CENTRAL LAND COUNCIL

and

NORTHERN LAND COUNCIL

Regulation of mining activities – environmental regulatory reform

Joint submission

1 March 2021

To: Environment Policy

Department of Environment, Parks and Water Security

GPO Box 3675 Darwin NT 0801

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

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1. KEY TERMS AND RECOMMENDATIONS

Aboriginal Land	Land granted as Aboriginal Land under the ALRA.
Aboriginal landowner	1. ALTs holding Aboriginal Land under ALRA; 2. Native title holders (as that term is defined in the NTA) for areas subject to an approved determination of native title that native title exists and registered native title claims.
ALT	Aboriginal Land Trust, a statutory land trust created under the ALRA.
ALRA	*Aboriginal Land Rights (Northern Territory) Act (Cth) 1976.*
CEO	DEPWS Chief Executive Officer
CLC	Central Land Council (ABN: 71 979 619 393), a Commonwealth statutory authority created under the ALRA.
Code	Code of Conduct for Mineral Explorers in the Northern Territory dated December 2020
Discussion Paper	NTG discussion paper on regulation of mining activities – environmental regulatory reform dated 9 December 2020
DEPWS	Department of Environment, Parks and Water Security
DITT	Department of Industry, Tourism and Trade
EIS	Environmental Impact Statement
EMP	Environmental Management Plan
EP Act	*Environment Protection Act 2019 (NT)*
EP Regulations	*Environment Protection Regulations 2020 (NT)*
ERLS	The proposed environmental regulation and licencing system that is the subject of the Discussion Paper.
ILUA	Indigenous Land Use Agreement under the Native Title Act.
IPA	Indigenous Protected Area
Land Councils	The CLC and the NLC
MMA	*Mining Management Act (NT) 2001*
MMP	Mining Management Plan
MTA	*Mineral Titles Act 2010 (NT)*
NTSSA	*Northern Territory Aboriginal Sacred Sites Act (NT) 1989*
NTA	*Native Title Act 1993 (Cth)*
NLC	Northern Land Council (ABN: 56 327 515 336), a Commonwealth statutory authority created under the ALRA
NTG	Northern Territory government
Native Title Representative Body	A body accredited as a Native Title Representative Body under the Native Title Act
Traditional owners	The use of the term 'traditional owners' is used to include all types of indigenous land owners including native title holders

RECOMMENDATIONS

Recommendation 1: The long-term negative impacts of abandoned and poorly rehabilitated mines will be felt by Territorians for many years to come, and most acutely by Aboriginal people, who are inseparably tied to country. Stronger legislative requirements should be put in place to ensure that the environmental impacts of mineral resource activity are better managed. A more rigorous environmental control system is required to achieve a better balance between the negative impacts of mining and the employment and revenue streams that may be available during the relatively short operational phase of mines.

Recommendation 2: If the Northern Territory community's interests are to be protected, the Northern Territory legislative regime (including any voluntary codes) must provide adequate opportunity for Aboriginal landowners and Aboriginal communities to be involved at every stage of the approvals process and mining life cycle, including a requirement that rehabilitation after mine closure should be to the satisfaction of Aboriginal landowners.

Reforms pursued through co-designed policy making and implementation are more likely to achieve good outcomes for all Territorians.

Recommendation 3: Legislative reform should facilitate opportunities for Aboriginal people associated with the mining industry, particularly land management during life of mine and ongoing monitoring and rehabilitation, including requirements in approvals that traditional owners must be consulted about environmental management.

Recommendation 4: In implementing the environmental framework the NTG should consider how to:

- create real opportunities for Aboriginal ranger groups and land management services to be actively involved in land management; and
- require consultation with traditional owners about offsetting proposals.

Recommendation 5: Information on Aboriginal land managers and rangers' role with resources projects and offsetting proposals should be publicly available and would provide valuable transparency about Aboriginal employment credentials of proponents and the application of offset policies.

Recommendation 6: Any standard conditions adopted must be a floor not a ceiling. Regulators must consider and add conditions to reflect the unique nature of each project and of each environment where it will occur.

Recommendation 7: The Northern Territory regulatory regime should include mechanisms to ensure that the financial and technical capacity of purchasers to deliver rehabilitation requirements is assessed during the approvals process. Regulators should consider:

- whether the applicant has previously failed to comply with licence conditions or health, safety and environment legislation (whether in the same jurisdiction, or in other domestic and international jurisdictions);
- past criminal conduct and any findings of corrupt activity, and past insolvency, including of related corporate entities (whether in the same jurisdiction, or in other domestic and

international jurisdictions);
- technical competency;
- when mines are operating on Aboriginal landowner's land, the potential licence holder's track record of Aboriginal engagement, including whether tenure arrangements were granted through agreement (rather than through National Native Title Tribunal or arbitrated processes), any breaches of agreements or cultural heritage legislation and the company's track record of Aboriginal employment and contracting. Due diligence investigations in relation to this aspect must involve inquiries with the relevant Land Council.

Recommendation 8: The Northern Territory regulatory regime should include mechanisms to ensure that the financial and technical capacity of purchasers to deliver rehabilitation requirements is assessed prior to any operator being allowed to transfer tenements. Considerations that should be considered by the Northern Territory regulator are set out in Recommendation 7.

Recommendation 9: A fully costed closure plan should be required to be commissioned and developed as part of the approvals process, and should be required to be reviewed regularly throughout life of mine, including with the involvement of Aboriginal landowners.

Recommendation 10: The CEO should be required to report publicly about the effectiveness of compliance monitoring and enforcement activity. Effectiveness should be communicated back to regulators setting the conditions.

Recommendation 11: The new framework legislation should:
- require registration or a licence for all exploration, extraction and mining activities;
- ensure that Aboriginal landowners and Native Title Representative Bodies are given the same notification rights as other (e.g. pastoral) landowners; and
- ensure that Aboriginal landowners are meaningfully and closely involved in mine closure plans and opportunities.

The proposal that the new framework legislation identifies non-disturbing activities for which a registration is not required cannot be supported.

Recommendation 12: A risk-based approach needs to be assessed on physical and cultural environmental grounds to account for activities that may be environmentally low risk (such as rock chipping) but may cause substantial disturbance to the socio-cultural and spiritual environment.

Recommendation 13: Regulations should be developed to ensure a considered approach to access issues. A miner intending to rely on section 83 for construction of a road should provide notice to native title holders and other landowners (e.g. pastoral lease holders) of the proposed route at the time it applies for a tenement. Input should be required from native title holders and other landowners before a section 83 access right is permitted

Recommendation 14: Regulatory reforms should not result in a blanket approach of issuing an environmental registration for exploration activities subject to standard form conditions.

Recommendation 15: All extractive activities should require a tailored environmental licence.

Recommendation 16: All mining licences should require a tailored environmental licence.

Recommendation 17: The legislative regime should provide that Aboriginal landowners and impacted Aboriginal communities can provide input during any licence review process, and the decision maker should be required to take their views into account.

Recommendation 18: Because of the special impacts that mining has on Aboriginal Territorians, Aboriginal landowners and the Land Councils must be involved in consultative processes to:
- develop risk criteria; and
- review risk criteria and registration conditions.

Recommendation 19: The CEO should be able to commence proceedings for breaches of the conditions of registration in respect of matters covered under a performance improvement agreement. In addition, entry into a performance review agreement should be a trigger to review the value of any environmental and rehabilitation security.

Recommendation 20: The CEO should be able to amend the conditions of a licence at the request of:
- an impacted local community (including an Aboriginal community); or
- an Aboriginal landowner.

Recommendation 21: Before amending the conditions of a licence the DEPWS CEO should have to:
- undertake a consultation process with landowners, including Aboriginal landowners and impacted local (including Aboriginal) communities;
- share sufficient information with such people to allow input into that process; and
- take their views into account in making his or her decision.

Recommendation 22: The NTG should prioritise capacity building at the regulator.

Recommendation 23: Increased transparency of environmental obligations under the EP Act, extending to publishing of environmental registrations and licenses and reports on environmental outcomes and should be matched by increased transparency of approvals sought under the DITT approvals system.

Recommendation 24: A decision maker should not be required to recommend a project for peer review only if he or she is satisfied that the project has no detrimental or significant impact on traditional owners. In addition to this, a decision maker should also consider whether a project is complex, controversial or unique, or uses new technology or methods, whether high levels of risk or uncertainty are inherent to the project, whether information is complete and adequate, and experts competent and credible.

Recommendation 25: A “prepare once, use many” approach to peer review documents is not appropriate, particularly in the Northern Territory where there are varied landscapes, environmental and socio-cultural environmental values and commodities. Working with external experts regulators may build the capacity of internal staff so that external advice is not needed as frequently.

Recommendation 26: The Land Councils are key stakeholders in the Northern Territory's resources industry, and should be involved with collaborative development of NTG policies and legislative requirements in relation to the sector.

Recommendation 27: Public consultation timeframes should be sensitive to the unique challenges and resources of traditional owners and communities, and climactic conditions in the Northern Territory which mean consultations cannot progress in December, January and February.

Recommendation 28: Reporting requirements should include:

- the requirement to report environmental incidents in relation to all activities covered under a licence or registration, whether exploration, extractive or mining related;
- annual reporting requirements for incidents that cause environmental harm should extend to incidents that may cause environmental harm so that patterns of risky behaviour can be identified (the requirement to report near miss incidents reflects various work health safety regimes); and
- reports should include detailed information setting out the root cause of each incident and the steps that are taken to mitigate damage or manage it (if ongoing).

Recommendation 29: The regulatory regime should involve implementation of clear, consistent standards that are enforceable. Further, the DEPWS CEO should have the power to revoke a licence or registration in the following additional circumstances:

- threatened non-compliance of environmental requirements (not just actual non-compliance, which will be too late); and
- threatened unauthorised environmental harms (that cumulatively are significant); and
- the CEO must enforce any performance management agreements, and this should be achieved through pecuniary penalties or withdrawing of certain consents

Recommendation 30: Regulations should allow impacted Aboriginal landowners and members of the community to enforce rehabilitation regulations to prevent environmental and community health risks where the regulator fails.

Recommendation 31: Due to the link between environmental management and rehabilitation, and the need for ongoing environmental monitoring post closure, DEPWS should manage rehabilitation and closure processes, not DITT. The closure certificate should be issued by DEPWS only once:

- post closure land use planning and rehabilitation has occurred;
- ongoing monitoring requirements are in place;
- Aboriginal landowners that obligations to them have been met to their satisfaction; and
- DITT has signed off that its requirements have been met.

Recommendation 32: The legislation should expressly provide that Aboriginal Land Trusts and native title holders have standing for merits review (i.e.: are directly affected people) and that social and cultural considerations may form the grounds for review.

Recommendation 33: The MMP should not be split into separate EMPs and operational management plans. This will create inefficiencies and increase risk that information falls through the gaps. Instead, environmental, rehabilitation and closure chapters of MMPs can be subject to public comment and participation.

Recommendation 34: Assessment approaches that require the company to research, design then seek approvals (such as consents from native title holders) once there is some certainty about project configurations are encouraged.

Recommendation 35: Avoid double handling by requiring environmental and sacred site approvals before other approvals.

Recommendation 36: Best practice sacred site requirements to apply in the Northern Territory, including the requirement for a sacred site clearance process before any ground disturbing works by explorers and miners. The NTG to amend its policies, including Environment Protection Regulations 2020, and advice provided to all developers and government departments to say that they can choose to apply for a Land Council clearance or an AAPA Authority Certificate. This advice should also state that if the proposed work is on Aboriginal Land, or where the government department or developer has commitments under an ILUA or Joint Management Agreement, they must apply directly to the relevant Land Council.

Recommendation 37: Given the impact of many remote resources projects on Aboriginal people and the inadequacy of many social impact assessments, guidance regarding social impacts should be developed in consultation with the Land Councils to ensure that the impact on Aboriginal people is adequately considered.

Recommendation 38: the oversight of rehabilitation and mine closure should be managed by DEPWS, even when the obligation to rehabilitate sits with the mining company. Where other aspects of mining are managed by DITT there should be formalised and cooperative arrangements between DEPWS and DITT.

Recommendation 39: To increase transparency and accountability there should be public reporting of applications to explore, extract and mine, including information about the applicant's capacity, what they are looking for, the outcome of decisions, and estimates of reserves for all prospective mines (not just for ASX listed entities via the JORC system).

Recommendation 40: Robust risk-based mechanisms should be established to ensure cost estimates for rehabilitation and closure are current and accurate through the life of the project. This should be combined with sufficient resourcing of DITT and DEPWS to ensure rigorous and continuous monitoring processes for early identification of risk that a company may not be able to fulfil its rehabilitation and closure obligations and adequate mechanisms to monitor and adjust financial obligations for rehabilitation and closure.

