Minerals Council of Australia
NORTHERN TERRITORY DIVISION

18 September 2023

Mr Paul Purdon
Executive Director, Environmental Assessment and Policy
Department of Environment, Parks and Water Security
GPO Box 3675
DARWIN NT 0801

By email: environment.policy@nt.gov.au

Dear Mr Purdon,

Environmental Protection Legislation Amendment (Mining) Bill 2023

The Minerals Council of Australia – Northern Territory Division (MCA NT) welcomes the opportunity to provide a submission to the Northern Territory Government on the draft Environment Protection Legislation Amendment (Mining) Bill 2023.

As the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, the MCA advocates policies and practices to deliver a safe, profitable, innovative, environmentally responsible industry that is attuned to community needs and expectations. MCA NT represents the interests of member companies operating, exploring and providing services to the minerals industry in the Northern Territory.

There are significant, intractable concerns with the proposed legislation and its operation – particularly the risks to investment, return to communities, efficient enhancement of biodiversity and conservation and to meeting the Northern Territory government's goal of a creating $40 billion economy by 2030.

ISSUES

The Northern Territory's minerals sector contributed $367 million in royalty payments in 2022-23, this is just over a third of the NT Government's own source revenue.[1] The sector is also one of the Northern Territory's largest long term job creators, directly employing approximately 3,500 people.[2] Significant co-investment with Aboriginal and Torres Strait Islander communities is underway, creating a new era of co-management and future prosperity.

The NT Government has previously committed to reforming mining regulation and incorporating environmental provisions of the *Mining Management Act 2001* (MMA) into the *Environment Protection Act 2019 (EP Act)*. To give this commitment effect, a discussion paper was released for consultation proposing a dual regulatory model with environmental matters regulated under the licencing system of the EP Act with the MMA amended to manage non environmental impacts of mining such as infrastructure and engineering.

[1] Northern Territory Government, *Northern Territory Government Budget 2023-34, Budget Paper No 2. Budget Strategy and Outlook*, Northern Territory Government, Darwin, 2023.
[2] Mineral Development Taskforce, *Mineral Development Taskforce Final Report*, Darwin, 2022, viewed 25 July 2023.

Despite broad stakeholder support for the dual regulatory model, without any substantive consultation the government is embarking on the creation of a single regulator of mining using the EP Act and repealing the MMA.

The power of the Minister for Mining to approve a mine and the methods and mechanics of mining have been removed with the repeal of the MMA. The Minister for Mining's limited responsibility will be the continuation of issuing a Mining Lease (ML) with diminished information on which to consider the grant. This usually occurs in advance of a mine commencing and is integral for development evaluation and final investment decision (FID).

The second role for the Minister for Mining is issuing a new 'notice of authority' after the mining activity receives a mining licence under the EP Act and mining securities for the licenced mining activity is paid. Other than acknowledging receipt of the security, the purpose and standing of this notice is unclear. Under this proposed regime the Minister for Mining no longer authorises activity associated with a mining operation nor issues a closure certificate when mining activity is completed. The overall power and responsibility of the Minister for Mining is greatly reduced and there is no ability for the minister to be assured that mining is conducted in the most efficient and cost-effective manner to ensure the Northern Territory gets the optimum amount in royalties and returns in benefits to the community.

Justification for the proposed model outlined in the Environment Protection Legislation Amendment (Mining) Bill 2023 references parts of the Territory Economic Reconstruction Commission Final Report 2020 and the 2022 Mineral Development Taskforce Final Report which both acknowledge the impact of regulatory processes on project economics and the need for risk proportionate regulations focused on outcomes to be targeted. While reform program principles of accountability, transparency, certainty, risk-based and outcomes-focused are stated as underpinning the proposed regulatory reforms, it is evident that the Environment Protection Legislation Amendment (Mining) Bill 2023 ignores the economic and social values fundamental for minerals development, including their broader contribution to biodiversity and conservation which are key considerations for sustainable development. Any shift away from robust consideration of these factors this would impact on the ability of the Northern Territory to attract investment and grow its economy in line with the NT Government's aspiration for a $40 billion economy by 2030.

Furthermore, despite arguing that a single regulatory regime under the EP Act creates efficiencies and certainty, the extraction of water to facilitate mining will be regulated under the *Water Act 1992*, and therefore there will still not be one single regime regulating mining in the Northern Territory.

