Minerals Council of Australia
NORTHERN TERRITORY DIVISION

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Mr Paul Purdon
Executive Director, Environmental Assessment and Policy
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Dear Mr Purdon

Information Paper on proposed Chain of Responsibility Laws

The Australian mining industry has a fundamental commitment to environmentally responsible exploration, development and rehabilitation.

The MCA has a long history of leadership in sustainable mining practices, with members committing to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development.*[1]

In addition, the MCA is coordinating the nation-wide implementation of an award-winning accountability framework (adopted from Canada and adapted for Australia) to help minerals companies evaluate, manage and communicate their sustainability performance more fully and transparently for each facility: Towards Sustainable Mining (TSM).[2] The TSM system takes the commitment to Enduring Value one step further by enabling companies to consistently assess and report site level performance on issues of greatest relevance to Australian operations and their communities, including biodiversity conservation management, tailings management and water stewardship.

As part of its responsible approach, the MCA NT, on behalf of the industry, has engaged extensively with the NT government over the past five years as it undertook the painstaking work of reforming the suite of environmental laws – a transformational process that is still underway.

The industry's commitment, practical action and contribution to reform processes are important considerations as the NT government considers introducing a significant new regulatory burden on companies in the Territory. The MCA NT urges the NT government to reconsider this proposal.

The need for additional regulations in the government's proposed *Environmental Chain of Responsibility Laws: environmental regulatory reform information paper* should be reconsidered for three reasons:

- New powers in ECoR legislation would not be required if the government were to use its current powers under the *Environment Protection Act ('EP Act')* and regulations more

[1] https://minerals.org.au/enduring-value-framework
[2] https://www.minerals.org.au/towards-sustainable-mining

effectively to ensure government collects adequate financial assurance through environment protection bonds, and do the same when rehabilitation security bond regulations are migrated from the Mining Management Act into the EP Act. These financial assurances were introduced specifically to provide the government and Territorians confidence that they would not be left with the financial liability of remediating incompletely rehabilitated sites.

- The government has neither completed nor published a regulatory impact assessment and statement (RIS) to weigh and compare the costs and benefits of introducing new ECoR legislation, including an evaluation of the need for such legislation in the context of the dot point above. (Note: the final report from the Territory Economic Reconstruction Commission [TERC December 2020] explicitly stated that the government should 'remove unnecessary impediments to private investment' and maintain only 'truly necessary standards and protections.')
- If the legislation is poorly designed, it is likely to introduce a substantial disincentive for investors who will balk at backing Territory-based developments because of the risk that they might be inappropriately determined to be responsible parties (and therefore financially liable, as persons or corporate entities) if projects are abandoned prior to satisfactory completion of all remediation requirements. (Note: this was the case when the Qld government drafted its ECoR Bill which could have captured 'mum and dad investors' who had neither realised significant financial gain nor had access to knowledge that environmental requirements were not being met during operation and/or had any authority to ensure that these requirements were being met.)

Contrary to assertions in the information paper, there is no broad industry support for this new legislation. Experience in other jurisdictions of similar proposals are mixed and should serve as a note of caution on how to deal with these important matters.

The appendix to this submission goes into more detail about industry's concerns but also identifies solutions for dealing with matters that the NT government wants to resolve.

The MCA NT seeks further opportunities to engage with government on this significant legislation. Should you require further information or clarification, please do not hesitate to contact me directly on 08 8981 4486 or janice.warren@minerals.org.au.

Yours sincerely

Drew Wagner

Executive Director

APPENDIX – DETAILED EXAMINATION OF PROPOSED LEGISLATION

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally. The MCA's strategic objective is to advocate public policy, legislation and operational practice for a world-class industry that is safe, profitable, innovative, environmentally-responsible and attuned to community needs and expectations.

This appendix provides detailed responses to matters raised in the NT government's *Environmental Chain of Responsibility Laws: environmental regulatory reform information paper.*

A. Is new environmental chain of responsibility legislation needed?

The MCA supports appropriate safeguards to protect the public from incurring financial liabilities from mining and other operators not able to fulfil their environmental regulatory obligations.