Recommendation 41: If mining rehabilitation has not been completed to the satisfaction of the Aboriginal landowners, then Aboriginal landowners should have the ability to require the security to be called upon and applied to the rehabilitation. This is particularly pertinent in the case of land administered under the ALRA where the landowners will resume a title in fee simple with potential liabilities.

Recommendation 42: DEPWS should not be required to entirely release environmental securities at mine closure if there will be a requirement for environmental monitoring post closure and possible remediation. This environmental security that is retained then constitutes a residual risk bond as against future liabilities.

Recommendation 43: In order to increase public confidence through transparency, the following information should be publicly available:

- the value of bonds for exploration and extractive projects;
- the methodology used to calculate liabilities; and
- the requirements the bond is underpinning in the MMP, EMP and EIS, and the terms on which the bond can be called upon.

Recommendation 44: A replacement legislative scheme will need to ensure that the value of environmental and mining securities are more regularly reviewed. Further, landowners (including Aboriginal landowners) should be able to request a review of securities on the basis of their observations about environmental impacts or concerns. Such provisions would go some way to restoring faith in the regulatory system.

Recommendation 45: Mechanisms to raise regulatory standards to ensure that progressive rehabilitation efforts are strengthened across the industry are:
- setting strict, enforceable standards for progressive rehabilitation and best practice mine closure planning;
- mandating specific progressive rehabilitation targets for all mining operations;
- requiring development approvals for mining projects to include conditions relating to progressive rehabilitation;
- requiring that mining and exploration tenure renewal is dependent on delivery of progressive rehabilitation;
- amending all mine operations' permits to include fixed, non-negotiable rehabilitation ratios that are maintained through the life of the mine; and
- imposing financial penalties on companies for failing to undertake progressive rehabilitation.

Recommendation 46: Landowners (including Aboriginal landowners) should be consulted about the value of environmental security and that environmental security should be reviewed through the life of the project to consider if that the environmental security reflects the cost and best practice of the time. When considering the value of security, either at the initial review or throughout the project, Aboriginal landowners should be consulted and, if they have an opinion, that opinion must be taken into consideration by the decision maker.

Recommendation 47: independent third party audits of rehabilitation costs should be required before rehabilitation bonds are set or varied.

Recommendation 48: If Mining Operators have standing to seek a merits review of the proposed environmental and/or infrastructure security, Aboriginal landowners should also have standing. Documents underpinning decision making, including reasons, should be available upon request (outside of the FOI process) to the Aboriginal landowners so that the right to merits review is meaningful.

Recommendation 49: Mines in care and maintenance must be actively managed.

- The regulator should be notified when the mine goes into care and maintenance, and further conditions should be placed on any environmental authorisation as required with the value of security adjusted as required.
- The operator should be required to prepare and regularly review and update a care and maintenance plan that identifies and addresses how environmental risks should be managed.
- The care and maintenance plan should include an expected duration (no longer than 5 years),

after which period the company should be required to either commence closure or submit for approval a comprehensive updated care and maintenance plan. The NTG should be able to reject the care and maintenance plan.

- Aboriginal landowners should be consulted and, if their submissions taken into consideration by the decision makers.
- The regulator should actively and regularly consider the likelihood of the operations being a stranded asset and should have the ability to force the operator to decommission and rehabilitate if care and maintenance status is not genuine.

Recommendation 50: The regulatory regime must allow Aboriginal landowners involvement in mine closure processes. The legislative regime should require:

- All applications, reports, notices, audit reports, response to a request for information relevant to complying with or obtaining any approvals or authorisations under environmental or mining regime be provided to Aboriginal landowners.
- Proponents must consult with Land Councils on behalf of Aboriginal landowners during the development and amendment of rehabilitation and closure plans.
- Proponents must be required, as far as possible, to restore land to the status it existed prior to their operations to the satisfaction of TOs. For example, if land was fit for pastoral purposes prior to mining, it should be rehabilitated to at least this standard. Any lesser standards represents inadequate rehabilitation.
- Aboriginal landowners should be able to complete an independent audit of decommissioning works prior to a certificate of closure being issued, and if that independent audit shows inadequate rehabilitation and closure, a certificate of closure should not be issued until rectification occurs.

Recommendation 51: Improved regulation of legacy mines and the rehabilitation of these mines is required, and this should include:

- a definition of legacy mines in the legislation, so that it applies to mines where no private company currently responsible for remediation works;
- the NT to call for tenders to perform remediation works for legacy mines, noting that a reduction in requirements related to current operations in exchange for work to remediate legacy mine sites constitutes a transfer of risk to the current operations and cannot be supported; and
- an annual report that covers operational and financial aspects of the Mining Rehabilitation Fund (**MRF**) should be published, including details of remediation work on legacy mines and the MRF current balance and expenditure, and should be made available to the public on the relevant Department's website and tabled in parliament.

Recommendation 52: To reflect the intention of the NTA, the MTA should be amended to extend the definition of "native title land" to land which is subject to a registered native title claim and to require notification to landowners to include notification to all Native Title Representative Bodies.

Recommendation 53: The NTG should apply a case by case approach to assessing whether the expedited procedure applies under the NTA. For efficiency, this assessment should involve input of impacted Land Councils and prescribed bodies corporate

Recommendation 54: The NTG's standard form conditions of exploration licences be reviewed in consultation with key stakeholders, including the Land Councils, and be publicly available.

Recommendation 55: The NTG's standard form conditions should be amended, and the Code of Conduct amended, so that notification of consultation is required with all native title holders, not only where there has been a determination or is a registered claim. Title holders to be required to provide adequate information to allow native title holders to understand the nature and location of the proposed activities. Title holders to hold meeting with native title holders and their representatives only Notice of meeting to be at least 28 days.

Recommendation 56: The standard form conditions that apply to tenements granted through the expedited procedure should also apply to tenements on crown land, parks and reserves and perpetual pastoral lease areas where there is no current registered claim or determination.

DITT to actively monitor compliance with licence conditions.

Failure to meet requirements to notify of access should be an offence.

Recommendation 57: Transitional arrangements to reflect leading practice standards. Coordination between regulatory agencies and sufficient resourcing to be available to reduce the transitional period to shortest time possible.

Recommendation 58: In order to increase public confidence through transparency, the following information should be publicly available in respect of residual risk bonds:

- the value of bonds;
- the methodology used to calculate liabilities; and
- the requirements, risks and expectations the bond is underpinning, and

The terms upon which the residual risk bonds can be called upon.

Recommendation 59: Aboriginal landowners to have the ability to recommend release and revision of residual risk payments.

Recommendation 60: The limitation period for actions under chain of responsibility legislation should be carefully considered to best protect the Northern Territory and its people.

2. INTRODUCTION

1. The Land Councils welcome the opportunity to make submissions to the Northern Territory Government (***NTG***) in respect of its discussion paper on regulation of mining activities – environmental regulatory reform dated 9 December 2020 (the ***Discussion Paper***). The Land Councils would be pleased to provide any further assistance required by the NTG.
2. The Discussion Paper confirms the NTG's commitment to supporting and encouraging the growth of a safe, competitive, innovative and sustainable resources industry that builds a stronger economy for all Territorians. Traditional owners and Aboriginal communities located in proximity to resources projects are the Territorians most significantly impacted by the environmental conduct of the resources industry, and they are impacted in special ways. A significant proportion of the Northern Territory is country with high environmental value. For these reasons the regulation of mining in the Northern Territory must be of the highest standard, to ensure that the positive impacts of mining outweigh the negative.

3. The Land Councils are supportive of the move to have environmental issues managed by DEPWS rather than DITT, with DEPWS able to place binding requirements on miners and explorers. Clearly this move requires significant coordination between DEPWS and DITT to ensure that mineral resource activity in the NT is appropriately and efficiently managed, without environmental risks falling through inter-agency gaps. But the Land Councils do not consider the move from a proposal based system to a licensing and regulation system is a necessary or improved mechanism to achieve environmental regulation. Given the varied nature of mineral resource activity in the NT, there is no real value in a standardised licensing system, so for that reason the benefits of a change in the system are minimal. Nevertheless our submission will address the questions posed in the Discussion Paper, as these answers are often also pertinent to an improved proposal based system. In our view, improvement to the regulatory regime to achieve improved outcomes is necessary under either a proposal or licencing and regulation based system.

4. Evidence shows that the rigour of the regulatory regime does not have a negative impact on resource activity[1]. The Land Councils would strongly resist any move by the NTG to introduce a less effective regulatory regime based on spurious assumptions that this would attract investment into the Northern Territory. The way to achieve a more efficient regulatory regime is to properly resource DEPWS and DITT.

5. Under the *Environment Protection Act 2019 (NT)* (***EP Act***), 'environment' is defined as "all aspects of the surroundings of humans including physical, biological, economic, cultural and social aspects." Protection and good intergenerational management of all environmental aspects of resources projects is vital for the continuation of religious and cultural traditions and the health and wellbeing of Aboriginal Territorians. Aboriginal Territorians have the most to lose from inadequate rehabilitation and environmental practices as their identity and beliefs underpinning it are closely associated with the land and waters which have sustained them for countless generations. Mining companies and governments come and go but traditional owners and Aboriginal communities living near mines bear the impacts of poor environmental outcomes for many generations and stay on the land which they inherited from their forbears, sharing its life in perpetuity.

6. A safe and sustainable resources industry in the Territory cannot operate without regard to the important roles and responsibilities of Aboriginal Territorians, and the social, cultural and environmental impacts that resources projects have upon them. That the Discussion Paper does not refer to Aboriginal Territorians is a glaring deficiency. That deficiency was recently replicated in the NTG's Code of Conduct for Mineral Explorers in the Northern Territory dated December 2020 (the ***Code***).

7. This submission is based on the Land Councils' long history and experience working with the Aboriginal people of the Northern Territory. Similarly Aboriginal people and Land Councils have a long history and experience working with the mining industry beginning with indigenous owned ochre and clay extraction operations that have been ongoing for tens of thousands of years. In 1963 opposition to bauxite mining on the Gove peninsula in East Arnhem Land and in 1966 exodus from the Wave Hill cattle station paved the way for the modern indigenous land rights movement in Australia that, along with other catalysts for change, led to the enactment of the *Aboriginal Land Rights (NT) Act 1976 (Cth)* (***ALRA***). Since their inception in 1974 (NLC) & 1975

[1] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) Finding 4.2*

(CLC) the Land Councils have been heavily involved with the mining industry, including in relation to oversight of the Ranger Uranium Mine near Jabiru. In relation to the mining industry, Aboriginal landowners rely on robust regulation and the highest standard of environmental performance to avoid incidents of environmental harm, including in relation to sacred sites.

8. The same heading numbers and headings are used as in the Discussion Paper.

3. LEGAL CONTEXT

9. The Land Councils have statutory functions in relation to protecting the interests of Aboriginal people in the Northern Territory. These responsibilities include a significant role in resources developments in the region.

10. The Central Land Council (***CLC***) exercises its functions in 780,000 square kilometres in the southern half of the Northern Territory; the Northern Land Council (***NLC***) in approximately 571,733 square kilometres of land and inland waters and 568,589 square kilometres of coastal and offshore waters extending northward to the outer edge of Australia's Exclusive Economic Zone.

11. These responsibilities include a significant role in resources developments in the region. The Land Councils' statutory functions extend to resources exploration and development agreements under the ***ALRA*** and the *Native Title Act 1993 (Cth)* (***NTA***). The Land Councils also have responsibilities with respect to protection of sacred sites, environmental management and permitting arrangements under various Commonwealth and Northern Territory statutes.[2]

12. The Land Councils have significant land management expertise. The CLC is the employer of over 90 land management rangers who are employed across twelve Indigenous ranger programs operating in the southern portion of the Northern Territory.[3]

13. The NLC also actively supports the work of traditional owners to maintain their cultural obligations and look after land and sea country. The NLC currently supports 84 permanent Aboriginal rangers and approximately 40 casual rangers across 13 ranger groups in the upper part of the Northern Territory[4] and jointly manages seven parks and reserves including Kakadu

[2] For example, under s203BB(1)(b)(v) of the NTA the Land Councils have facilitation and assistance functions in relation to matters relating to native title. Under section 23(1)(a) ALRA, the CLC has the function of ascertaining and expressing the wishes and the opinion of Aboriginal people living in its region as to the management of Aboriginal land.

[3] These are:

- Anangu Rangers (Angas Downs IPA, Imanpa community);
- Anangu Luritjiku Rangers (Papunya and surrounding Haasts Bluff ALT);
- Anmatyerr Rangers (Ahakeye ALT (Ti Tree) and wider Anmatyerr region);
- Arltarpilta Inelye Rangers (Atitjere, Harts Range region, Huckitta Station and surrounds);
- Kaltukatjara Rangers (Docker River and Katiti Petermann IPA);
- Ltyentye Apurte Ranges (Santa Teresa ALT and surrounds);
- Murnkurrumurnkurru Rangers (Daguragu ALT and surrounds);
- Muru-warinyi Ankkul Rangers (Tennant Creek region);
- North Tanami Rangers (Lajamanu and Northern Tanami IPA);
- Tjuwanpa Rangers (Ntaria, Hermannsberg ALTs and adjoining national parks);
- Warlpiri Rangers (Yuendumu, Willowra, Nyirrpi and Southern Tanami IPA); and
- Tjakura Rangers (Mutitjulu).

