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'Environmental Chain of Responsibility Laws' submission

The Arid Lands Environment Centre (ALEC) is Central Australia's peak community environmental organisation that has been advocating for the protection of nature and ecologically sustainable development of the arid lands since 1980. ALEC has worked closely with the Department around mining regulatory reform, having written a submission on 'regulation of mining activities: environmental regulatory reform' in March this year, as well as having close engagement with the Pepper Inquiry and the subsequent implementation of its recommendations around shale gas activities. ALEC actively contributes to the development of energy and resources policy through written submissions, community education and advocacy within the community.

ALEC welcomes the Northern Territory Government progressing their regulatory reform agenda around mining activities and the prioritisation of chain of responsibility (CoR) legislation. ALEC strongly supports CoR legislation as a tool to strengthen the Northern Territory's environmental regulations. The Territory has a long history of bearing the cost of environmental degradation as a result of non-compliance with legacy mines littered across the Territory. Rehabilitation of these sites exceeds $1 billion. The environmental impacts can be sources of ongoing contamination such as at legacy mine sites at Redbank and Rum Jungle.

CoR is a vital instrument which provides financial protection to the Northern Territory Government when non-compliance occurs around environmental obligations and responsibilities as required under the *Environment Protection Act* 2019 (*EP Act*). It is unique in its jurisdiction as a compliance tool and covers an existing gap where the Northern Territory Government is currently liable. Importantly, CoR does not add any additional regulatory burdens to corporations that comply with the regulatory environment. What it does do is provide regulators with teeth ensuring that a 'related person' to companies that do not comply with their environmental obligations bear the financial costs. In periods where a company is facing financial hardship and is no longer able to meet its environmental obligations, a statutory compliance notice as part of CoR legislations, ensures that those responsibilities are the responsibility of a connected party. CoR gives added flexibility and strength to the regulatory regime, increasing the likelihood that environmental obligations are satisfied.

CoR was identified as a key instrument as part of the Pepper Inquiry - recommendation 14.30 makes this abundantly clear. The Pepper Inquiry Final Report (p.426) emphasises that "those who are in a position to influence a company's compliance are held accountable… the Government should not bear the costs of environmental management and rehabilitation". ALEC welcomes that recommendation 14.30 is being implemented and then expanded by the Northern Territory Government.

Queensland CoR case study

The *Environment Protection (Chain of Responsibility) Amendment Act* 2016 (QLD) represents the most advanced CoR legislation nationally. The Queensland amendments and supporting documentation provides important lessons for the Northern Territory.

The Queensland legislation is incorporated in their *Environment Protection Act* 1994. ALEC welcomes the CoR legislation being embedded into the *EP Act*. It strengthens the Act and ensures that the objectives of the Act under s3(a) and s3(b) can be more effectively upheld.

The Queensland legislation is complimented by the *Guideline: issuing 'chain of responsibility' environmental protection order under chapter 7, part 5, division 2 of the Environmental Protection Act 1994 (the Guideline)*, which is comprehensive in its approach. The 43-page Guideline does its best to provide definitions of key words and phrases of the legislation, as well as providing examples of who would be liable under the CoR legislation. ALEC strongly supports a comprehensive guideline being released in accordance with the passing of the CoR amendments to the EP Act.

The Queensland Government also conducted a review two years after the CoR legislation was passed - *Review of Queensland's Environmental Chain of Responsibility laws*. This review provided an important opportunity to check whether the legislation was working as intended. The review (p.7) confirmed that the legislation "had been used responsibly and remains appropriate". The review (p.8) also clarified that the Guideline had provided stakeholders with "comfort". The review process also gave a platform for the concerns of stakeholders around the legislation and supporting documents. These concerns were aired and then changes were subsequently made by the Department around their consultation process. ALEC encourages the Northern Territory Government to also conduct a review of their CoR legislation within a few years of the legislation passing.

Breadth of the activities covered under the CoR reforms

ALEC strongly supports the breadth of the proposed CoR laws. The Information Paper (p.4) states that "all activities that have the potential to harm the environment can be subject to the legislative powers if need be". This ensures consistency in the approach by the Northern Territory Government across sectors. In addition it reasserts that the overall aim is to ensure compliance around environmental objectives and better protection of the environment.

A ‘relevant connection’

ALEC has some concerns that the proposed legislation in the Northern Territory has narrower standing around a ‘relevant connection’ than the Queensland Government legislation. S363AB(1)(b) of the Queensland legislation considers a relevant connection to be:

- “the person is capable of significantly benefiting financially, or has significantly benefited financially, from the carrying out of a relevant activity by the company; or
- the person is, or has been at any time during the previous 2 years, in a position to influence the company’s conduct in relation to the way in which, or extent to which, the company complies with its obligations under this Act.”

Critically, the Queensland legislation only requires one of these options to be satisfied, for a person to have a relevant connection. In contrast, the proposed CoR legislation in the NT considers a relevant connection to “include the capacity of the person over the previous three years to have influenced the behaviour that has led to the compliance concern”, and one of five other options.

The proposed amendments in the Northern Territory ensure that for a party to be culpable they must have influence. This ensures there is a narrower standing in who the CoR legislation can be attributed to. Unlike the Queensland legislation which has the powers to refer Environment Protection Orders to ‘major investors’ and ‘shareholders’ in certain circumstances, it is unlikely that the NT CoR amendments will have such powers. It remains unclear why the Northern Territory Government is only focusing on stakeholders that can influence behaviour, and not ensure that financial institutions that can derive significant dividends and capital gains such as equity from a company can also be liable to CoR. By limiting the scope of the legislation, the Northern Territory Government is limiting the security that the CoR legislation provides. Considering the fiscal position of the Northern Territory Government and the fact that the NT landscape is littered with non-compliance in legacy mines, it is incongruent that the scope of the legislation has been narrowed. ALEC considers the requirement of ‘influence’ to be too high a threshold. ALEC considers there to be a need for the definition of a ‘relevant connection’ to be revised and broadened.

In addition, ALEC holds concerns that the three year timeline may be too short a time-period when deciding who is a ‘relevant connection’. It may take many years for environmental non-compliance to be realised. In this period a company may have been sold, key decision makers which had influence over decision-making may have stepped down or moved on, or companies may have been in care and maintenance for an extended period. Considering the smaller-scale of the Northern Territory Environment Protection Authority compared to other jurisdictions, the NT should require extended timelines around CoR. CoR legislation should hold ‘related persons’ and ‘relevant connections’ to account based on the decisions that were made at the time, not based on the speed in which compliance is detected.

The Queensland legislation does not have a timeframe around their definition of a ‘relevant connection’ in regards to “the person [who] is capable of significantly benefiting financially, or has significantly benefited financially, from the carrying out of a relevant activity by the company”. The NT proposed CoR amendments are weaker in how they can be implemented than the Queensland case study.

Kind regards,
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Policy Officer