Modern mining rehabilitation practice is highly regulated, better implemented and more accountable than ever before. Despite this, there a risk that a small number of operators may not be able to fulfil their rehabilitation obligations to the standards required, including to meet approval conditions. In these circumstances, the NT financial assurance (FA) mechanism provides government with access to sufficient funds to rehabilitate these sites to meet requirements. The NT FA is intended to cover 100 per cent of the rehabilitation liability, and rehabilitation security bonds and the Mining Remediation Fund (established to remediate legacy mine issues) will be reviewed in the government's current environmental regulatory review and reform program for the NT minerals sector.

In addition, the NT's new *EP Act* and Regulations have introduced environment protection bonds for any activity with potentially significant environmental impacts, and these would be used to complete required remediation works if an operator fails to satisfactorily complete their rehabilitation requirements.

Given that existing NT legislation, through environment protection and mining rehabilitation security bonds, provides government with funds to satisfactorily complete environmental remediation should a company cease operations prior to meeting these requirements, the MCA NT questions the need to enact the proposed environmental chain of responsibility ('ECoR') legislation.

The need to pass such broad-ranging legislation is also questionable given that Australia's first ECoR Act was passed by the Queensland government primarily to enable it to collect funds from a particular operator from whom it failed to obtain such FA, to remediate significant environmental damage from a refinery (Yabulu Nickel Refinery just north of Townsville[3,4]). The NT government already has powers to collect environmental bonds from non-mining operations.

Regarding creating new legislation, the final report from the Territory Economic Reconstruction Commission (TERC; December 2020) stated the following:

> Securing investment to drive demand for jobs and grow the economy requires a sustained cultural shift towards welcoming and winning new investment, collaboration and a determined focus on removing unnecessary impediments to private investment'

with a regulatory framework that makes the Territory 'an easy place to do business, while maintaining truly necessary standards and protections' and 'Regulatory practice that is responsive and fast, providing certainty to investors.'

As demonstrated in Queensland's initial draft of ECoR legislation, ambiguity in the design or implementation of the law can disincentivise investment or participation on boards by experienced personnel (because of risk of being determined to bear financial responsibility for remediating land damaged by failed developments). This in turn can impact responsible development in the Northern

[3] https://www.carternewell.com/page/Publications/Archive/CoRA_Guideline_approved_-_Is_it_just_a_bandaid_solution/
[4] https://www.cbp.com.au/insights/insights/2017/march/chain-of-responsibility-amendments-to-the-queensla

Territory, because the most experienced candidates for board membership will be less inclined to take up these roles.

The MCA NT challenges the statement in the last paragraph of Section 4 of the information paper,

> Apart from some general misunderstandings or fundamental opposition to such laws, the majority of stakeholders engaged with the mining reforms expressed support for CoR laws provided they are applied transparently and appropriately, with both industry representative and environmental groups recognising the benefit of CoR laws in being able to protect governments and taxpayers from inheriting financial environmental liabilities associated with non-compliance.

Four of the five submissions from minerals industry organisations (including a legal firm that specialises in NT mining matters) on the short section on ECoR in the government's December 2020 information paper on reforms to regulation of mining activities questioned or outright opposed the introduction of ECoR legislation.

The MCA NT's submission acknowledged that the intent of ECoR is to protect government and Territorians from having to pay to complete remediation works that should have been done by the relevant operator; however, in discussions with government, our position has been that currently not enough detail is available on the design and intended implementation to adequately weigh potential benefits against the costs (to both government and the industry) of introducing ECoR legislation in the Territory.

Before the government commits to drafting new legislation, it should demonstrate why the current regulatory framework is inadequate, including where the new *EP Act* and Regulations are unable to protect the government and Territorians from having to finance satisfactory completion of rehabilitation from operations that cease before this occurs. Section 3 of the CoR information paper (CoR in environmental law) has not made a strong case in this regard.

The government must complete a defensible regulatory impact statement (RIS) for the proposed ECoR and publish the results of this analysis.

B. If government is committed to enacting environmental chain of responsibility legislation, how to ensure it is fit for purpose

If the government is committed to pursuing development and enactment of ECoR legislation, then the MCA NT recommends that consultation that commenced with release of the information paper in July 2021 will continue before and during the drafting process, to avoid pitfalls that might compromise the efficiency (including cost-efficiency, for both investors and regulators) and effectiveness of the legislation, and/or have substantial unintended and deleterious consequences in terms of future attractiveness of the NT minerals sector.