[4] These are:

- Garngi Rangers based on Croker Island
- Mardbalk Marine Rangers based on Goulburn Island
- Numbulwar Rangers based in Numbulwar
- Yugul Mangi Rangers based in Ngukurr

National Park.

14. Agreements between Land Councils, traditional owners and industry underpin every major mine in the Northern Territory other than McArthur River Mine, many exploration and extraction projects and facilitate working relationships for industry and Aboriginal parties. Under the agreements negotiated for its region, the Land Councils impose obligations on operators in relation to environmental management and rehabilitation.

4. LAND COUNCILS ARE KEY STAKEHOLDERS IN THE TERRITORY'S RESOURCES INDUSTRY

15. The Land Councils have extensive experience with all major resource projects in the Northern Territory, having performed their functions for over 40 years.

16. The largest of these mining projects in the CLC region is the Newmont Tanami Operations on Aboriginal Land 550 km north-west of Alice Springs which employs close to 1000 people and in 2020 produced almost 500,000 ounces of gold. It is the result of a Part IV ALRA agreement negotiated in 1983 with the CLC. Recently, Newmont's board agreed to expand the mine's life beyond 2040 at a cost of more than $1 billion. This is a significant contribution to the Northern Territory economy.

17. Other projects on Aboriginal Land that are underpinned by a Part IV Agreement negotiated by the CLC include Edna Beryl gold mine near Tennant Creek, Twin Bonanza gold mine 520 km west of Tennant Creek, the L6 Surprise Oil field and Mereenie and Palm Valley oil fields. Mereenie and Palm Valley fields were the sole providers of gas to the entire Northern Territory for nearly 30 years until offshore gas became available. Recently, production in Central Australia has increased, with gas being provided to the east coast of Australia via the new Northern Gas Pipeline and to the Newmont Tanami Operations via the new Tanami Gas Pipeline.

18. The CLC has recently negotiated agreements for the Mount Peake Project and the Nolan's Project, both of which are in the process of raising finance and could be major operations. Also, the CLC has negotiated and entered ILUAs / Section 31(1)(b) Agreements for Molyhil Mine (2007) 240km north east of Alice Springs, Harts Range garnet mine 200km north east of Alice Springs (2012), Jervois Mine (copper-silver) 380 km north east of Alice Springs (2016) and L7 Dingo gas field which supplies Alice Springs. Some of these mines are in care and maintenance.[5]

19. In the NLC's region there are over 50 granted tenements on Aboriginal land. Fifteen of these are mineral production agreements and two are petroleum exploration agreements. The NLC agreement negotiated in 1978 for the Ranger Uranium Mine was the very first mining agreement of its kind in Australia; a new agreement for the Ranger Uranium Mine was negotiated in 2012. An agreement in relation to the Gove bauxite mine was negotiated by the NLC and traditional owners in 2011. This agreement laid the foundations for the most recent mineral production agreement finalised in the NLC's region, the Gulkula Mine agreement in 2017. The Gulkula Mine is

- Waanyi Garawa and Garawa Rangers based in Borroloola and Robinson River
- Timber Creek Rangers based in Timber Creek
- Wardaman Rangers based in Katherine
- Wagiman Rangers based in Pine Creek
- Wudicupildiyerr rangers based in Wudicupildiyerr
- Bulgul Land & Sea Rangers based in Bulgul on the western side of Litchfield
- Malak Malak Rangers based in the Daly River region
- Kenbi Rangers based on the Cox Peninsula

[5] See, for example, https://www.abc.net.au/news/rural/20190-12-05/harts-range-garnet-mine-australian-abrasive-minerals-shuts/11764474

on Aboriginal land in East Arnhem Land and is Australia's first Indigenous owned and operated bauxite mine. The mine is 100% owned by the Gumatj clan and currently employs 27 indigenous staff. There are also agreements in place in relation to Northern Territory Iron Ore Project, part of which is located on Aboriginal land near Minyerri and which is currently in care and maintenance.

20. Various agreements for mining projects have also been negotiated in the area of the NLC on behalf of native title holders. ILUAs/Section 31(1)(b) Agreements have been finalised for the Merlin Diamond Mine near Borroloola; the Frances Creek Gold Mine (2007); and the Mt Porter gold mining project (2004) both located in the Pine Creek region. All these mines are currently in care and maintenance due to factors unrelated to tenure arrangements. The NLC has also negotiated three agreements with Kirkland Lake Gold Australia for their gold projects in the Pine Creek region (2015, 2018, 2019); and agreements are in place with regard to the Bootu Creek Manganese Mine near Tennant Creek; the Sill80 Ilmenite Mine near Minyerri and the Nathan River Resources (formerly Roper Bar) iron ore project (2012) all of which are currently operational except for Kirkland Lake's Cosmo Mine which has been in care and maintenance since 2017.

5. GENERAL COMMENTS

5.1. Impacts on Aboriginal Territorians

21. In this submission the term ***Aboriginal landowner*** is used to refer to Aboriginal people who have legal rights in relation to land. These include:

    a. Aboriginal Land Trusts holding Aboriginal land under ALRA;

    b. Native title holders for areas subject to an approved determination of native title that native title exists and areas subject to registered claims.

22. Other Aboriginal people and groups regularly impacted by exploration, mining and extractive operations include Aboriginal communities (Aboriginal people living close to the operations) and traditional owners. In the Northern Territory context, traditional owners are also impacted in areas where there is no determination of native title or registered native title claim, particularly on the pastoral leasehold estate not yet claimed, where in all likelihood native title rights continue and are subject to protections under the NTA.

23. Incomplete or inadequate mine site rehabilitation and environmental management can lead to significant detrimental long term environmental (including social) costs including impacts on surface and groundwater pathways, availability and quality, biodiversity impacts, safety risks and societal costs associated with disrupted communities and a legacy of environmental impacts. Indigenous identification with the country and its perceived and actual harm associated with mining can have impacts on the levels of individual and group wellness, identity and feelings of safety and security. These costs are disproportionately borne by Aboriginal Territorians who live remotely and close to mine sites, and who feel cultural connection to the affected country.

24. As Yanyuwa and Garawa woman Nancy McDinny told the recent Commonwealth inquiry into mining rehabilitation:

> *No-one is telling us what's happening on the river. We need to know. We're the people living down there, so we need to know what's going on the river. Our old people are all dying, and we're here, and we want to talk to someone. We need that mine to be closed, because we are living down there, and we don't want our people to get sick. We're the ones who will be*

copping it down here.[6]

25. The former Redbank mine is a site that has been investigated by the NT EPA. Pollution has been found more than 40 km downstream from the site with mine derived slats impacting on sacred sites. The failures in regulation at the former Redbank mine and at other mine sites throughout the Northern Territory have been highlighted by the NT EPA. Traditional owner of the Redbank Mine Site Keith Rory said:

> *We have grandchildren and kids coming up, we need a future. The mine needs to do the right thing by the people. Our young kids need to get on the country, hunting and fishing. They can't be frightened of contamination. We need to make sure that the country is safe for our young people to go back, to work, hunt and live on their grandfather's and grandmother's country.*[7]

Recommendation 1: The long-term negative impacts of abandoned and poorly rehabilitated mines will be felt by Territorians for many years to come, and most acutely by Aboriginal people, who are inseparably tied to country. Stronger legislative requirements should be put in place to ensure that the environmental impacts of mineral resource activity are better managed. A more rigorous environmental control system is required to achieve a better balance between the negative impacts of mining and the employment and revenue streams that may be available during the relatively short operational phase of mines.

26. Traditional owners have unique interests and suffer deep spiritual and cultural impacts associated with a project that are not necessarily felt in the same way by other members of the Aboriginal community. The connection to respective parts of the country, or its specific features and manifestations, varies as it depends on kinship and ceremonial obligations of individuals and family groups. Traditional owners nearly always resume the land at end of project life. This is reflected in Commonwealth statute; on native title land, the non-extinguishment principle applies to the grant of a mining lease or exploration licence and native title rights and interests survive mine closure. Similarly, Aboriginal land subject to mineral leases is still Aboriginal land after closure and relinquishment. If containment of contaminants fails, neighbouring Aboriginal land or native title land may also be impacted. Traditional owners have a very strong interest in environmental sustainability and the ongoing health of land and waters for future generations, as well as accumulated millennia of experience in caring for country.

27. The Discussion Paper does not mention Aboriginal landowners, Aboriginal communities or traditional owners. Given that they are the Territorians most impacted by the success or failure of environmental regulation of the mineral sector, this is a serious omission that was replicated in the Code. The Discussion Paper fails to make the connection between environmental regulation, mine rehabilitation outcomes and Aboriginal Territorians.

Recommendation 2: If the Northern Territory community's interests are to be protected, the Northern Territory legislative regime (including any voluntary codes) must provide adequate opportunity for Aboriginal landowners and Aboriginal communities to be involved at every stage

[6] Submission 41 to the Commonwealth Environment and Communications References Committee (2019) *Rehabilitation of Mining and Resources Projects and Power Ash Dams as it relates to Commonwealth responsibilities*.

[7] See DIIT website – www.industry.nt.gov.au/industries/mining-and-energy/mine-rehabilitation-projects/redbank-mine/traditional-owners <accessed 17 February 2021>

of the approvals process and mining life cycle, including a requirement that rehabilitation after mine closure should be to the satisfaction of Aboriginal landowners.

Reforms pursued through co-designed policy making and implementation are more likely to achieve good outcomes for all Territorians.

5.2. Opportunities missed – involving Indigenous knowledge and Aboriginal ranger groups in environmental management

28. The CLC employs and manages over 90 land management rangers associated with 12 ranger groups in Central Australia (see section 4) and the NLC employs over 110 land and sea management rangers associated with 14 ranger groups in the Top End, in addition to other indigenous ranger groups in the region. Contracts for land management are an opportunity for Aboriginal ranger groups to provide skilled labour required by proponents and government, and undertake economic development in a manner that is sustainable and often supportive of cultural and spiritual practices and associations.

29. The Australia Institute recently estimated that around 18,000 jobs would be created over five years to rehabilitate 220,000 hectares of unrehabilitated mining land in Queensland.[8] This is a significant number of jobs that would be facilitated by an increased government focus on mine site rehabilitation. While this estimate applies to Queensland, there are also significant opportunities in the Northern Territory to employ Rangers and other Aboriginal people in mine site rehabilitation, including of legacy mines.

30. The recent EPBC Act Review findings highlighted that there should be normalisation of incorporating Aboriginal knowledge in environmental management planning through culturally appropriate engagement.[9] The Discussion Paper's silence about involving Aboriginal people, and particularly Aboriginal ranger groups in environmental management is a lost opportunity to support a local, Territory based industry. This oversight was replicated in the Code, which at 4.1.2 suggested explorers should give the landowner opportunity to quote for contract work and endeavour to employ local residents for casual or seasonal work. The Code does not explicitly address the opportunities to source skilled land management expertise from Territorians via Aboriginal ranger groups and land management services.

31. The mining industry in the Northern Territory is alive to the benefits of engagement with Land Councils, traditional owners and Aboriginal rangers. In its submission to the *Inquiry into the Destruction of 46,000 year old caves at the Juukan Gorge* by the Parliamentary Joint Standing Committee on Northern Australia, the Minerals Council of Australia provided an example of this positive relationship in the Northern Territory:

> *The mining agreement covering a mine in the Northern Territory includes stringent commitments to protection of Aboriginal interests and excluding any sacred sites from operations any sacred sites. The agreement was made under the Commonwealth's Aboriginal Land Rights Act (Northern Territory) Act 1976…*

[8] As cited in the Commonwealth Environment and Communications References Committee (2019) *Rehabilitation of Mining and Resources Projects and Power Ash Dams as it relates to Commonwealth responsibilities* at 7.20.

[9] Samuel, G et.al. (2020) *Final Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* at 2.2.2.

Management and protection of sacred and culturally significant areas are undertaken in collaboration with the custodians through either a fee for service or employment development program. This has led to a tailored ranger program.
This positive relationship has enabled the mine to work with traditional custodians on integration of traditional ecological knowledge into cultural heritage management, mine land rehabilitation and closure processes[10].

Recommendation 3: Legislative reform should facilitate opportunities for Aboriginal people associated with the mining industry, particularly land management during life of mine and ongoing monitoring and rehabilitation, including requirements in approvals that traditional owners must be consulted about environmental management.

