To: Northern Territory Department of Environment, Parks and Water Security

Re: Environmental Chain of Responsibility Reforms

5 August 2022

Introduction

AMEC appreciates the opportunity to provide comment on the Northern Territory Department of Environment, Parks and Water Security's (the Department) proposed Chain of Responsibility (CoR Bill) legislative amendments.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 520 companies across Australia. Our members are explorers, emerging miners, producers, and a wide range of businesses working in and for the industry, with 30 member companies actively exploring, mining, and developing projects in the Northern Territory.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 274,000 people. In 2020/21 Industry generated a record high $301 billion in mining exports, invested $3.2 billion in exploration expenditure to discover the mines of the future, and collectively paid over $43.2 billion in royalties and taxes.

The Proposed Legislative Framework

General Feedback

AMEC is supportive of the Government's intent to craft a policy and regulation that provides risk-based environmental protection. However, the proposed CoR Bill poses several concerns for Industry. The proposed framework indicates that CoR laws intend to ensure that Government is not left to "pick up the tab" when obligation holders do not or are unable to meet their statutory obligations. However, this will increase compliance costs borne on Industry and duplicate financial instruments that exist to address residual risk. Industry already pays securities in the form of environmental bonds and levies into the Mining Remediation Fund (MRF) to ensure the Government is sufficiently funded to remediate areas of environmental harm in the rare instance that a company is unable to meet environmental obligations. We note that since its inception the MRF is yet to be exercised for a company unable to meet its obligations and has been focussed on legacy sites.

The Department already has a robust suite of regulatory tools in place to ensure environmental obligations are met. Given the wide-ranging powers already held by the Minister via the *Environmental Protection Act 2019* (EP Act), the need for a Chain of Responsibility framework has not been established, beyond satisfying the Pepper Inquiry recommendations.

Petroleum focus

The current legislative framework is focussed on activities in the petroleum and onshore natural gas industry. However, there is substantial and justified concern from within Industry that the Government's intent is to shift these requirements onto mining and mineral exploration companies.

The TERC Reports

In November 2020, the Territory Economic Reconstruction Commission (TERC) published its final report detailing the rapid development needed to achieve the Government's stated goal of a $40 billion economy by 2030. The TERC report outlined a catalogue of investment that needed to start and a range of reforms to reach this aspirational goal.

The objectives highlighted under "Regulatory Framework" outline what should be the target for the Government through these regulations. The report notes an "*easy place to do business, while maintaining truly necessary standards and protections*" and a *"regulatory practice that is responsive and fast, providing certainty to investors*" as key elements of a regulatory framework that support a bankable investment environment.

As observed in the report, "*This is not business as usual – it requires a systemic shift in the role of government, from facilitating investment to one of actively pursuing and winning investment for the Territory*". The report highlights that three mines are expected to close by 2030, and there have been no new major mines since 2005[1]. To encourage the growth of Industry, in line with achieving the TERC Report's aspirational goals, it is important that Industry is supported and encouraged through stable and consistent regulation.

It is nearly two years since the Government introduced the TERC Report, it is important for Industry that this well-intended document is not simply shelved. The intent of the CoR Bill will disincentivise investment and undermines the narrative and intent of the TERC Report.

Ministerial role

The power to identify the responsible person (S 192C), their relevant connection (S 192D) and then subsequently issue a notice (S 192 E – J) is proposed to reside with the CEO of the Department. This is a critical responsibility that is not expected to be exercised frequently and is likely to be contentious. The Chain of Responsibility powers are drastic and step beyond the norms of the Commonwealth Corporations Act. For these reasons we consider the power should only held by the Minister and not delegated to the Department CEO.

Statement of Reasons

The draft legislation does not require a statement of reasons to be published as to why the decision to issue a notice has been undertaken. This is out of step with the *Environmental Protection Act 2019*, which includes the requirement for the Minister or CEO to issue reasons when they make certain decisions.

Provisions should be included to ensure the CEO provides a statement of reasons when they issue an Environmental Compliance Notice for the purposes of chain of responsibility.

Queensland Judge Leanne Clare SC asked the Queensland Crown Prosecutor to provide reasons for the decision for discontinuing court proceedings against five executive officers following the prosecution of Linc Energy under that States Chain of responsibility legislation. She stated, "Given

[1] https://ntrebound.nt.gov.au/__data/assets/pdf_file/0020/952301/terc-final-report.pdf

info@amec.org.au | 1300 738 184
www.amec.org.au

the enormity of the prosecution and the cost and time, and also the impact on so many people, it calls for an explanation on the record,"[2]. It is foreseeable that any action that is taken using the Chain of Responsibility powers in the Northern Territory will also be substantial, and likely contentious. A statement of reasons would provide a clear explanation as to the Government's position, removing ambiguity and potential confusion.