In its development of ECoR legislation (in consultation with industry), the government should commit to the following:

- **Ensure legislation is appropriate for the Territory** – The government should look at the effectiveness, regulatory burden and impacts on investment of Queensland's and Victoria's ECoR legislation and identify the best of both models to guide development of NT ECoR legislation, including through continuing consultation with industry and subsequently in drafting instructions for the bill.
    - For example, two features of Queensland's regulation that should be included in the NT bill are:
        - The up-front development (in consultation with industry) and publication of guidelines, so that industry can get a good understanding of the system and so that the system can be implemented consistently and on a 'principles-based' approach rather than on a strict 'rules-based' approach

    - Sunset review dates whereby an independent body evaluates the operation of the ECoR system, inviting industry submissions, so that it can stay relevant and be modified as required. (Note: Queensland reviewed its ECoR legislation after two years of its implementation.)
  - Ultimately an NT ECoR framework must be suitable given existing regulation and the Territory's unique circumstances (e.g. tenement law).
- **Applying best practice principles** - The principles of best practice regulation should underpin any new legislation, including
  - Making a compelling and defensible case why new laws and regulations are needed;
  - Considering a range of feasible options and alternatives; and
  - Providing clear guidance on triggers and implementation.
- **Avoiding unnecessary regulatory burden** - Recognise and integrate efficiently with existing safeguards, including FA and other mechanisms, to not over-regulate or over-burden the NT minerals sector which is already heavily regulated.
- **Striking a balance between ensuring adequate environmental protections through appropriate and proportionate (risk-based) regulation and promoting industry investment and ecologically sustainable development.**
- **Being clear in its application** – Key terms, including the nature of liabilities and 'high risk companies' should be clearly defined and supported by guidelines.
- **Fair and reasonable targeting of 'related persons'** (highest risk to industry if definition is too broad) – The definition of related persons should be explicitly limited to those with responsibility and management control to influence the corporation's activities. While this is defined in the information paper, associated terms, such as the 'level of influence', should also be clearly defined, including
  - Minor holdings or influence – Capturing all persons with any level influence will discourage investment. Consideration must be given to both level of control and information available to those persons to influence in an informed manner. (For example, what if a controlling interest does not divulge risks or problems to the minor interest. The minor interest may not even have a presence at the asset.)
  - Landowner liability – Landowners as associated entities of the obligated party should be clearly defined and constrained to where influence can be demonstrated. Landowners/landholders (e.g. pastoralists and/or Indigenous corporations) not afforded such protections may be unfairly impacted and would be unlikely to support any mineral and other development.
  - Temporal relevance – ECoR legislation should apply only to those persons who would have been both aware of developing environmental issues and had influence at the time the environmental liability was incurred.
- **Flexibility** – Design of the laws should accommodate changing corporate circumstances or structures, including changes to board composition/ownership, mergers, joint ventures and acquisitions.
- **Opportunity for redress prior to triggering application of ECoR legislation** – Companies should be given opportunities to address and resolve issues before ECoR provisions are triggered, through a transparent, step-wise process.
- Developing and providing practical guidance – Clear guidance, including case study examples, should accompany implementation of any new ECoR legislation.

Both the Victorian and Queensland ECoR legislation have provisions ensuring that persons with no effective knowledge or control over an operation's compliance with statutory obligations cannot be identified as 'related persons':

- Victoria's legislation puts some sensible constraints over which officers can be related persons (i.e. only those who have true control over corporate actions). The 5-point test in section 284(1)(b) of the Act is very good, particularly the catch-all at 284(i)(b)(v) which seems to add a common-sense test that an officer ought not be a relevant person if it would be 'oppressive, unjust or unreasonable' to make them so; and
- Queensland's legislation constrains which outsiders can get caught, plus the requirement for the administering authority to 'have regard' to the Guidelines in making any decision (Section 363AB(7)), although NT legislation should tighten the language to compel the administering authority 'to act in accordance with the Guidelines', not merely 'have regard to' them.