32. Section 125 of the *Environment Protection Act 2019* (NT) (***EP Act***) provides a legislative power to require offsets from projects that have undergone environmental impact assessment or are subject to regulatory approval under another Act that has been prescribed in the *Environment Protection Regulations 2020* (***EP Regulations***). As part of this power, the Minister may establish an environmental offsets framework for use under the EP Act, or any other Act prescribed in the EP Regulations. As at the date of this submission, it appears that no other Acts have been prescribed in the EP Regulations.

33. As at the date of this submission, much of the Northern Territory environmental offsets framework policy, including technical detail is still under development. It would be useful for any developments in this area, including in relation to the application of offsets to mining projects, to begin with finalisation and implementation of key offsets policies and instruments. This is a necessary starting point to ensure there is a transparent application to mining projects (particularly offset integrity measures to avoid double counting and ensure offsets are real, measurable, verifiable and additional). Further, consistent with the EPBC Act statutory review final report, offsets should result in a net gain to the environment.

34. There is significant private sector interest in 'nature based solutions', particularly in relation to climate change adaptation and mitigation and in initiatives relating to natural capital and environmental economic accounting. In addition, the recent EPBC Act statutory review final report provides clear findings and recommendations regarding the potential benefits in leveraging carbon markets for biodiversity outcomes and environmental restoration. Given the potential for mining projects to require assessment under EPBC Act processes, there is broad potential for good outcomes under Northern Territory approaches to offsets and incentivising the involvement of Aboriginal ranger groups and land management services.

Recommendation 4: In implementing the environmental framework the NTG should consider how to:

-create real opportunities for Aboriginal ranger groups and land management services to be actively involved in land management; and

- require consultation with traditional owners about offsetting proposals.

Recommendation 5: Information on Aboriginal land managers and rangers' role with resources

[10] Minerals Council of Australia, submission to the Inquiry into the destruction of 46,000 year old caves at Juukan Gorge in the Pilbara region of Western Australia, sub104, p9

projects and offsetting proposals should be publicly available and would provide valuable transparency about Aboriginal employment credentials of proponents and the application of offset policies.

6. PROPOSED ENVIRONMENTAL REGULATORY FRAMEWORK FOR MINING

6.1. General (mining) environmental obligations or duties

1. *Is the approach of imposing general (mining) environmental obligations or duties to provide a 'safety net' and support for the licencing and registration scheme supported? If not, why?*
2. *What alternatives should be considered?*

35. Standard conditions may be beneficial in jurisdictions where there are numerous similar projects mining and processing the same commodity in the same manner (e.g.: iron ore in Western Australia, coal in Queensland). However, they are not necessarily useful in a small jurisdiction with multiple commodities and diverse and complex Aboriginal interests like the Northern Territory. Standard conditions risk a lowest common denominator approach that may result in important and unique environmental aspects and values associated with a proposed mining project location being missed by the regulator.

36. The approach of imposing general mining environmental obligations or duties to provide a safety net can only be supported if such conditions are a floor, not a ceiling. Best practice allows a prudent regulator to add conditions to reflect the unique nature of each project and each environment that will be impacted.

37. Effective monitoring and enforcement depends on effective conditions at the outset. Drafting of clear and transparent conditions associated with environmental approvals is supported.

Recommendation 6: Any standard conditions adopted must be a floor not a ceiling. Regulators must consider and add conditions to reflect the unique nature of each project and of each environment where it will occur.

3. *What other general (mining) environmental obligations should be included?*

Anti-avoidance of rehabilitation obligations

38. The NTG should be concerned about business practices that can result in companies deliberately avoiding rehabilitation obligations through mines being sold to small resources companies with outstanding rehabilitation liabilities. The Northern Territory regulatory regime should include mechanisms to ensure that the financial and technical capacity of purchasers to delivery rehabilitation requirements, particularly where sales occur late in mine life.

39. Leading practice was recently discussed in the Productivity Commission report into resources sector regulation, reproduced below[11]:

[11] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 7.12)*

LEADING PRACTICE 7.12

Smaller companies that acquire a resource extraction site that is nearing the end of its life may struggle to meet their rehabilitation obligations. Leading practice suggests that governments account for this risk in financial assurance frameworks. Governments can also consider the financial strength of companies in tenement licensing approvals, as has been implemented in Queensland's recent reforms.

40. As set out in the Productivity Commission report, thorough assessments of potential licence holders (including at the transfer or assignment phase) addresses the risk of non-compliance. The NT regime (*Mineral Titles Act* section 58(2)(d) and regulation 44 of the *Mineral Titles Regulations* goes some way to scrutinising the capacity of licence applicants, it does not meet leading practice which is replicated below[12]:

LEADING PRACTICE 4.2

Thorough assessments of potential licence holders address the risk of repeated non-compliance. Leading practice involves regulators taking a risk-based approach to due diligence when granting, renewing or transferring tenements and considering:

- whether the applicant has previously failed to comply with licence conditions or health, safety and environment legislation (whether in the same jurisdiction, or in other domestic and international jurisdictions)
- past criminal conduct, technical competency and past insolvency.

While all jurisdictions undertake some due diligence, none fully follows leading practice.

Recommendation 7: The Northern Territory regulatory regime should include mechanisms to ensure that the financial and technical capacity of purchasers to deliver rehabilitation requirements is assessed during the approvals process. Regulators should consider:

- whether the applicant has previously failed to comply with licence conditions or health, safety and environment legislation (whether in the same jurisdiction, or in other domestic and international jurisdictions);
- past criminal conduct and any findings of corrupt activity, and past insolvency, including of related corporate entities (whether in the same jurisdiction, or in other domestic and international jurisdictions);
- technical competency;
- when mines are operating on Aboriginal landowner's land, the potential licence holder's track record of Aboriginal engagement, including whether tenure arrangements were granted through agreement (rather than through National Native Title Tribunal or arbitrated processes), any breaches of agreements or cultural heritage legislation and the company's track record of Aboriginal employment and contracting. Due diligence investigations in relation to this aspect must involve inquiries with the relevant Land Council.

Recommendation 8: The Northern Territory regulatory regime should include mechanisms to ensure that the financial and technical capacity of purchasers to deliver rehabilitation requirements is assessed prior to any operator being allowed to transfer tenements.

[12] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 4.2)*

Considerations that should be considered by the Northern Territory regulator are set out in Recommendation 7.

Upfront costing and inclusion of closure plans

41. Principle 2 of the National Principles for Managing Rehabilitation Financial Risks that was endorsed by Energy Council Ministers in August 2018[13] is set out below:

Principle 2

Robust mine rehabilitation and closure plans are established before project commencement and endorsed by the state/territory body administering mine/petroleum site compliance.

42. Reflecting this principle, section 40(2)(g) of the MMA requires an MMP to include a plan and costing of closure activities. In practice, this is often not done. It is not possible for regulators or companies to assess the long term economic viability of a project without developing and costing a closure plan up front. The practice of not including a fully costed closure plan also creates difficulty for Aboriginal landowners who are asked to make decision about native title or ALRA consents without being able to assess the long term impacts of a project.

Recommendation 9: A fully costed closure plan should be required to be commissioned and developed as part of the approvals process, and should be required to be reviewed regularly throughout life of mine, including with the involvement of Aboriginal landowners.

Public release of monitoring and compliance information and data and updating conditions

43. The CEO should be required to report publicly about the effectiveness of compliance monitoring and enforcement activity. As recently found by the Productivity Commission:[14]

FINDING 7.2

In most jurisdictions public reporting about the effectiveness of compliance monitoring and enforcement activity is limited, putting public confidence in the regulation of projects at risk.

[*emphasis added*]

44. The Productivity Commission also recommended that adequacy of conditions is fed back to regulators setting those conditions, so that this information can be taken into account.[15]

Recommendation 10: The CEO should be required to report publicly about the effectiveness of compliance monitoring and enforcement activity. Effectiveness should be communicated back to regulators setting the conditions.

6.2. Environmental registration and licensing scheme overview

[13] National Principles for Managing Rehabilitation Financial Risks that was endorsed by Energy Council Ministers in August 2018. Available at : *http://coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/National%20Principles%20for%20Managing%20Rehabilitation%20Financial%20Risks.pdf* (accessed 16 February 2021)

[14] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Finding 7.2)*

[15] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 7.1)*

4. *Rather than relying on a non-exhaustive list of substantial disturbance activities such as that contained in s. 35 of the MMA, should the new framework legislation identify an exhaustive list of non-disturbing activities? This could include, for example, airborne surveys and terrestrial seismic surveys undertaken using existing tracks.*

45. The Productivity Commission recently made the following finding (our underline).[16]

> FINDING 4.2
>
> No evidence has been presented to this study indicating that differences between jurisdictions' approaches to licensing have created impediments to investment, or that any particular regime for the allocation of tenements is 'leading practice' in all circumstances. However, exemptions from normal licensing requirements aimed at attracting investment have questionable merit.

46. The proposal that new framework legislation identifies non-disturbing activities for which a registration is not required cannot be supported. This approach would remove some exploration, extraction and mining activities from regulatory oversight. Also, it would mean that some exploration, extraction and mining activities could occur in areas cultural or environmental significance without any oversight. This exemption from normal licencing requirements is unacceptable.

> **Recommendation 11:** The new framework legislation should:
>
> - require registration or a licence for all exploration, extraction and mining activities;
> - ensure that Aboriginal landowners and Native Title Representative Bodies are given the same notification rights as other (e.g. pastoral) landowners; and
> - ensure that Aboriginal landowners are meaningfully and closely involved in mine closure plans and opportunities.
>
> The proposal that the new framework legislation identifies non-disturbing activities for which a registration is not required cannot be supported.

47. The Productivity Commission has also recently made the following leading practice finding:[17]

> LEADING PRACTICE 6.1
>
> Leading-practice environmental impact assessment (EIA) involves application of a risk-based approach, where the level and focus of investigations is aligned with the size and likelihood of environmental risks that projects create. Early identification of risks through thorough scoping, including community consultation, is critical for developing EIA terms of reference that focus on the projects biggest and most likely impacts and therefore which matters need to be investigated more or less thoroughly. The ongoing EIA improvement project in New South Wales shows movement in this direction.

48. There are intrinsic links between the environment, culture and wellbeing. A risk-based approach needs to be assessed on physical and cultural environmental grounds. An activity such as rock chipping may not constitute a substantial disturbance to the physical environment but may constitute a substantial disturbance to the socio-cultural and spiritual environment if the targeted

[16] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Finding 4.2)*

[17] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Finding 6.1)*

outcrop is culturally significant.

Recommendation 12: A risk-based approach needs to be assessed on physical and cultural environmental grounds to account for activities that may be environmentally low risk (such as rock chipping) but may cause substantial disturbance to the socio-cultural and spiritual environment.

5. Are there any mining related activities that currently require authorisation and a mining management plan that should not be subject to the new framework?

49. All mining, extraction and exploration activities should require a permit or a licence. See recommendation 10 and recommendation 11.

6. Are there any mining related activities that are not currently required to be authorised that should be under these reforms?

50. Section 83 of the MTA provides a right of access via the nearest practicable route from a road or airstrip, and permits a miner to construct a road. However, we are unaware of any departmental guidelines for assessing the nearest practicable route. Without regulatory guidance, this section also duplicates section 84 MTA.

51. Hiley J considered this section in the NT Supreme Court, finding:

> *This right conferred by s 84(1) supplements the other important rights conferred upon a title holder by ss 80 to 83 of the Act, some of which involve activities over land belonging to others. For example, s 83 entitles a title holder to enter land outside its title area and to construct or maintain a road or to do other work to enable the title holder to have access to its title area. Notwithstanding that the exercise of such rights could interfere with or detrimentally affect the existing rights of landowners or others with a relevant legal interest in that land, there is no express requirement in those sections for notice to be given or for consent to be sought and obtained.*[18] (underline added)

52. Letting a mining company construct a road on the basis of its own assessment of the nearest practicable route constitutes a step outside of the government regulatory system and constitutes poor public land management. It is clear from reviewing parliamentary debates that the Legislative Assembly never intended that section 83 would operate to allow unregulated road construction by the holders of mineral tenements. The Minister at the time expressed an intention to develop regulations to address this issue, but no such regulations have ever been made.

Recommendation 13: Regulations should be developed to ensure a considered approach to access issues. A miner intending to rely on section 83 for construction of a road should provide notice to native title holders and other landowners (e.g. pastoral lease holders) of the proposed route at the time it applies for a tenement. Input should be required from native title holders and other landowners before a section 83 access right is permitted.

