2 of Section 17 states that a decision-maker *must* consider and apply these principles. However, the subsequent Clause 3 of Section 17 states that the decision-maker is under no obligation to state how these reasons were applied.

Clause 3 should be removed from the legislation as it reduces the transparency of Government decision making.

Decision making principle and Intergenerational equity

The extension of our current preferences and obligations into the future is to be questioned, as there is uncertainty regarding the perspective and situation of future generations of Northern Territorians.

Part 2, Division 1, Section 18, Clause 1 and Section 21 of the same Division are duplicative as they essentially state the same thing.

Section 21 could be argued as an argument for the maintenance of status quo. The current definition includes the term 'health' of the environment which is the only reference to the term in the Bill. It is unclear how that subjective term should be considered.

Precautionary Principle

Industry considers that this principle is weighed against any activity where the Government is uncertain of the outcome and provides an outlet to excuse not making a decision. It raises questions over what is determined to be sufficient certainty.

Part 3

Declaration of Protected Environmental Areas and Prohibited Actions

In the Territory, 67 sites are identified as Sites of Conservation Significance, 'the most important sites for biodiversity conservation that need further protecting'[2]. There is also RAMSAR wetlands, national parks and reserves. Over 5 million hectares of the Territory are successfully protected under the existing legislative mechanisms in national parks, reserves and wetlands.

Part 3, Division 3, allows for the creation of temporary and permanent "Protected Environmental Areas", essentially a new type of conservation estate.

It is unclear why the Government has chosen to create new instrument of "Protected Environmental Areas" through Division 2, Part 3. The Territory has some of Australia's (and the World's) most iconic national parks. Furthermore, the capacity to create conservation estate already exist in other legislation. The existing legislation appears to be achieving the desired outcome of creating conservation estate.

The entire Division is duplicative and unnecessary.

The Minister, the CEO and Environmental Officers have sufficient powers under the legislation to stop an activity as detailed through Part 9 of the Act.

The provisions for prohibited actions incorrectly suggest that there are activities that the Government cannot manage through regulation. Prohibition also pre-empts any innovative solution that may be entirely environmentally acceptable, or even positive. Due to the Section 44, under Part 4 Division 1 later in the Act, these innovative solutions would not even be considered by the Government.

[2] https://nt.gov.au/environment/environment-data-maps/important-biodiversity-conservation-sites/introduction

Part 4

Government projects must be included

It is unclear whether the Environmental Protection Bill includes all Government projects such as roads and infrastructure. There has been concern from some within Industry that the Territory Government will not be expected to adhere to this legislation. The NT Government should be subject to its own environmental legislation, as Government projects also affect the environment.

Part 5

Prevalence of Environmental legislation (Section 92)

Section 92 appears to overrule the sovereignty of Parliament of the Northern Territory. This is an addition that was not consulted upon with Industry. It appears to grant the Environmental Minister a portfolio capable of overruling all other considerations.

AMEC suggest that this Section is unnecessary as all Government approvals should have similar legislative consideration and weighting.

Role of NT EPA on unacceptable impact

Sections 75 – 80 outline how the Environment Minister must make a decision on when the NT EPA has decided, of its own volition, that a project is not acceptable to the Northern Territory.

In the current drafting, the Minister is faced by a choice between accepting the statement given by NT EPA and declaring that a project has unacceptable impact; or disagree with the advice given and deliver an opposing view with published reasoning. In the circumstance when the Environment Minister disagrees, the Minister will be under resourced to undertake the task as the agency they will have to rely on will have given them opposing advice. Thus, it is very difficult for the Minister to determine a view different to the NT EPA.

Ministerial approval

AMEC is opposed to the final approval for a mining project or any other development process being entirely dependent on the Environmental Minister. This establishes an environmental approval as a veto over all other approvals.

It should be relatively easy for the Scrutiny Committee to foresee a dispute where an approval may be in the benefit of the Territory but has been vetoed by an environmental approval. AMEC suggests that a section be added to resolve a dispute between a development approval and an environmental approval.

This situation is made more complex when the NT EPA determines that a project is environmentally unacceptable.

In the Western Australian *Environmental Protection Act 1986* legislation, the Governor provides an outlet if there is a conflict between two approvals. Section 48J of that Act reads:

48J. Decision of disputes between Minister and responsible Ministers

If the Minister and a responsible Minister cannot agree —
(a) on whether or not the Minister should give advice under section 48A(2)(b) in relation to a scheme;
(b) under the relevant scheme Act on whether or not an environmental review has been undertaken in accordance with the relevant instructions issued under section 48C(1)(a);
(c) on whether or not a direction should be given to the Authority under section 48D (2) or 48E(1) or, if a direction should be so given, what its content should be;
(d) on whether or not the scheme to which a report relates should be subject to conditions under section 48F or, if that scheme should be so subject, to what conditions it should be so subject; or (e) on whether or not conditions referred to in section 48G (2) should be altered and, if so, to what extent, the Minister and the responsible Minister shall refer the matter in dispute to the Governor and the decision of the Governor on that matter shall be final and without appeal.