C. Additional comments and questions on specific content in the information paper

Section 5. Overview of proposed legislative framework for CoR

- **Additional compliance (page 8):** 'Applying CoR laws will not impose any additional compliance obligations on regulated entities, whether they are individual persons or corporations'.
  - Government needs to clarify whether the CoR laws will have retrospective effect. Although the Chief Executive Officer's new powers under the *EP Act* to serve environment protection notices (EPNs) or other statutory obligations on related persons will commence when the empowering laws come into force, will the ability to do so be based on events that have already occurred, and be based on relationships between 'primarily-liable' companies and potential related persons that are already in place, or will there be some element of delayed or phased introduction?
- **Definition of 'related person' (page 9**): 'The connection for a 'related person' is inherently reliant on the concept of influence and whether a person or company has been in a position to influence behaviour, or benefit financially, from the actions that have led to the breach of statutory obligations and compliance concerns'. Other legislation (QLD) has been amended so that the test has a higher threshold - 'substantial financial benefit' or 'significant financial benefit' - although no materiality threshold has been set, and a common law interpretation is relied upon.
  - That threshold is too low and potentially captures as a 'relevant person' somebody who may gain an immaterial financial benefit (e.g. 'mum and dad investors') from the actions that have led to the breach of statutory obligations and compliance concerns. Other legislation (QLD) has been amended so that the test has a higher threshold - 'substantial financial benefit' or 'significant financial benefit' - although no materiality threshold has been set, and a common law interpretation is relied upon.
- **Relevant connection (page 10):** 'The proposed CoR legislative framework will include certain exclusions and other parameters that will ensure certain professionals or persons that have had no authority or influence, but do appear to have a 'relevant connection' because of the existence of a contract or standing as an officer, will not be 'captured, or rather, be considered a 'related person' for the purpose of redirecting obligations'.
  - There is no express carve-out for arm's length debt financiers (such as banks/financial institutions), as well as other investors that lack the obvious elements of 'culpability' for the behaviour that has led to the compliance concern. This category should be added to those expressly carved-out from being 'related persons'. While such a carve-out may

appear obvious, it is necessary if the NT government is serious about addressing concerns of potential investors.

- **Decision-making powers (page 11):** Any decision-making power must be subject to appropriate measures of restraint. For example, in deciding whether to issue an EPN to re-direct a statutory obligation to an entity determined to be a related person, the regulator should first be required to consider whether the related person has taken all reasonable steps, having regard to the extent to which the related person was in a position to influence the company's conduct, to ensure the company
    - Complied with its obligations under the EP Act; and/or
    - Made adequate provision to fund the rehabilitation (including by way of statutory bond) because of environmental harm from a relevant activity carried out by the company (notwithstanding the ultimate rehabilitation/ environmental failure)

  The regulator should be prevented from acting in cases where the related person has taken all such reasonable steps.

- 'For any prescribed acts, the decision-making power to redirect obligations will reside with the usual statutory authority responsible for making decisions to issue a compliance notice under the prescribed act.'
    - Similar legislation in Australia (particularly QLD) is supported by industry-led guidelines to provide greater clarity regarding the administration of the provisions of the ECoR laws.
    - As an additional layer of protection, those guidelines must be considered in determining whether an EPN will be issued to a 'related person' of the company.
    - As a further 'check and balance', the regulator should have no ability to arbitrarily amend the guidelines without prior industry consultation.

Section 6. Next steps

- **Feedback on design (page 12):** 'The Department is particularly interested in your feedback on the proposed application of the framework through the EP Act and prescribed legislation and the key design parameters.'
    - The key design parameters should evaluate amendments introduced into other State legislation (including to key defined terms and concepts), plus the Queensland guidelines, to ensure that a measured system is introduced that maximises clarity for industry operators and reduces the potential for unintended application (or extension) of the ECoR principles by regulators.

D. Other issues

Applying ECoR provisions should be a last resort and always be consistent with a transparent, risk-based guideline developed in consultation with industry; however, a combination of government

- Collecting and holding an adequate environmental/rehabilitation security bond
- More effectively enforcing approval conditions throughout the life of a project, including, where appropriate, progressive rehabilitation (with sign-off)

can and should be used to ensure satisfactory completion of remediation of projects without having to resort to applying ECoR measures.

The MCA NT recommends that government review the efficiency and effectiveness of implementation of ECoR legislation in other jurisdictions prior to preparing drafting instructions for similar legislation in the NT.

If government is committed to developing ECoR legislation for the Territory, consultation with industry should continue beyond the current deadline for submissions to ensure that the new act and regulations can meet intended objectives without deleterious unintended consequences, particularly through creating uncertainty and therefore unacceptable risk for potential investors.