[18] *Australian Ilmenite Resources v Silver [2018] NTSC 72*

6.3. Environmental registration

53. The Discussion Paper foreshadows that exploration activities will operate according to an environmental registration subject to standard form conditions. This blanket approach to dealing with exploration and some extractive activities cannot be supported without at least providing for socio-cultural risk factors (as detailed in recommendation 11), including sacred site protection (see recommendation 36) and supplementing standard form conditions (as detailed in recommendation 7). There is insufficient detail in the Discussion Paper to be able to support a process that does not address the specifics of each proposal. The Land Councils would welcome further discussion on this proposal.

Recommendation 14: Regulatory reforms should not result in a blanket approach of issuing an environmental registration for exploration activities subject to standard form conditions.

54. Further, all extractive activities potentially have a sufficiently significant environmental impact (including socio-cultural aspects) to warrant an environmental licence.

Recommendation 15: All extractive activities should require a tailored environmental licence.

6.4. Environmental licences

55. The proposal that mines operate under standard condition licences cannot be supported. The reasons for this are set out in recommendation 7 and 11. All mining licences should include environmental licence conditions tailored towards identified risks.

Recommendation 16: All mining licences should require a tailored environmental licence.

56. Licence reviews are supported, but public submissions, including from Aboriginal landowners during the review phase should be required. The decision-maker should be required to take their views into account when undertaking such reviews.

Recommendation 17: The legislative regime should provide that Aboriginal landowners and impacted Aboriginal communities can provide input during any licence review process, and the decision maker should be required to take their views into account.

6.5. Registration and licence condition reviews

57. The Discussion Paper proposes that the regulations will identify a consultative process involving the mining industry and other stakeholder groups to develop risk criteria and conduct reviews of the risk criteria and registration. It is imperative that this process involves Aboriginal Landowners and Land Councils.

Recommendation 18: Because of the special impacts that mining has on Aboriginal Territorians, Aboriginal landowners and the Land Councils must be involved in consultative processes to:

- develop risk criteria; and

- review risk criteria and registration conditions.

58. If performance improvement agreements are not enforceable they provide no compliance incentive to companies operating in remote localities, far from public view. Cancelling the performance improvement agreement will provide no incentive if the underlying licence remains on foot.

Recommendation 19: The CEO should be able to commence proceedings for breaches of the conditions of registration in respect of matters covered under a performance improvement agreement. In addition, entry into a performance review agreement should be a trigger to review the value of any environmental and rehabilitation security.

7. Under what other circumstances should the CEO be able to amend the conditions of a licence?

59. Conditions in a licence should be able to be amended at the request of Aboriginal landowners or impacted Aboriginal communities. Aboriginal landowners and impacted Aboriginal communities should also be consulted prior to the CEO amending a licence condition, and their views should be taken into account.

Recommendation 20: The CEO should be able to amend the conditions of a licence at the request of:

- an impacted local community (including an Aboriginal community); or

- an Aboriginal landowner.

Recommendation 21: Before amending the conditions of a licence the DEPWS CEO should have to:

- undertake a consultation process with landowners, including Aboriginal landowners and impacted local (including Aboriginal) communities;

- share sufficient information with such people to allow input into that process; and

- take their views into account in making his or her decision.

6.6. Independent specialist review and sign-off

60. Although it is difficult for regulators to recruit to the Northern Territory, specialised knowledge is required for effective regulation. This is particularly relevant in the Northern Territory where the Northern Territory mineral sector is not dominated by a single particular commodity.

61. Measures to increase regulator capacity (see recommendation 22), as well as transparency (see recommendation 23), are key to restoring public confidence in the NTGs ability to manage environmental impacts and mining programs. Capacity building within the Northern Territory regulator is supported.

Recommendation 22: The NTG should prioritise capacity building at the regulator.

Recommendation 23: Increased transparency of environmental obligations under the EP Act, extending to publishing of environmental registrations and licenses and reports on environmental outcomes and should be matched by increased transparency of approvals sought under the DITT approvals system.

8. What protections could be included in the legislation to ensure peer review powers are only used when required to ensure that the licensing process provides the necessary environmental protections and meets the objectives of the EP Act?

62. Peer review commonly occurs at the assessment stage of the project. In deciding whether to use peer review, a decision maker should consider whether a project is complex, controversial or unique, or uses new technology or methods, whether high levels of risk or uncertainty are inherent to the project, whether information is complete and adequate, and experts competent

and credible. The decision maker should also consider best practice principles and standards. This should include a consideration of whether or not the project will have a significant or detrimental impact on traditional owners. When making a decision as to whether or not a project will require peer review, the decision maker must be satisfied that the project will not have any detrimental or significant effect on traditional owners.

63. A peer reviewer will need to evaluate not just the findings of a specialist study, but whether the terms of reference for the study are correctly drafted (i.e.: has the right question been asked)? Peer review powers, when used, should require a detailed terms of reference for the peer reviewer developed in consultation with him or her. Accuracy of information used, identification or assessment and evaluation of key impacts, appropriateness of approach, methodologies used and adequacy of mitigation measures can also be considered as well as alternatives to mitigation.

Recommendation 24: A decision maker should not be required to recommend a project for peer review only if he or she is satisfied that the project has no detrimental or significant impact on traditional owners. In addition to this, a decision maker should also consider whether a project is complex, controversial or unique, or uses new technology or methods, whether high levels of risk or uncertainty are inherent to the project, whether information is complete and adequate, and experts competent and credible.

64. Further information regarding specialist review and sign off for the value of mining securities is set out at paragraph 107.

9. What information or assistance could you provide to enable administrative guidance that supports a "prepare once, use many" approach to peer review documents to be developed?

Recommendation 25: A "prepare once, use many" approach to peer review documents is not appropriate, particularly in the Northern Territory where there are varied landscapes, environmental and socio-cultural environmental values and commodities. Working with external experts regulators may build the capacity of internal staff so that external advice is not needed as frequently.

6.7. Public participation and transparency

65. The Productivity Commission recently outlined the following leading practice in relation to public participation and engagement:[19]

LEADING PRACTICE 12.8

Regulators can improve the public's understanding of regulatory objectives and processes by:

- engaging with local communities on the regulatory process throughout the life cycle of a resources project, including in the initial scoping stage, as occurs in Canada
- conducting broader consultation on an ongoing basis to understand community expectations and provide this feedback to policy makers and the government, as occurs in New South Wales.

66. As set out in section 4, the Land Councils are key stakeholders in the resources industry with

[19] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 12.8)*

experience with all major resources projects in the Northern Territory over 40 years. Legislative reforms and policies are best made collaboratively. The Land Councils would welcome further input into NTG policies and legislative requirements.

Recommendation 26: The Land Councils are key stakeholders in the Northern Territory's resources industry, and should be involved with collaborative development of NTG policies and legislative requirements in relation to the sector.

6.8. Improving timelines and certainty

67. Statutory periods for public input should reflect that traditional owners are disproportionately impacted by environmental impacts from mining, extractive and exploration activities. Statutory consultation periods should not assume readily available telecommunications and internet access or literacy in English. These assumptions are restrictive and mean that many Aboriginal people in remote areas cannot make or be involved in submissions relating to matters that will significantly affect them.

68. Despite having significant and unique interests, there is no express reference in the Discussion Paper to how the NTG will facilitate involvement of Aboriginal interests in consultation processes. Further details (such as the Code) have been developed without input from the Land Councils. Consultation with traditional owners on country ordinarily requires around 60 business days. Due to climatic and cultural reasons, consultations are not appropriate, and likely not effective, in December, January and February. While the need to balance many stakeholders in environmental approval processes is understood, there are measures that can be taken to better enable the Territorians who are most impacted by mining projects to provide reasonable input on proposals that affect them.

Recommendation 27: Public consultation timeframes should be sensitive to the unique challenges and resources of traditional owners and communities, and climactic conditions in the Northern Territory which mean consultations cannot progress in December, January and February.

6.9. Environmental incident reporting and recording

69. The proposal that reported and recorded environmental incidents in relation to mining activities (whether those causing material or serious environmental harm or environmental harm or those that may cause material or serious environmental harm) be made public is supported. Making such reports publicly available will go some way to managing community concerns and instilling public confidence in the response of the Northern Territory regulator.

Recommendation 28: Reporting requirements should include:

- the requirement to report environmental incidents in relation to all activities covered under a licence or registration, whether exploration, extractive or mining related;

- annual reporting requirements for incidents that cause environmental harm should extend to incidents that *may* cause environmental harm so that patterns of risky behaviour can be identified (the requirement to report near miss incidents reflects various work health safety regimes); and

- reports should include detailed information setting out the root cause of each incident and the steps that are taken to mitigate damage or manage it (if ongoing).

6.10. Environmental compliance and enforcement

70. The regulatory regime should involve implementation of clear, consistent standards regarding requirements of miners throughout their project and at end of life. These standards must be enforceable.

71. Best practice is for every regulator to have compliance and enforcement policies in relation to projects (i.e.: so there should not be a complete separation of policy functions). Compliance and enforcement policies create transparency, certainty and predictability.

72. The Discussion Paper proposes that when an operator cannot comply with standard conditions of an environmental registration, DEPWS CEO may require the operator to apply for a licence and grant the operator a licence and revoke the registration. The CEO may also refuse to grant the licence if there are significant unauthorised environmental harms and the operator has not taken steps to address these.

Recommendation 29: The regulatory regime should involve implementation of clear, consistent standards that are enforceable. Further, the DEPWS CEO should have the power to revoke a licence or registration in the following additional circumstances:

- threatened non-compliance of environmental requirements (not just actual non-compliance, which will be too late); and

- threatened unauthorised environmental harms (that cumulatively are significant); and

- the CEO must enforce any performance management agreements, and this should be achieved through pecuniary penalties or withdrawing of certain consents

10. Are there any compliance and enforcement tools not currently available in the EP Act or the MMA that should be considered for inclusion as part of these reforms?

73. The proposal in the Discussion Paper that performance improvement agreements should be used when there has been non-compliance with registration conditions is only acceptable if the DEPWS CEO can take civil or criminal action for non-compliance with the agreements. Otherwise these agreements cannot take the place of proper compliance and enforcement tools.

74. As discussed in the paragraphs immediately above, the regulatory framework should include transparency and accountability to the community for rehabilitation standards and the status of rehabilitation works at any point in time. In addition, the regulations should allow impacted Aboriginal landowners and affected members of the community r to enforce rehabilitation regulations to prevent environmental and community health risks where the regulator fails.[20]

Recommendation 30: Regulations should allow impacted Aboriginal landowners and members of the community to enforce rehabilitation regulations to prevent environmental and community health risks where the regulator fails.

6.11. Mine remediation and environmental licence surrender

75. The Discussion Paper proposes that at the cessation of mining and the successful completion of closure requirements the operator will need to apply to surrender the environmental registration or licence. DEPWS will consider the application and determine whether the agreed environmental outcomes and closure objectives have been achieved. Once DEPWS has determined the agreed

[20] This was discussed by the Commonwealth Environment and Communications References Committee (2019) *Rehabilitation of Mining and Resources Projects and Power Ash Dams as it relates to Commonwealth responsibilities*; paragraphs 3.54. – 3.60.

environmental outcomes and closure objectives have been achieved it will accept the surrender and advise DITT which will, subject to its own regulatory requirements, issue a mine closure certificate and return the security.

Recommendation 31: Due to the link between environmental management and rehabilitation, and the need for ongoing environmental monitoring post closure, DEPWS should manage rehabilitation and closure processes, not DITT. The closure certificate should be issued by DEPWS only once:
- post closure land use planning and rehabilitation has occurred;
- ongoing monitoring requirements are in place;
- Aboriginal landowners that obligations to them have been met to their satisfaction; and
- DITT has signed off that its requirements have been met.

6.12. Reviews of environmental decisions

76. The Discussion Paper states that it is proposed to:

- include judicial review of all decisions made under these reforms. Applicants, directly affected people and people that participated in the decision making process (e.g. by commenting on a licencing application) will be able to seek review;
- applicants, directly affected people and people who participated in the decision making process can seek merits review of an environmental licencing or registration decision; and
- directly affected people e.g. landholders or licensees can seek a merits review of any compliance or enforcement decision such as the issue of an environmental protection notice.

Recommendation 32: The legislation should expressly provide that Aboriginal Land Trusts, native title holders for areas subject to a native title determination and the Applicant(s) where a registered native title claim exists have standing for merits review (i.e. are directly affected people) and that social and cultural considerations may form the grounds for review.

7. PROPOSED MINING MANAGEMENT REGULATORY REFORMS

7.1. Improving definitions

77. See recommendation 52 regarding the definition of native title land.

7.2. Authorisation and Mining Management Plan reform

78. The Discussion Paper proposes that it will likely be a condition of an environmental registration or licence that the mining operator prepare and maintain a publicly available environmental management plan (***EMP***), although a mining management plan (***MMP***) will no longer be provided. MMPs will be replaced with a more simplified mining plan or program that concentrates only on mining activities including infrastructure design, infrastructure management and operation systems, staged extraction, decommissioning and mine closure. Environmental impact management will be conditioned and managed separately through the environmental registration and licencing scheme.