The Western Australian Governor relies on the Cabinet to provide them with advice, so this provision effectively shifts dispute resolution to Cabinet, where all considerations can be weighed.If there were a dispute between two Ministers, or an outcome where an Environment Minister where the Environment Minister has to overrule the advice of the NT EPA, it would be beneficial to have the option of a Cabinet approval.

While the Government may currently consider such a conflict an unlikely outcome, however the legislation should be future proofed against such a foreseeable possibility.

In other jurisdictions it has been found that the Government may weigh the evidence presented differently than as prepared by the Environmental Protection Agency. The addition of a provision as proposed allows the Environment Minister, and the Cabinet, the capacity to grant an environmental approval.

This is particularly important for this legislation as the definition of environment includes “economic, social and cultural” factors. However, it provides little guidance to the NT EPA as whether to weigh the economic factor at all.

This is extremely concerning as the Minister is obliged by this legislation to consider the advice of the NT EPA. If the advice from the NT EPA does not include any consideration of the economic, such as jobs, technology and wealth creation, then a strict reading of the legislation could mean that the Minister does not need weigh these realities in their decision.

Section 73 which specifies what the Minister must specifically weigh in decision does not include the social or the economic benefits with the environmental benefits when making a decision for environmental approval. This should be corrected.

Part 7: Financial Provisions

Use of Environment Protection Bonds

Section 128, specifies the purposes of the Environment Protection Bond. Clause E is extremely open ended, it gives the CEO the power to use the Bond for anything relating to this Act. Traditionally, environmental bonds have been focussed on prevention, remediation and rehabilitation of environmental impacts. Clause E, steps beyond this definition to allow the Government to effectively use the bond for whatever it chooses.

Two obligations must be placed on the usage of Environmental protection bond: firstly, the approval holder must be notified in writing by the CEO to increase transparency; and the approval holder should be allowed to appeal the use of their Bond.

Interest on Environmental Protection Bonds

The interest accrued on the Environmental Protection Bond held should not be transferred to the Consolidated Account. The clear intent of this Part is the use of financial instruments to ensure the remediation, rehabilitation and post-closure monitoring and reporting, not to finance the Territory consolidated account.

The Scrutiny committee must add a clause to Section 130 to retain all proceeds accrued to the Environmental Protection Bond Account.

Division 2 Environment Protection Levy

AMEC is opposed to the introduction of an Environment Protection Levy. This is duplicative of the Bond provisions and is a purely revenue raising exercise by the Government.

The broad definition under Section 133, Clause 2, allows the CEO to use the fund for essentially whatever purpose they see fit.

The lack of transparency and reporting on the use of this levy is a concern for industry. The legislation should have clear transparency and probity provisions around the levy requiring a report to be tabled in Parliament annually accounting for:

- what amount was raised;
- what the levy was used for;
- what outcomes were achieved.

There has been little clarity provided as to the scale of these extra costs on Industry.

Division 3 Environment Protection Fund

AMEC is opposed to the creation of Environment Protection Funds. The protection of the environment is already funded through Government taxes, separate funds beyond the line of sight of Parliament are not necessary.

The lack of transparency and reporting of these proposed funds is a concern for industry. The legislation should have clear transparency and probity provisions requiring a report to be tabled in Parliament annually accounting for:

- what amount was raised;
- how decisions were made to use the funds;
- how the industry who contributed to the fund was consulted on the use of these funds (a logical extension of the objects of this proposed Bill); and
- what outcomes were achieved.

Despite opposing these Funds, the following clauses are supported:

- Section 137, Clause 4, that ensures the interest raised remains within the fund; and
- Section 138, Clause 4 that hypothecates the funds to a specific industry is supported.

Part 8 Practitioners and Auditors

Without the necessary and associated regulations, it is difficult to comment on the purpose and effectiveness of the wording of this Part of the legislation.

However, the licencing of Practitioners and Auditors should be considered alongside Milton Freidman's Chapter 8 of his book Capitalism and Freedom, which makes an extensive argument against licensure as a monopolistic practice. An argument repeated by then President Obama's Council of Economic Advisors, which issued a framework to roll back primarily state based occupational licencing in 2015[3].

AMEC would also suggest it should be considered alongside the Northern Territory Government Commissioned Langoulant *Plan for Budget Repair* issued earlier this year.

Occupational licencing is likely to increase costs. The implicit assumption is that creation of practitioners and auditors will improve outcomes. So, alongside these provisions should be consideration to measure performance to see if the assumption is correct.

[3] https://www.scribd.com/doc/272814969/CEA-report-on-occupational-licensing?secret_password=piRg7qvS7TeQVHAmSiNX

Part 9 Enforcement

The Environmental Protection Officer has been granted very broad powers under this legislation.

Entry on Aboriginal land

Under Section 109 of the Australian Constitution, "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The Scrutiny Committee should consider whether this provision applies to the entry onto *Aboriginal Land Rights Act* land as per Section 165.