192B Prescribed Environmental Duty definition

It is better legislative practice to draft legislation on the existing statute rather than proposed reforms.

The definition of prescribed environmental duty can easily be a consequential amendment once the *Environmental Protection Legislation Amendment Bill 2022* has been drafted and introduced. The drafting is based on the assumption that the *Environmental Protection Legislation Amendment Bill 2022* shall include a Part 5B and pass as proposed in the legislation. Whilst a minor issue, this could cause the Act to carry a redundant definition that refers to a section of an Act that does not exist.

AMEC recommends this clause is removed and amended later.

192C Related Person & 192D Relevant connection

S192C 1(a) grants the CEO the ability to decide a "person, has or had in the preceding 3 years, a relevant connection to the high-risk entity".

The drafted definition of the 'related person' is broad and ambiguous. The current drafting provides no certainty to a company when investing who will be held liable for its actions.

AMEC considers that the definition of a 'related person' lacks clarity and creates uncertainty. Furthermore, the proposed framework does not properly address how contractors will be considered if they are found to be negligent in their responsibilities. If a contractor were to be negligent in their activities and therefore cause environmental harm, it is unclear whether it would be the contractor held liable under CoR laws or the parent company due to their 'relevant connection' and capacity to influence the behaviour. Government must properly address these concerns by providing an explicit definition of 'related person' and their 'relevant connection', as the current definitions are subjective and open to interpretation. The structure of Joint Venture arrangements can be quite complex, and as a common operating model in the mineral exploration and mining sector, how they will be treated is an important consideration that remains unanswered.

Regulatory Impact Statement drafted

As outlined in The Northern Territory Government Regulation-Making Framework: "*Consistent with COAG commitments and best practice regulation the Territory Government has adopted a formal process, the Regulation-Making Framework (RMF), which mandates the preparation of a Preliminary Regulation Impact Statement (PRIS) and the potential preparation of a Regulation Impact Statement (RIS)*"[3].

It does not appear a RIS was prepared prior to the publication of the legislation.

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[2] https://www.abc.net.au/news/2021-08-17/linc-energy-case-dropped/100382384
[3] https://treasury.nt.gov.au/__data/assets/pdf_file/0020/490007/I-ECO-RMF.pdf

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The Northern Territory Government needs to apply its own Regulation Making Framework, consistent with the commitments it has made at COAG, to every piece of reform.

A clear, transparent, and methodical process must be adopted that delivers incremental reform. A focus on providing certainty must be a priority.

A Preliminary Regulation Impact Statement should have been published with the Bill.

Environmental Bonds

The drafting of the proposed framework operates outside of, and independently from, other environmental financial regulatory mechanisms such as environmental bonds. The Chain of responsibility provisions should be clearly positioned a method of last resort. So to that end, AMEC does not consider that CoR laws can be considered independently from environmental bonds.

Under the EP Act, mining and mineral exploration companies are required to pay environmental protection bonds as a condition of environmental approval. Environmental protection bonds aim to ensure that the approval holder meets their environmental obligation and provides the Government with a financial security to intervene to prevent, minimise or rectify environmental harm caused by mining activities, in the rare event that environmental obligations are not met.

These environmental bonds are already in place to provide for the remediation of sites if a company has been unable to meet their obligation. To consider environmental bonds independently from CoR laws is inappropriate, as the two hold similar purposes. Clarity that the Bond must have been fully exercised before the CoR Bill powers are implemented would address potential misinterpretation.

Closing comments

The mining and mineral exploration industry is held to high standards in ensuring that mine sites are safely and effectively remediated once activities have ceased. Companies are required to rehabilitate sites and pay the Government ongoing fees in environmental bonds and levies to the MRF to ensure that the environmental harm can be prevented, minimised, or mitigated, should the Government be required to take action. These measures are already in place to ensure that companies are held responsible an fulfil their environmental protection duties.

We are concerned that the proposed CoR Bill will only disincentivise investment into the Territory and increases the burden of regulation.

For further information contact:
Neil van Drunen
Director, WA, SA, NT & Industrial Policy
AMEC