79. The Discussion Paper notes that this will provide:

> *"Increased opportunities for public participation in the environmental licensing process for mining activities, through public comment periods for licence applications that have not been*

subject to environmental impact assessment processes."

80. Increased opportunities for public participation in the environmental licencing process is supported, but this should be able to occur without the MMP being split into two documents regulated by two separate departments. Environmental and operational aspects of mining plans must speak to each other and there are efficiencies in a single document (with a single index, table of abbreviations and ability for environmental chapters to refer to operational chapters and visa versa where required). For example, the design and management of a tailings facility could be considered a piece of infrastructure that is managed through a new MMP lodged with the mines department, however at most mine sites tailings and their management represent the greatest environmental risk. A single MMP document reduces the risk that significant information and controls will fall through the gaps.

81. Importantly, the Discussion Paper proposes that rehabilitation and closure processes are set out in the simplified mine management plan. However, an EMP requires these same sections. The Discussion Paper outlines concerns with overlapping jurisdiction for environmental regulators resulting from the on/off site regulatory regime which has the potential to create significant inefficiencies and uncertainties however separation of rehabilitation and closure processes from environmental regulators appears to duplicate this issue.

Recommendation 33: The MMP should not be split into separate EMPs and operational management plans. This will create inefficiencies and increase risk that information falls through the gaps. Instead, environmental, rehabilitation and closure chapters of MMPs can be subject to public comment and participation.

11. What improvements to the mining authorisation process do you consider would improve efficiency and effectiveness?

Require project configurations early

82. It is common for proponents to put forward one project configuration and seek native title consents and environmental approvals well prior to the project being funded and finalised. Some proponents appear to see environmental and native title or ALRA consents as a tick the box exercise required to boost the prospect of them obtaining funding. Once environmental and native title approvals are obtained companies often materially change the configuration. This is inefficient and adds significantly to cost as further consultations are required. Proponents should be required to develop their project configuration before seeking approvals, including for native title or ALRA consents and environmental approvals.

Recommendation 34: Assessment approaches that require the company to research, design then seek approvals (such as consents from native title holders) once there is some certainty about project configurations are encouraged.

Avoid double handling by requiring environmental and sacred site approvals first

83. Environmental approval (whether by EIS, licence or permit) needs to occur after the project configuration is decided but before any mining approval and consent from native title holders is granted. This is for two reasons:

    a. First, from a public policy perspective, it is inefficient to cause a proponent to obtain mining approvals and consent from native title holders prior to, and pending an environmental approval:

i. which is not granted, or;

ii. which is granted but the conditions in which cause the mining approvals to be revised.

b. Second, it is unacceptable to ask Aboriginal landowners to make a decision about their support for a project prior to an environmental assessment being completed. Environmental factors will significantly impact Aboriginal landowners' assessment of the desirability and workability of a project.

84. There must be engagement with traditional owners about sacred site protection early in the development of the project, so that the project configuration can take sacred site requirements into account. Examples of more proactive cultural heritage approaches exist elsewhere in Australia, such as Victoria, where cultural heritage management must be addressed before certain other approvals and authorisations can be granted.

Recommendation 35: Avoid double handling by requiring environmental and sacred site approvals before other approvals.

Encourage best practice sacred site protection

85. The Land Councils have over many years developed a robust process for sacred site protection. Consistent with section 23(1)(ba) of ALRA, the Land Councils assist Aboriginal people to protect their sacred sites by advocating that development proposals (including exploration, extraction, mining, infrastructure and road works) are subject to a sacred site clearance prior to commencement of any work. This function applies to all the land in a Land Council's region and it is not limited to Aboriginal land.

86. Clearance certificates issued by the CLC and NLC reports in relation to sacred sites surveys aim to prevent damage to and interference with Aboriginal sacred sites by setting out conditions in relation to entering and working on subject land. They serve to protect the applicant against prosecution for entering, damaging or interfering with sites under the *Northern Territory Sacred Sites Act NT (1989)* (***NTSSA***) and ALRA by providing the applicant with documentary evidence that the custodians and traditional Aboriginal owners of the subject land have been consulted and consent to the applicant's proposed works.

87. The Land Councils' approach to ensure that sacred site clearances are required before any ground disturbing work is consistent with best practice sacred site protection principles. These were recently set out by the Productivity Commission – see below.[21] On the other hand if explorers only request a search of the sites register from the Aboriginal Areas Protection Authority (***AAPA***) this often occurs late in the piece (contrary to leading practice in the first dot point below), does not centre traditional owners in decision making about their sacred sites (contrary to leading practice in the second dot point below), and is based on the erroneous assumption that all important sacred sites will be on the AAPA sites register.

LEADING PRACTICE 8.2

Leading-practice heritage regimes:

- embed heritage engagement in the project assessment process, so that heritage is considered in the earliest stages of, and throughout the life of, a project, rather than being a 'final box to check' when other approvals have been obtained

[21] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 8.2)*

- centre traditional owners in decision making about their heritage. This means, in the first instance, that project proponents seek agreement from traditional owners on how heritage impacts will be managed
- provide a process where both traditional owners and project proponents can seek dispute resolution or appeal a heritage decision.

Leading-practice examples include:

- the Victorian *Aboriginal Heritage Act 2006*, under which a cultural heritage management plan must be approved by the Registered Aboriginal Party before planning approval can be given
- the Queensland *Aboriginal Cultural Heritage Act 2003* which requires a negotiated agreement on heritage issues before a project can go ahead.

[*emphasis added*]

88. Through the CLC's clearance process, traditional owners gain a sound understanding of the proposed work and its impact on their land, enabling them to make an informed decision. The sacred site clearance certificate process is as follows:

    a. The traditional owners of the land in question are identified;

    b. CLC's staff (and if required the project proponents, or their representatives) discuss the land use proposal with the identified traditional owners to ensure they are fully informed of, and understand the nature and scope of, the request;

    c. CLC's staff travel with traditional owners to the country covered by the proposal. Through this clearance activity traditional owners are able to exclude any culturally sensitive areas and place other conditions on the works to ensure proper protection of sacred sites; and

    d. CLC prepares a sacred site clearance certificate which is given to the proponents, who are contractually bound to comply with the conditions of the certificate.

89. If an explorer or a mining company complies with a clearance by the Land Council, the clearance is highly likely to provide a defence against prosecution as it will be evidence that the works are done by consent of the traditional owners, and will allow the explorer or a mining company to successfully argue that they had no reasonable grounds for suspecting that the site was a sacred site. On the other hand if explorers only request a search of the sites register from the AAPA showing registered and recorded sites, there is a distinct possibility that the explorer will enter on, damage, or desecrate a sacred site leaving themselves exposed to prosecution. The Land Council's sacred site clearance process was endorsed in the MCA's submission to the Juukan Gorge Inquiry[22].

Recommendation 36: Best practice sacred site requirements to apply in the Northern Territory, including the requirement for a sacred site clearance process before any ground disturbing works by explorers and miners. The NTG to amend its policies, including *Environment Protection Regulations 2020*, and advice provided to all developers and government departments to say that they can choose to apply for a Land Council clearance or an AAPA Authority Certificate. This

[22] Minerals Council of Australia, submission to the Inquiry into the destruction of 46,000 year old caves at Juukan Gorge in the Pilbara region of Western Australia, sub104, p9

advice should also state that if the proposed work is on Aboriginal Land, or where the government department or developer has commitments under an ILUA or Joint Management Agreement, they must apply directly to the relevant Land Council.

Social Impacts

90. Section 5.1 of this submission sets out the particular and extensive impacts that mines have on Aboriginal people in the Northern Territory. Social impacts are often inadequate and do not differentiate between impacts on Aboriginal communities and the particular impacts on traditional owners. Social impact assessments of dust, noise and other amenity disturbances do not regularly assess impacts on camping places, cultural sites and hunting places that are impacted.

91. This was recently the subject of findings as to leading practice by the Productivity Commission:[23]

LEADING PRACTICE 10.1

Guidance on the social impacts that should be considered in the approvals process, and how they should be considered, helps improve the quality of social impact assessments. For example, the New South Wales Government has issued guidance that outlines:

- what social impacts should be considered in the assessment
- how to engage with the community on social impacts
- how to scope the social impacts and prepare the assessment.

The effects identified in social impact assessments should not always be the domain of companies to address. Rather, leading practice requires that social impact assessments provide a framework for companies and governments to work together to address these effects, in line with the principles outlined in finding 10.1. The Commission has not identified a leading-practice jurisdiction in this area.

Recommendation 37: Given the impact of many remote resources projects on Aboriginal people and the inadequacy of many social impact assessments, guidance regarding social impacts should be developed in consultation with the Land Councils to ensure that the impact on Aboriginal people is adequately considered.

Ensuring effective coordination among agencies

92. Many jurisdictions require resources projects to obtain assessments and approvals by multiple regulators within a jurisdiction. The Productivity Commission has recently made findings in respect of this issue:[24]

FINDING 6.8

Resources projects typically require a range of assessments and approvals by multiple regulators within a jurisdiction. While regulatory coordination has improved over the past decade, proponents still report difficulties navigating the regulatory landscape. Lack of coordination can cause costly delays and liaising with multiple agencies can also give rise to significant compliance costs.

93. Lack of regulatory coordination in the Northern Territory affects more than proponents; it affects

[23] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 10.1)*

[24] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Finding 6.8)*

Land Councils and Aboriginal parties too. Lack of coordination can cause duplication of work and delays liaising with multiple departments.

94. The Discussion Paper proposes to place mine closure and rehabilitation in the hands of the Department of Industry, Tourism and Trade (***DITT***), where it is removed from the Department of Environment, Parks and Water Security (***DEPWS***) which is responsible for other environmental approvals. Without effective coordination, this likely to create significant inefficiencies and uncertainties as well as contribute to reduced confidence in the regulator. Leading practice was discussed by the Productivity Commission:[25]

LEADING PRACTICE 6.12

Effective coordination among agencies within a jurisdiction reduces uncertainty, facilitates timely processing and minimises overlaps and inconsistencies. This can occur through:

- a lead agency or major project coordination office that provides guidance to proponents and coordinates processes across agencies (without overriding the decision-making capacity of other regulators). The coordination models in Western Australia and South Australia, and the case management system in Northern Territory have been highlighted as leading practice by study participants
- co-operative arrangements between agencies. These include the use of memorandums of understanding, inter-agency working groups or taskforces such as those in Western Australia. South Australia's approach of using costs recovered from resources companies to pay staff in multiple regulatory agencies also supports faster approvals and better inter-agency communication.

Recommendation 38: the oversight of rehabilitation and mine closure should be managed by DEPWS, even when the obligation to rehabilitate sits with the mining company. Where other aspects of mining are managed by DITT there should be formalised and cooperative arrangements between DEPWS and DITT.

Increase transparency

95. Confidence in regulators is undermined by low levels of transparency. Regulators grant rights to explore, extract or mine minerals that belong to the Crown. All Territorians should have the right to know who is applying for tenements and what they are looking for, information about the applicant's capacity, and the outcome of regulator's decisions.

96. In addition, to increase transparency and accountability there should be public reporting of estimates of reserves for all prospective mines (not just for ASX listed entities via the JORC system).

Recommendation 39: To increase transparency and accountability there should be public reporting of applications to explore, extract and mine, including information about the applicant's capacity, what they are looking for, the outcome of decisions, and estimates of reserves for all prospective mines (not just for ASX listed entities via the JORC system).

7.3. Management of mining securities

12. How can the mining securities framework be improved?

[25] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 6.12)*

97. Principle 3 of the National Principles for Managing Rehabilitation Financial Risks that was endorsed by Energy Council Ministers in August 2018[26] is set out below:

Principle 3

Notwithstanding the obligation for tenement holders to rehabilitate mine sites, state/territories should hold financial securities for rehabilitation and closure. These being set at levels that reflect the level of disturbance and risk of the operation, minimising the state/territory's financial exposure.

98. The NTGs current practice to make rehabilitation bonds cover 100% of the value of rehabilitation is supported. Closure and rehabilitation costs were not traditionally seen by the industry as a business risk. Having a major cash component upfront for rehabilitation commitments means that rehabilitation becomes a business risk and incentivises managers and the board to ensure environmental management and rehabilitation are factored into mine planning and operations. If securities are set realistically then the market will help to determine which projects are genuinely attractive and viable. This should increase certainty for the operator, the NTG, Territorians and investors.

99. Rehabilitation bonds are not a 'set and forget'. Robust risk based mechanisms need to be in place to ensure cost estimates for rehabilitation and closure are current and accurate through the life of the project. This should be combined with sufficient resourcing of DITT and DEPWS to ensure rigorous and continuous monitoring processes for early identification of risk that a company may not be able to fulfil its rehabilitation and closure obligations through mechanisms to monitor and adjust financial obligations for rehabilitation and closure. This reflects the following principles of the National Principles for Managing Rehabilitation Financial Risks that was endorsed by Energy Council Ministers in August 2018[27]

Principle 4

Robust risk-based mechanisms are in place to ensure cost estimates for rehabilitation and closure remain current and accurate throughout the life of the project.