Environmental Protection Notices

Section 185 refers to the lodging of Environmental Protection Notices with the Registrar General, currently placing the lodging of the document at the discretion of the CEO. For transparency, and in particular for Environmental Protection Notices issued under Section 179 that permit acts or omissions in contravention of the Act, they should be registered. The language should be shifted in this Section from 'may' to 'must'.

NT EPA may issue stop work notice

Fact Sheet 6 that was issued by the NT Government subsequent to the Bill's introduction to Parliament outlined a policy intent for the NT EPA as an advice-giving agency engaged in the Environmental Impact Assessment. The second page of the Factsheet had a simplified table that states the NT EPA will not be a regulator of environmental management[4]. This view of the role of the NT EPA has been consistently articulated throughout the consultation process.

It seems incongruent to this vision of the NT EPA as an advice-giving independent agency that Section 194 to 198 allows the NT EPA to issue stop work notices. This power should reside with the CEO of the Department, as the regulator, would surely be more appropriate.

Part 11

This Part 11, and its implementation, will have a substantial impact on the structuring of financing and companies operating in the Northern Territory. The scrutiny committee must consider the impact of this Part of the Act on the cost of business of operating in the Territory.

Criminal Liability of executive offices of body corporate

Under Section 265, Clause 8, the definition of a relevant offence has been included. This is a notable improvement on the consultation draft. However the relevant offence definition should be tightened. The inclusion of subsection (b) which refers to a breach of a regulation, as a criminal offense is excessive. If a transgression of a regulation has been sufficiently environmentally damaging to warrant prosecution it is highly likely to have also been a specified environmental offence. Furthermore, without the regulations it is difficult to be supportive of such a provision. AMEC recommends that subsection (b) is excluded.

[4] https://denr.nt.gov.au/environment-information/environmental-policy-reform/environment-protection-bill-2019

Liability of partners and unincorporated associations

Section 266 will have a negative effect on the joint venture structure frequently adopted in mining and mineral exploration. A joint venture can take many forms. A common type is a "farm in" that gives of an ownership interest in the principal mining company's project, subject to the farm-in party achieving certain expenditure commitments over an agreed period of time.

AMEC considers that a hierarchy of liability starting with the environmental approved holder or alleged transgressor (and if there is more than one holder, in the proportions of their holdings) as the first in the hierarchy of liability is more appropriate. The current wording of the legislation provides no direction over who is liable and in what sequence accountability.

A 'Hierarchy of liability' is found within the *Contaminated Land Management Act 1997 (NSW)* and Queensland's *Environmental Protection Act 1994 (Qld)*. Both operate on the "polluter pays" principle, but the hierarchy is provided to delineate who is accountable after the polluter. This delineation will provide clarity to the operation of this section, but also provide transparency to the businesses as to how to structure their finances.

Part 12 Review of Decisions

AMEC is supportive of the changes that have been made to tighten the standing provisions for review.

Appeal of the Minister's Decision (Part 12)

In the current wording of this Part it is unclear whether a company can appeal the final decision of the Environment Minister. This must be clarified in the text of the Bill as this option should be available to provide companies with natural justice.

Capacity of the Northern Territory Civil and Administrative Tribunal (Section 277)

There is substantial concern within Industry that the Northern Territory Civil and Administrative Tribunal (NTCAT) is the inappropriate court for the review of environmental decisions.

As the NTCAT website states in its About section, *"NTCAT is much less formal than a court and its procedures are less complicated. Lawyers are permitted in most cases but usually are not necessary."*[5]

For the review of a decision on projects that are measured in the tens of millions of dollars, which are likely to hinge on the interpretation of complex scientific evidence, this is not the appropriate Court.

AMEC recommends the Supreme Court as being the appropriate Court for the review of Decisions.

[5] https://ntcat.nt.gov.au/about-us (Accessed 12.06.2019)

Part 13 General matters

Limitation on Delegation of power (Section 278 and 279)

The current draft legislation allows for the Minister to "delegate any of the Minister's powers and functions". Given that the Minister has a right to issue approvals that prevail over any other statutory authorisations (as per Section 92) this right to delegate should be limited and transparency assured.

There are certain powers and functions that should remain within the purview of the Minister. AMEC recommends a clause be added that excludes the following as a minimum from the delegation authority:

- Revocation of approval
- Refusal of approval
- Environmental levy
- Establishment of Environmental Protection Funds
- Declaration of referral triggers
- Declaration of prohibited actions
- Declaration of environmentally protect areas; and
- Condition setting.

There are many sensible, usually process driven reasons, why certain powers should be delegated within the Department. However, this drive for process efficiency must be balanced by the need for transparency and accountability.

AMEC would also strongly recommend that a clause be included stipulating that the Minister be required to table in Parliament any delegation of power or function. This process will increase the transparency of what has been delegated and why.

FURTHER COMMENT

The Association of Mining and Exploration Companies represents over two hundred and fifty members nationally, many of which are invested in the Territory.

AMEC would be willing to present to the Committee to discuss this submission further if considered appropriate.