McArthur River Mining
A GLENCORE COMPANY

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Karen Avery | Executive Director, Environment Policy and Support
Department of Environment and Natural Resources

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

Dear Karen,

Re: Draft Environment Protection Act 2019 (NT)

McArthur River Mining Pty Ltd (MRM) welcomes the opportunity to engage on the NT Government's environmental regulatory reform process, and participate by providing comment on the proposed new legislation, the Environment Protection Act and Regulations.

MRM acknowledges the efforts that have been undertaken for this process and appreciate the level of supporting documentation such as fact sheets and latest news highlighting the potential changes on your website.

The mine is significant for the Northern Territory economy, and over the past five years has directly contributed more than $2.3 billion to the NT and Australian economies through employment, spend on goods, services and continued capital investment.

MRM provides work for about 1,000 people and has a very strong focus on local and Indigenous employment opportunities and the recent NT EPA recommendations for approval of the Overburden Management Project, will ensure operations continue until 2047.

MRM understands that the intent of the proposed new legislation is to not only provide good environmental outcomes but to also provide investor certainty and community confidence. Whilst MRM welcomes some of the proposed changes (such as the introduction of timeframes for regulatory requirements) we believe that some of the goals could be achieved by further refinement and consistent application of the current Environmental Assessment Act and Environmental Assessment Administrative Procedures.

Provisions should be made for site specific Terms of Reference which include the real issues each proponent potentially has on the environment and not standard ones applied across in all industry projects. This will align proponents in addressing their relevant risks and provide certainty around community confidence.

Several points of relevance have been discussed below relating to proposed changes that are not supported and whereby we believe the actual outcome will be the opposite of its original intent.

Principles of ecologically sustainable development

MRM agrees with using principles of ecologically sustainable development as considerations for decisions made under the proposed Act with the proposed ;legislation attempting to incorporate principles set out in source documents such as the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). However the proposed legislation omits some of the key elements ingrained in those principles.

To illustrate the above, the decision-making principle in section 15, provides little context for the objects of the legislation. MRM refers to section 3A(a) of the EPBC Act which states that the principle is "decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations". The proposed legislation does not contain the critical references to the important criteria of "economic, environmental and social" considerations to be used in the assessment process.

Further the precautionary principle as it was adopted in 1992 by the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil (the Rio Declaration on Environment and Development, generally known as the Rio Declaration), provides in part that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". MRM notes that section 16 of the proposed legislation omits reference to the importance of cost-effectiveness when considering measures to avoid unacceptable environmental harm.

Section 17 in the proposed legislation reads "The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations." The principle, as it was adopted in the Rio Declaration actually provides "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." The principle contains an explicit right to develop, expressly noted in the 1997 Report of the Secretary General on application and implementation of the Rio Declaration and which, MRM submits, should also be reflected in the proposed legislation.

Environmental Objectives and Triggers

MRM notes that the proposed legislation lacks the adequate definitions for referral triggers and approval triggers. Further, the proposed legislation fails to incorporate objective thresholds by which the significance of an impact is to be measured once the decision to require an EIS has been made. MRM looks forward to receiving further information and a further opportunity to consult with the NT government once the NT government has released its proposed objectives for review.

Assessment formats

The proposed new legislation provides avenue for several forms of assessment including assessment on referral information, assessment by supplementary environmental report, assessment by EIS or Assessment by inquiry. Whilst the intent is to provide an assessment process based on risks, current legislation also does this, with the use of Public Environmental Reports however these have generally not been applied within the Mining Industry for many examples when potentially they could have been.

Funding and Levies

The proposed new legislation provides three avenues of funding for environmental protection however they are all appear to be for the same purpose with the Act highlighting factors of environmental emergencies, rehabilitation of the environment and remediation of environmental harm. While we agree with a robust mechanism to ensure environmental harm is managed and rehabilitation is completed on sites, projects which are already subject to security requirements pursuant to other legislation, such as the *Mining Management Act* should be exempt and not subject to further bonding requirements. Any additional financial provisioning will increase financial burden on proponents.

MRM notes the proposed legislation introduces the 'environmental taxation levy'. MRM believes that the introduction of such a levy, that neither has a direct nexus to the project or addresses specifically identified legacy issues within that project's sector, will inhibit growth and investment in the Territory.

The concerns raised with regard to levies in Part 9, Division 2, are equally applicable to the environmental protection funds provisions of Division 3. Levy-based funds should address no more than project-specific issues or specific identified legacy issues within that sector.