SPECIFIC COMMENTS ON THE DRAFT BILL

Part 2 Amendment of Environment Protection Act 2019

Section 4 amended (Definitions) The definition of *'*Mining Minister*'* is missing reference to the Minister administering the Mineral Titles Act 2010.

Clause 124G(2) Impacts of clearing of native vegetation A mining title is issued with a defined area for the express purpose of conducting authorised activities under that title. When the Minister for Mining issues a mineral title certain rights and activities on the lease area are conferred to the tile holder and those rights include disturbing the land which involves clearing. Seeking to regulate through conditioning such activities already conferred as a right is duplicative, confusing and creates legal risk for the title holder. This runs contrary to the government's design principle of 'certainty'.

The MCA NT recommends this is either removed or modified to acknowledge these rights.

Clause 124L(2) 'Substantial disturbance' is defined in the environmental regulations 233R and requires a mining licence under the EP Act. However, this conflicts with rights conferred on a title holder to conduct exploration activities including digging pits, trenches and holes and sinking bores and tunnels and by drilling activities. All those activities which is the right of the title holder to conduct

involves clearing which under this amendment the EP Act seeks to restrain those rights by insisting on the title holder obtaining a conditioned licence.

Like Clause 235G(2), regulating activities already conferred as a right is inappropriate and creates legal risk for the title holder. This runs contrary to the government's design principle of 'certainty'.

The MCA NT recommends this either be removed or modified to acknowledge these rights.

Clause 124S Risk criteria and Section 124T standard conditions The effective operation of these amendments depends on issuing a licence with a range of conditions depending on perceived environmental risk. Amendments in the Regulations outline the process for determining these risks and standard conditions. There has, to date, been no drafting of the risk criteria and associated conditions, nor consultation with industry. This new Act should not commence until there has been substantial progress on these matters to ensure that industry has a clear understanding of the licence conditions they are likely to be subject to. The failure to provide drafts of risk criteria and conditions as defined in the amended Regulations of the EP Act will impact on investment confidence and certainty for the industry.

The MCA NT recommends government consult with the minerals industry to inform the development of standard conditions.

Clause 124X(1)(a) As mentioned previously seeking to condition activities on a mineral title area where rights to undertake activities including clearing, bore construction etc have already been authorised by the Minister for Mining is entirely inappropriate and will create uncertainty and confusion.

The MCA NT recommends government amend this clause accordingly.

Clause 124X(3) this amendment to the EP Act cannot authorise water extraction which will be subject to the *Water Act 1992*. As such mining will still be subject to dual regulation.

Clause 124Y Condition requiring independent reports and documents This clause does not specify what criteria of when and why such independent reports or documents are required. Without this detail it can assumed that the request of these reports and documents may be used to fill any failure of the regulator to provide inspection and compliance reports.

Additionally, there is significant ambiguity around the term independent. While some companies have significant internal competence for undertaking environmental assessment. Others may look to secure the services of a limited pool of professionals located in the Northern Territory. Accordingly, this may create unnecessary constraints on companies having government acceptance of material provided.

Clause 124ZA(2)(b) the need for ongoing monitoring and reporting as detailed in this clause must be time bounded and based on clear criteria at the commencement of the mining activity. This clause again provided no certainty and risks investor confidence.

The MCA NT recommends government amend this clause to specify the criteria and time frames required.

Clause 124ZC(3)(c) Application for licence It is unclear how the applicant is meant to specify which form of licence the application is for if there are no risk criteria or standard conditions published against which the Miner can base the application.

Clause 124ZD Requirement for additional information This clause is used to 'stop the clock' thereby proving delays to considering and issuing of a licence. These requests can be used to delay making decisions within prescribed timeframes. Instead the regulator should set out clear assessment requirements at the outset of the project including what information is required from the miner to consider a licence application properly and within the specified time frames. Administrative failure on the part of the regulator should not be at the expense of the mineral title holder. This increases the risk for the development of the title and creates significant uncertainty.

A regulator lacking the knowledge, experience, and practicalities of mining may use the mechanism of seeking more information to justify not making an approval decision. There is evidence of delays by the regulator when considering environmental management plans under the petroleum regulations for oil and gas activities. This clearly demonstrate the inefficiencies and uncertainty that will flow from the use of this clause.

Clause 124ZK Time for decision on environmental (mining) licence This clause provides that the Minister must make a decision in a prescribed period of time and yet there are no consequences for the failure to meet the prescribed timelines. This uncertainty again impacts on investor confidence and time delays accrues additional costs which are borne by the mineral title holder.