Principle 5

Rigorous and continuous monitoring processes are applied for the early identification of any potential risk that a company may not be able to fulfil its rehabilitation and closure obligations.

Principle 6

Mechanisms, including legislation, are developed to monitor and apply financial obligations for rehabilitation and closure with consideration given to the interaction of state/territory and Commonwealth legislation.

Recommendation 40: Robust risk-based mechanisms should be established to ensure cost

[26] National Principles for Managing Rehabilitation Financial Risks that was endorsed by Energy Council Ministers in August 2018. Available at : *http://coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/National%20Principles%20for%20Managing%20Rehabilitation%20Financial%20Risks.pdf* (accessed 16 February 2021)

[27] National Principles for Managing Rehabilitation Financial Risks that was endorsed by Energy Council Ministers in August 2018. Available at : *http://coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/National%20Principles%20for%20Managing%20Rehabilitation%20Financial%20Risks.pdf* (accessed 16 February 2021)

estimates for rehabilitation and closure are current and accurate through the life of the project. This should be combined with sufficient resourcing of DITT and DEPWS to ensure rigorous and continuous monitoring processes for early identification of risk that a company may not be able to fulfil its rehabilitation and closure obligations and adequate mechanisms to monitor and adjust financial obligations for rehabilitation and closure.

100. As discussed in section 5.1, Aboriginal people, especially traditional owners, often bear the brunt of negative externalities associated with poorly managed resources projects. Aboriginal landowners should have the ability to:

a. recommend whether a security should be released or revised, and these recommendations should be required to be taken into account by the DEPWS decision maker; and

b. seek merits review of the value and methodology used to calculate a security.

101. Further, the entire environmental bond should not be released as it should become a residual risk bond.

Recommendation 41: If mining rehabilitation has not been completed to the satisfaction of the Aboriginal landowners, then Aboriginal landowners should have the ability to require the security to be called upon and applied to the rehabilitation. This is particularly pertinent in the case of land administered under the ALRA where the landowners will resume a title in fee simple with potential liabilities.

Recommendation 42: DEPWS should not be required to entirely release environmental securities at mine closure if there will be a requirement for environmental monitoring post closure and possible remediation. This environmental security that is retained then constitutes a residual risk bond as against future liabilities.

102. The NTGs current position of making the value of bonds for mining projects publicly available is supported. However each of the:

a. value of bonds for exploration and extractive projects;

b. methodology used to calculate liabilities; and

c. requirements the bond is underpinning in the MMP, EMP and EIS, should also be publicly available.

Recommendation 43: In order to increase public confidence through transparency, the following information should be publicly available:

- the value of bonds for exploration and extractive projects;

- the methodology used to calculate liabilities; and

- the requirements the bond is underpinning in the MMP, EMP and EIS; and the terms upon which the security can be called upon.

103. Finally, the value of securities should be regularly reviewed. At present the value of securities is reviewed on:

a. request from operator based on changes in potential lease liability;

b. findings of periodic audits and inspections, which highlight deviations from an approved Mining Management Plan (MMP);

c. amendments to an approved MMP; and

d. at the time of sale, transfer or mine closure.

Recommendation 44: A replacement legislative scheme will need to ensure that the value of environmental and mining securities are more regularly reviewed. Further, landowners (including Aboriginal landowners) should be able to request a review of securities on the basis of their observations about environmental impacts or concerns. Such provisions would go some way to restoring faith in the regulatory system.

13. How can the management of mining securities be improved to provide greater incentives and reward for progressive rehabilitation?

104. The Productivity Commission has recently identified progressive rehabilitation as leading practice, and set out ways in which it may be encouraged.[28]

LEADING PRACTICE 7.11

Progressive rehabilitation can lead to a better understanding of rehabilitation requirements, ensure that funds are made available, reduce the total costs of rehabilitation, improve health and safety outcomes and provide community confidence in the operator's commitment to rehabilitate.

Progressive rehabilitation can be encouraged by including requirements in approval plans, and by financial surety requirements being reduced commensurate with ongoing rehabilitation work. Victoria's rehabilitation policy for Latrobe Valley mines represents a good example of the latter mechanism.

105. Mechanisms to raise regulatory standards are also set out in the *Commonwealth Environment and Communications References Committee (2019) Rehabilitation of Mining and Resources Projects and Power Ash Dams as it relates to Commonwealth responsibilities*.[29]

Recommendation 45: Mechanisms to raise regulatory standards to ensure that progressive rehabilitation efforts are strengthened across the industry are:

- setting strict, enforceable standards for progressive rehabilitation and best practice mine closure planning;

- mandating specific progressive rehabilitation targets for all mining operations;

- requiring development approvals for mining projects to include conditions relating to progressive rehabilitation;

- requiring that mining and exploration tenure renewal is dependent on delivery of progressive rehabilitation;

- amending all mine operations' permits to include fixed, non-negotiable rehabilitation ratios that are maintained through the life of the mine; and

- imposing financial penalties on companies for failing to undertake progressive rehabilitation.

14. What improvements could be made to the calculation of mining securities to better address potential environmental risks and impacts?

[28] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 7.11)*

[29] *Commonwealth Environment and Communications References Committee (2019) Rehabilitation of Mining and Resources Projects and Power Ash Dams as it relates to Commonwealth responsibilities* at paragraph 4.35.

15. What other matters would you like to see considered as part of a review of mining security assessment?

106. Section 43A of the MMA requires the Minister to calculate the amount of security to be provided by an operator by reference to the level of disturbance likely to be caused by the mining activities to be carried out under the Authorisation granted to the operator. Aboriginal communities, especially traditional owners are acutely aware of disturbances caused by mining activities, and will bear the risk of any under-calculation of mining securities.

Recommendation 46: Landowners (including Aboriginal landowners) should be consulted about the value of environmental security and that environmental security should be reviewed through the life of the project to consider if that the environmental security reflects the cost and best practice of the time. When considering the value of security, either at the initial review or throughout the project, Aboriginal landowners should be consulted and, if they have an opinion, that opinion must be taken into consideration by the decision maker.

107. Third party audits of rehabilitation costs would give the public greater confidence that they know what the full costs of rehabilitation are. Internal cost estimates by companies often do not accord with reported liabilities (whether calculated using the NTG's spreadsheet or otherwise). The real costs of closure may be seen as commercially confidential for operators, and publicly available numbers can be subject to various accounting treatments such as discounts for NPV such that the amount that is declared is many multiples less than the actual cost, particularly if the mine closes early before progressive rehabilitation has been undertaken.

Recommendation 47: independent third party audits of rehabilitation costs should be required before rehabilitation bonds are set or varied.

7.4. Reviews of mining decisions

16. Should mining operators have standing to seek a merits review of the proposed environmental and/or infrastructure security? Why?

108. The Productivity Commission recently considered this issue, noting the following was leading practice.[30]

LEADING PRACTICE 6.11

Where approval decisions are made by unelected officials it is a leading-practice accountability measure that they can be subjected to merits review that allows for conditions and approval decisions to change to reflect substantive new information. The *Environment Protection Act 2019* (NT) puts this principle into practice.

109. As discussed in section 5.2. traditional owners continue their custodianship of land after mine closure, and bear the brunt of any inadequate environmental security. As a general principle, if Mining Operators have standing to seek a merits review of the proposed environmental and/or infrastructure security, Aboriginal landowners (as per Land Council definition) should also have standing. Further, documents that go to the decision maker's decision about the proposed security should be publicly available so that Aboriginal landowners' ability to seek merits review is meaningful.

Recommendation 48: If Mining Operators have standing to seek a merits review of the proposed

[30] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 6.11)*

environmental and/or infrastructure security, Aboriginal landowners should also have standing. Documents underpinning decision making, including reasons, should be available upon request (outside of the FOI process) to the Aboriginal landowners so that the right to merits review is meaningful.

17. *How should care and maintenance be defined?*
18. *What other mechanisms could be adopted to improve the management of environmental impacts during care and maintenance periods?*
19. *Should the legislation impose a time limitation on how long a site can remain in care and maintenance? If so, what period may be appropriate?*
20. *What, if any, standard obligations for environmental management during care and maintenance periods should be incorporated into the EP Act?*

7.5. Management of care and maintenance periods

110. Mines in the CLC and NLC region in care and maintenance include Molyhil, Harts Range garnet mine, Twin Bonanza, Groundrush, Tanami Mine and several mines around Tennant Creek such as North Star, Frances Creek, Cosmo Mine, Merlin Mine and NT Iron Ore Mine. The number of mines that are in care and maintenance in the Northern Territory indicates that the Northern Territory regulator has not always had a good sense of the economics of a mine prior to approval. Regulators appear to be minded to approve mines on the basis that it will generate income and jobs, only to have operators develop uneconomic mines that are then sold to an unsuspecting purchaser.

111. Having mines in care and maintenance is not of itself a difficulty; the difficulty arises where care and maintenance is used to avoid environmental and rehabilitation obligations. Resources sites that are placed into care and maintenance can pose risks to the environment, and the operator may be at greater risk of default and insolvency. The NTG should be concerned about business practices that can result in companies deliberately avoiding rehabilitation obligations. These include mines being placed into care and maintenance indefinitely as an alternative to rehabilitation and closure.

112. The Productivity Commission recently recommended managing these risks by ensuring a requirement to notify the regulator when a site is placed into care and maintenance, which can lead to further conditions, and the preparation of care and maintenance plans.[31] Adequate securities are also key. Movement into a care and maintenance phase should trigger a review of the value of the environmental security.

LEADING PRACTICE 7.8

Resources sites that are placed into care and maintenance can create particular risks for the environment, and the operator may be at greater risk of default. These risks can be managed by a requirement to notify the regulator when a site is placed into care and maintenance, which can lead to further conditions. The preparation of care and maintenance plans that identify and address how environmental risks will be managed (such as those required in Western Australia) and the option to modify a site's financial assurance requirements (as available to the regulator in Queensland) are leading practice examples.

[31] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 7.8).*

Recommendation 49: Mines in care and maintenance must be actively managed.

- The regulator should be notified when the mine goes into care and maintenance, and further conditions should be placed on any environmental authorisation as required with the value of security adjusted as required.

- The operator should be required to prepare and regularly review and update a care and maintenance plan that identifies and addresses how environmental risks should be managed.

The care and maintenance plan should include an expected duration (no longer than 5 years), after which period the company should be required to either commence closure or submit for approval a comprehensive updated care and maintenance plan. The NTG should be able to reject the care and maintenance plan.

- Aboriginal landowners should be consulted and, if their submissions taken into consideration by the decision makers.

- The regulator should actively and regularly consider the likelihood of the operations being a stranded asset and should have the ability to force the operator to decommission and rehabilitate if care and maintenance status is not genuine.

7.6. Management of legacy mines

21. In addition to the proposals contained in this paper, what other mechanisms could the Territory introduce to minimise the potential for legacy sites to be created in the future?

113. There is a large number of legacy sites and abandoned mines and shafts in the Northern Territory. These include Mt Palmer Mine and Rex Mines, Redbank, Peko, Goodall, Rum Jungle, Kathleen, several areas around Tennant Creek, Hatches Creek, Arltunga and Winnecke Goldfields.

114. Aboriginal communities, especially traditional owners, are significantly impacted by legacy mine issues. The involvement of Aboriginal landowners at every step of the mine planning and closure process goes some way to mitigating the potential for the creation of legacy sites by including the oversight and input of landholder with a strong interest in environmental sustainability and the ongoing health of land and waters. Traditional owners have millennia of experience in caring for country and a significant interest in the health of country for future generations. From a consultation and input perspective, closure should be treated similarly to opening and require the involvement of Aboriginal landowners for planning and managing post mining land uses and monitoring. Specific recommendations are set out below in recommendation 50.

Recommendation 50: The regulatory regime must allow Aboriginal landowners involvement in mine closure processes. The legislative regime should require:

- All applications, reports, notices, audit reports, response to a request for information relevant to complying with or obtaining any approvals or authorisations under environmental or mining regime be provided to Aboriginal landowners.
- Proponents must consult with Land Councils on behalf of Aboriginal landowners during the development and amendment of rehabilitation and closure plans.
- Proponents must be required, as far as possible, to restore land to the status it existed prior to their operations to the satisfaction of TOs. For example, if land was fit for pastoral purposes prior to mining, it should be rehabilitated to at least this standard. Any lesser standards represents inadequate rehabilitation.

- Aboriginal landowners should be able to complete an independent audit of decommissioning works prior to a certificate of closure being issued, and if that independent audit shows inadequate rehabilitation and closure, a certificate of closure should not be issued until rectification occurs.