MRM submits that the proposal to introduce an additional financial assurance pursuant to section 196 will have a significant detrimental impact on the mining industry in the Northern Territory. Any requirement allowing the financial assurance to be held for 20 years and allowing it to be capable of being applied to address environmental issues at other sites will significantly inhibit investment in the Territory. This is because proponents would be reluctant to tie up capital in projects for which they have already received a closure certificate and have satisfactorily remediated the site.

Supplementary Review

Current changes around supplementary information is proposed under Regulation 59, with this action now requiring additional public submission with an added time period of no less than 21 days. Whilst the assumed intent of this is around openness and transparency it provides an additional platform for ongoing discussion with no real outcome. This will result in a never ending review process.

Powers of Approval

The purpose of environmental impact analysis is to provide decision makers with sufficient data on environmental impacts to make informed decisions in balancing a variety of factors and policies, including both environmental and economic development.

The proposed transfer of the decision making process for approval from the relevant minister to the environment minister is not supported on the basis that all projects need to be based on aspects of merit and not only environmental matters.

Part 7 gives the Minister for Environment veto power over virtually every development project in the Northern Territory. Not only does the legislation grant the Minister the ability to refuse an environmental approval after the environmental impact assessment has been conducted (section 86), it grants to the Minister the power to establish criteria that triggers an environmental impact assessment in the first place (section 37), as well as the power to establish environmental objectives by which an environmental impact assessment is presumably measured (section 36). This even extends to transfers of environmental approvals already granted (section 113). There appears to be no appeal from the Minister's decisions.

MRM submits that the environmental impact assessment should remain a process, with decision-making authority vested in the Minister responsible for the sector in which the project lies, with consideration for the recommendations of the NT EPA and Minister for the Environment.

As referred to above, the NT EPA should not be engaging in value judgments as to whether impacts are acceptable or unacceptable. Such judgements should balance the competing social, commercial, or economic benefits against an environmental impact and should be undertaken by the ultimate decision-maker.

The NT EPA role should be limited to providing objective analysis and conclusions with respect to environmental impacts. More specifically, NT EPA should be limited to determining whether or not a significant environmental impact identified during the environmental impact assessment process can be avoided, mitigated, or offset to a level less than significant as measured by objective criteria. It is then up to the ultimate decision maker, not the NT EPA or the DENR Minister, to make the value judgement as to whether the residual impact is acceptable or unacceptable based on all relevant considerations.

Incident Notification and Duplication

Unless notified otherwise there will be several instances where duplication will occur through other legislation and hence not have the proposed effect of investor certainty and efficiency in reporting around the process. Whilst the reporting of an incident is a supported approach to environmental management would a hydrocarbon spill on a mining site now require reporting under both Mining Management Act legislation and the potential Environmental Protection Act?

Standing and Limitation Period

MRM acknowledges the statement from Minister for the Environment dated 30 October 2018 confining judicial reviews to only those directly affected by a decision or those who made a valid and genuine submission to the decision-making process. However MRM remains concerned that, even with the Minister's statement, the proposed wording in this Part will create a litigious environment in the Territory because it remains too broad and potentially allows appeals from parties who have no substantive standing. It is not clear what is meant by anyone who has made a "valid and genuine submission".

It is quite feasible that in relation to politically contentious projects there would be an increase in litigation as a direct consequence of these provisions regardless of the level of environmental impact assessment conducted.

In order to be an eligible applicant seeking an injunction, applicants should be required to show they are directly affected, whether a person, a business, an Aboriginal Land Council, a Registered Native Title Prescribed Corporate Body, or a local government. MRM submits that appropriate standards for standing should be based on the applicant having an injury-in-fact and that the injury is within a zone of protected interest – an environmental interest for example, as opposed to an economic or pecuniary interest.

MRM submits that a three year statute of limitation for bringing proceedings under Part 12 is too long and will only increase the uncertainty that inhibits investment and job creation. The time for commencement, at least for challenges to a final decision on an assessment, should be no more than 90 days.

The conclusion of an environmental impact assessment process should provide a reasonable level of certainty to the party who has prepared the EIS or other applicable assessment documentation. A three year statute of limitation, at which time a project may be well underway, provides no such security.

The above key points highlights our concerns with the proposed changes and we hope this information guides you in an overall strategy around the proposed Environmental Protection legislation.

Yours sincerely,

Greg Ashe
Chief Operating Officer
Glencore Zinc Australia