MCA NT recommends where this occurs, the action should be taken as automatically approved.

Furthermore, there needs to be a clear statement in this clause that the clock starts when the company lodges its application for a licence, not when the environment regulator says that it's been received, and the clock is commencing.

Clause 124ZM Period of environmental (mining) licence It is noted that a licence is in force for the period of the mining activity. As such under the transitional arrangements, any existing authorisation and valid Mining Management Plan (MMP) should be deemed to exist for the life of that approved MMP and not expire after 4 years. There needs to be some flexibility in this transition period for operating mines with long term mining authorities and approved MMPs, without such arrangement this Bill poses a risk to investment security in the Northern Territory.

Clause 124ZP Review of licence conditions This clause provides for review of licence conditions but does not specify what would trigger a review process and needs clarification.

Clause 124ZQ(1)(d) General powers of the Minister to amend environmental (mining) licence conditions This clause proposes to allow for general powers for the Minister to amend licences based on Minister becoming aware of new information. There is potential for this clause to allow for vexation claims by persons opposed to a mining activity which has already been assessed and licenced under the EP Act. This clause significantly increases the legal uncertainty for proponents and MCA NT recommend it is removed.

If not removed, a clear process for treating new information (including that provided by the proponent) should be established, including standards that the new information should meet.

Subdivision 6 Notice and cancellation at request of mining operator

Clause 124ZZF When a mining activity is completed This clause provides no details as the Ministerial responsibilities or process for cancelling the licence and clearly advising and recording on the register that the mine is closed and that the operator has met all the conditions of their licence. Presumably any security would be returned to the operator at that time. Clarification within the Bill is needed for the process for declaring and authorising the mine closure. Currently the Minister for Mining issues a closure certificate and no further action is required on the part of the operator. Failure to provide clear and unambiguous process in the relevant section of the bill is an omission that does not provide any confidence to the mining industry.

Clause 124ZZN Minister may request additional information The power proposed in this section to seek additional information lacks specificity and can be used to delay decision making to cancel a licence on completion of mining, increasing uncertainty and risk.

Clause 124ZZS Amendment on conditions of environmental (mining) licence or grant of environmental (licence) instead The transfer of a licence is a commercial decision by a title holder or operator. The ability of a Minister to amend a licence and impose new conditions poses a risk to the viability of the operation. The company seeking to take over a mining activity enters into a commercial contract based on the existing licence and conditions. Seeking to change conditions

during the transfer may cause the contract to be voided. The introduction of this clause has the potential to jeopardises future investment in mining activities. If a problem existed with the current licence, then it should be dealt with and not await a transfer proposal.

Subdivision 2 Extension of specified periods

Clause 124ZZZB and clause 124ZZZC It is unclear what is meant by the term '*to do thing*'. It has not been mentioned in Definitions.

Clause 124ZZZN Notice to CEO and Mining Minister This clause lacks clarity. If the Minister for Mining must be notified why is the Minister for the Environment not notified. This implies that the CEO of DEPWS and the Minister for Mining have equal standing in regards the administration of legislation in the Northern Territory.

Division 1A Mining Security

Clause132C Amount of mining security It is important that a transparent methodology and formula for determining security is determined prior to this amendment to the EP Act is enacted. This should be developed in consultation with the mining industry. The failure to have an agreed methodology specified somewhere in the Act will only add to uncertainty and risk for the mining industry.

Clause 132C(9) This is a clause that **introduces residual risk payments by another mechanism.** The mining licence issued to enable the mining activities will include closure plan and conditions for closure and when completed the licence is cancelled. Accordingly, the security bond is determined when the licence is issued. There should be no additional security required post closure. This clause appears to be an attempt to introduce residual risk payments to the mining industry by stealth. Residual risk payments do not currently exist in any mining legislation and to introduce them would represent a major policy shift and not flagged by this government. The sovereign risk to the Northern Territory by doing this is enormous and this section and related section in the Bill should be rejected.

Clause 199A(2) Monitoring **and management notice** If the mining licence has been cancelled at completion of mining operations, then all conditions of the licence including closure and monitoring has been completed satisfactorily. **This section is attempting to introduce residual risk payments by another means** as outlined above and attempts to keep a company paying for possible legacy issues well after closure and as such sends a dangerous signal to investors that they will be responsible for a mining site long after they have finished operations and the lease is no longer in effect. If it was used it would be acknowledging that this mining licencing regime has been ineffective or failed to deliver the outcomes intended. Failure of the regulator should not be to the detriment of the mining operator who has complied with the licence and legislation.