22. In what ways can industry be encouraged and supported to play a larger role in undertaking remediation works on legacy sites?

115. Mining companies may have expertise and equipment that enables them to carry out remediation work. If the NTG wishes to encourage and support industry to play a larger role in undertaking remediation works on legacy sites, it should identify priority remediation works and advertise so that the industry can tender for such work. Such work could be funded from the remediation fund. Unless this work is contracted out there is no economic incentive for miners to clean up other company's mines. A reduction in the environmental bond or other requirements related to their own operations in exchange for remediation works on legacy sites constitutes a transfer risk to the current operations and cannot be supported.

116. Based on NTG estimates there is more than a billion dollars in remedial work required. All money raised by the levy should be spent on remediation, which should include the reasonable expenses incurred to consult with Land Councils on behalf of the relevant Aboriginal landowners, and subject to a transparent public process for prioritising spending of money in the fund.

Recommendation 51: Better regulation of legacy mines and the rehabilitation of these mines is required including:

- A definition of legacy mines in the legislation, so it applies to mines where no private company currently responsible for remediation works.
- The NT to call for tenders to perform remediation works, noting that a reduction in requirements related to current operations in exchange for work to remediate legacy mine sites constitutes a transfer of risk to the current operations and cannot be supported.
- An annual report that covers operational and financial aspects of the Mining Rehabilitation Fund (**MRF**), including details of remediation work on legacy mines and the MRF current balance and expenditure should be made available to the public on the relevant Department's website and tabled in parliament.

7.7. Land access arrangements

23. In what ways could the management and administration of land access arrangements be improved for both mineral title holders and affected landholders or leaseholders?

Ensuring the MTA reflects the NTA

117. Under the NTA, procedural rights in relation to exploration, extraction and mining tenements are extended to:

a. areas subject to an approved determination that native title exists; and

b. areas subject to a registered claim,

with notification rights extending to all common law holders (regardless of having a claim or determined native title) via the process of notifying Native Title Representative Bodies.

118. In contrast, the MTA limits procedural provisions to "native title land" which, according to the definition in section 8, is limited to land for which there is an approved determination of native title that native title exists in the land. The result is that the definition of "landowners" in the MTA

excludes the applicant with a registered claim over an area, and other common law holders, whereas the NTA extends notifications rights to all categories and negotiation rights to those with a registered claim. In this way the MTA makes a distinction between areas subject to determination and other areas that is contrary to the NTA scheme.

119. This leads to absurd outcomes. For example

a. The notification provisions of section 66(2) apply to areas subject to a native title determination but not a registered native title claim, even though the procedural rights in the NTA extend to them;

b. Section 74 provides that if the grant of a mineral title is a future act (which includes land subject to claim), the Minister may only grant such title after the processes in the NTA have been followed yet the title of section 74 refers to native title land, which by definition only includes land subject to a determination.

Recommendation 52: To reflect the intention of the NTA, the MTA should be amended to extend the definition of "native title land" to land which is subject to a registered native title claim and to require notification to landowners to include notification to all Native Title Representative Bodies.

Assessing exploration applications on a case by case basis

120. There should be no blanket issuing of expedited procedure applications based on tenement type. Such an approach undermines confidence in the Northern Territory regulator if it appears the regulator will approve applications despite the quality of the applicant or the impact of the ELA. The Productivity Commission has recently made findings that exploration activities have differing impacts on native title land, and a case by case approach by States and Territories to assessing whether the expedited procedure applies is necessary.[32]

FINDING 5.5

Exploration activities have differing impacts on native title land. Consequently, a case-by-case approach by States and Territories to assessing whether the expedited procedure under the *Native Title Act 1993* (Cth) applies is necessary to give effect to the intention of the Act.

121. For efficiency, the Department should liaise with the Land Councils and prescribed bodies corporate on a case by case basis to assess whether the expedited procedure should apply and consider sacred site concerns, including as advised by the Land Councils and the register of sites held by the Aboriginal Areas Protection Authority, noting that the register is not comprehensive. The Land Councils can provide valuable input.

Recommendation 53: The NTG should apply a case by case approach to assessing whether the expedited procedure applies under the NTA. For efficiency, this assessment should involve input of impacted Land Councils and prescribed bodies corporate

122. Best practice is also to ensure that conditions, particularly standard form conditions, that attach to a tenement granted pursuant to the expedited procedure are publicly and easily available, as occurs in Queensland. Conditions are not publicly or easily available in the Northern Territory which undermines confidence in the regulator. Such conditions should be updated in consultation with key stakeholders, including Land Councils working collaboratively with the NTG.

[32] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Finding 5.5.)*

Recommendation 54: The NTG's standard form conditions of exploration licences be reviewed in consultation with key stakeholders, including the Land Councils, and be publicly available.

123. As previously stated, the Land Councils were not part of the development of the recently released Code. The Code does not address consultation requirements with native title holders. While the standard form conditions address consultation of native title holders, the Land Councils position is that these conditions do not lead to best practice consultation.

124. Schedule 2, condition 6 to the NTG's standard form conditions provides the following:

> *Consultations with Native Title Parties*
>
> *6(a) The title holder shall, prior to the commencement of exploration activities other than reconnaissance, convene a meeting on the licence area (or the nearest convenient locality) with registered native title claimants or holders to explain the exploration activities. The title holder may also invite the relevant pastoral lessee(s) or landholders to this meeting.*
>
> *This provision does not apply where the Holder is required to consult with registered native title claimants or holders because of the existence of a separate agreement.*
>
> *(b) Notice of the meeting shall be by letter and shall be posted to the registered native title claimants or holders and the representative body not less than 17 days before the meeting and shall nominate the date, time and place of the meeting.*
>
> *(c) The title holder must have regard to representations made to it at the meeting regarding any aspect of the exploration activities which raises concerns. These representations may deal with access procedures to particular areas of land within the licence area.*

125. In the Land Councils experience this condition to consult is almost never complied with in the absence of a separate agreement. Further, the Land Councils' position is that the proposed meeting does not adequately address the requirement for consultation. Native title likely exists over all pastoral land in the NT, so there should be a requirement to consult native title holders even when there is no determination or registered claim. Consultation can occur through the Native Title Representative Body for the area.

126. The title holder should be required to provide the representative of the native title holders with adequate information to inform proper consultations. The meeting should be for native title holders and their representatives only. Title holders should meet with other interest holders at separate meetings.

127. The timeframe for notice of meetings is inadequate, given the logistics for people to attend meetings, with at least 28 days' notice being more reasonable.

Recommendation 55: The NTG's standard form conditions should be amended, and the Code of Conduct amended, so that notification of consultation is required with all native title holders, not only where there has been a determination or is a registered claim. Title holders to be required to provide adequate information to allow native title holders to understand the nature and location of the proposed activities. Title holders to hold meeting with native title holders and their representatives only. Notice of meeting to be at least 28 days.

128. Standard form conditions for exploration licences are triggered by the expedited procedure. However, in the Northern Territory context unless there has been extinguishing tenure (such as exclusive possession rural leases or freehold grants in towns) there is almost certainly native title,

regardless of whether there is a claim or determination. The standard form conditions should also apply to crown land, parks and reserves and perpetual pastoral lease areas where there is no current registered claim or determination.

129. DITT needs to monitor compliance with the standard form conditions. The Land Council's experience is that the current requirements for consultations with native title holders are rarely met.

Recommendation 56: The standard form conditions that apply to tenements granted through the expedited procedure should also apply to tenements on crown land, parks and reserves and perpetual pastoral lease areas where there is no current registered claim or determination.

DITT to actively monitor compliance with licence conditions.

Failure to meet requirements to notify of access should be an offence.

8. TRANSITIONAL ARRANGEMENTS

24. How would the proposed transitional arrangements effect your mining activities?

25. What improvements could be made to the proposed transitional arrangements to facilitate the transfer of projects into the new system in a timely, staged and efficient manner?

26. For each type of mining activity – exploration, extraction and mining operations – what would be an appropriate timeframe in which to require the activity to obtain an environmental registration or licence?

27. Are the proposed arrangements for non-finalised processes appropriate? If not, what alternative processes should be considered?

28. What arrangements would you propose for operators that wish to transfer the mining activity?

130. As a general principle, transitional arrangements need to be clearly defined and communicated to all stakeholders and reflect leading practice standardsThey should not be a window to push through marginal approvals or lower standards. A high level of coordination between the regulatory agencies and sufficient resourcing is required to reduce the transitional period to the shortest time possible.

Recommendation 57: Transitional arrangements to reflect leading practice standards. Coordination between regulatory agencies and sufficient resourcing to be available to reduce the transitional period to shortest time possible.

9. FUTURE REFORM ACTIVITIES

9.1. Residual risk payments

29. What elements would you like to see included in a residual risk framework?

30. Are there specific matters that should be considered as part of developing a residual risk framework applicable to mining activities?

131. After mine closure there is a long period of post closure monitoring and maintenance. For example, the Ranger mine is legally required to ensure radioactive tailings do not enter the environment for 10,000 years and the operator at McArthur River Mine has committed to a 1000 year period of ensuring safety post closure. These time spans exceed the life of any corporate entity. The Northern Territory legislative regime does not currently ensure that regulation and monitoring and long term environmental challenges are managed appropriately.

132. A common experience among Aboriginal Territorians is that mines are shut up (whether in care and maintenance or left as legacy sites) and never rehabilitated. The following testimony from Garawa man Jack Green reflects common experiences.

> *We've got that mine just left there without fixing it. We know what happens when a mining company walks away. It's happening in front of our eyes. So we worry about that with other mines like the McArthur River Mine.*
>
> *When mining companies find out the big problems at Redbank they just sell it again and again, recycle it you know. Government allows that but nothing happens to fix the site.*
>
> *The government has responsibility for that site now, but there's not enough money coming in to fix it all up. In fact it's already ruined, can never be fixed. They just put a fence around it – that's it.* [33]

133. The Productivity Commission recently considered residual risk payments, and made the following best practice finding:[34]

LEADING PRACTICE 7.13

Residual risk payments allow governments to be compensated for foreseeable residual risks after the surrender of a mine site, while allowing companies to surrender their liability for the site. These payments should be proportionate to the remaining level of risk and determined at the point of surrender. Risks should be assessed, and payments calculated, through a formalised process. As a focus on residual risk issues is relatively new, no jurisdiction has been identified as having a leading-practice approach, although recent reforms in Queensland look to be moving in this direction.

134. As discussed in section 5.1, Aboriginal communities, especially traditional owners, often wear the risk of negative externalities arising from inadequately rehabilitated mines. The entire environmental bond should not be released at the time a closure certificate is issued if there is a long period of environmental monitoring post closure and remediation work may be required (for example, due to floods, cyclones or geological failure), so that the environmental bond can be transferred to become a residual risk bond, without limiting the ability of the NTG to seek a greater bond from the operator when the original bond has not been sufficient for the environmental impact of the project. Aboriginal landowners should have the ability to recommend whether securities should be released and revised, including the value of any residual risk payment. See recommendations 41 and 42. Best practice principles require transparency around how residual risk bonds are calculated, their value and the requirements, risks and expectations they underpin.

Recommendation 58: In order to increase public confidence through transparency, the following information should be publicly available in respect of residual risk bonds:

- the value of bonds;

- the methodology used to calculate liabilities; and

- the requirements, risks and expectations the bond is underpinning, and

The terms upon which the residual risk bonds can be called upon.

[33] Submission 41 to the Commonwealth Environment and Communications References Committee (2019) *Rehabilitation of Mining and Resources Projects and Power Ash Dams as it relates to Commonwealth responsibilities*

[34] *Productivity Commission, Resources Sector Regulation, Study Report. (2020) (Leading Practice 5.8.)*

Recommendation 59: Aboriginal landowners to have the ability to recommend release and revision of residual risk payments.

9.2. Chain of responsibility legislation

31. What benefits might there be to applying chain of responsibility laws to mining and other environmentally impacting activities?

135. The Land Councils support the introduction of legislation similar to the chain of responsibility legislation in Queensland (that allows the piercing of the corporate veil) and consider that this reform is urgently required to allow effective regulation of the mining industry. The Land Councils consider this reform should progress at the same time as the current reforms. The new laws will require the Northern Territory regulator to have oversight over the financial position of mining operators, so that if the company shows early signs of distress an environmental protection order can be made to ensure works are undertaken, or otherwise ensure that environmental conditions and approvals are enforceable against third parties. This will protect the Northern Territory community and tax payers.

136. Unlike the Queensland legislation, there should not be a two year time limit on action under chain of responsibility legislation. This is problematic given the life of mine and ability for mines to enter a long period of care and maintenance.

Recommendation 60: The limitation period for actions under chain of responsibility legislation should be carefully considered to best protect the Northern Territory and its people.