The MCA NT recommends this clause be deleted. If not, there needs to be some explanation why this power proposed in this section is within the power of a CEO and not the Minister.

Clause 277 Reviewable decisions and affected persons The provisions of merits review proposed in this Bill to decisions for mining approvals will cause unnecessary delay and cost to approval processes, and further disincentivise investment in the Northern Territory. Provisions for Judicial Review already exist for decisions made in relation to mining approvals. The creation of a merits review process undermines the ministerial discretion in decision making power and may lead to significant and unnecessary and costly administrative tribunal proceedings. The function of the Northern Territory Civil and Administrative Tribunal (NTCAT) as the reviewer of decisions proposed in this Bill is to 'produce the correct or preferable decision' which is a broadly subjective objective.

Public consultation is already built into environmental impact assessment processes and provides ample opportunity for submission of information to inform decision-making. Accordingly, the MCA NT strongly recommends merits review provisions be removed.

Part 15 Transitional matters for Environment Protection Legislation Amendment (Mining) Act 2023

Clause 304(1) An existing mining authorisation and approved Mining Management Plan (MMP) should be deemed to be a mining licence for the duration of that authorisation and approved MMP. Each MMP is established for a set duration to provide investment and production certainty for the proponent and government alike. They are developed in line with current legal requirements.

There appears no justifiable reason to insist on requiring a new licence after four years if the mine is operating in accordance with the deemed licence. This appears to be a bureaucratic administrative requirement that would provide no benefit to the environment or the mining operator. There are not many mines currently in operation in the Northern Territory or with MMP approvals that would seemingly cause administrative burden that would warrant the need to move these approvals to the proposed framework immediately, therefore there needs to be some flexibility in these transitional arrangements to acknowledge operating mines with long term authorisations. To insist on requiring a new licence for administrative purposes only is an expense and delay to an operator with no advantages.

Part 3 Amendments to Environmental Protection Regulations 2020

Part 7A Mining activities

Clause 233A to clause 233L These clauses set out a process for declaration of risk criteria under section 124S of the Act and then provides for a review of these risk criteria. These clauses are unclear and seemingly duplicative in process.

Clause 233M to clause 233P These clauses outline a review process for standard conditions. However, there is no mention as to how standard conditions which will apply under 124T will be determined. Importantly there is no process stated whereby mining operators must be consulted in determining the standard conditions. This will be critical if the standard conditions are to be practical.

Clause 233R Substantial disturbance of mining site This clause defines disturbance to include many of the activities that the *Mineral Titles Act 2010* (MTA) provides a right to undertake in issuing a mineral title. As such conditioning activities authorised under the MTA will not improve certainty but will add to confusion.

Part 4 Other Laws amended

***Minerals Titles Act 2010* amendments**

There are two main additions to the *Minerals Title Act 2010*.

Clause 70A inserts a fit and proper person test to ensure a proper person can hold a mineral title.

Clause 79A provides for a Notice of authority to commence or continue an authorised activity. It is triggered when a mining security for the mining activity is paid.

Clause 79A (6)(b) The Minister must consider before issuing a notice of authority that the mining licence to which the mining security relates is consistent a relevant technical work program applying to the mining site.

Clause 41 (2)(c) has been altered to remove ‘summary of the work proposed to be carried out for conducting authorised activities under the Mineral Lease (ML)’ and replaced with ‘a technical works program for the first operational year of the ML’.

CONCLUDING COMMENTS

Overall, these above changes to legislation will result in the Minister for Mining having a summary of proposed activities when considering the granting of a ML, and when making the decision all that is required to consider is the proposed first year activities. As such the Minister for Mining is not informed of what the mining activity will comprise over the life of the mine when considering the grant of the mining licence. This diminishes the power and responsibility of the Minister for Mining. The Northern Territory cannot be assured that its minerals are being extracted and processed in the most efficient and effective manner and will impact on potential revenue to the Northern Territory.

The MCA NT looks forward to amendments being made to the draft Environment Protection Legislation Amendment (Mining) Bill 2023 to ensure that the Northern Territory is an attractive destination for investment in the minerals industry going forward.

The MCA NT is available to further discuss the development of this legislation at any time and look forward to working with government in future. Should you need further information please do not hesitate to contact either myself on 08 8981 4486, or Amber Jarrett, Principal Policy Adviser MCA NT on 0424886662 and Amber.Jarrett@minerals.org.au.

Yours sincerely

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