Environment Centre NT
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To Whom it May Concern,

Regulation of mining activities: environmental regulatory reform

The Environment Centre NT (**ECNT**) is the peak community sector environment organisation in the Northern Territory of Australia, raising awareness amongst community, government, business and industry about environmental issues and assisting people to reduce their environmental impact and supporting community members to participate in decision-making processes and action. Thank you for the opportunity to provide a comment on the "Regulation of mining activities: environmental regulatory reform" consultation paper (**"Consultation Paper**").

ECNT congratulates the Northern Territory Government on its proposed reforms to the Northern Territory's mining laws (**"Proposed Mining Reforms"**), which present a once-in-a-generation opportunity to fix a broken system. The NT's mining regulatory regime has produced a number of toxic mine sites that are (or will be) a significant liability for the Northern Territory Government and ultimately Australian taxpayers.

1. The need for regulatory reform

While regulatory reform to the onshore gas industry (as a consequence of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, or **Pepper Inquiry**), and the recent enactment of the *Environment Protection Act 2019 (NT)*, have considerably improved the environmental regulatory system in the Northern Territory, the state of the Northern Territory's mining laws remains a significant reputational, financial and environmental risk for the Northern Territory.

It is well known throughout Australia that the NT's mining regulatory regime falls far short of best practice. Management of mines in the tropics is complex and difficult, and legacy mines such as Mount Todd, Rum Jungle, and Redbank tarnish the Territory's landscape, leaching heavy metals and acids into waterways, with apparently little consequence or accountability for the mining companies who were responsible for the damage. There have been issues with respect to the transparency of mining regulation during the entirety of the approval, operation, closure and rehabilitation phases of mines in the NT due to the secrecy of Mining Management Plans (**MMPs**),

as well as the absence of any public reporting on compliance with conditions for mining approvals or enforcement activities undertaken by the regulator. Apart from the approval phase for mines (due to environmental impact assessment processes), there is little to no public engagement by government about the ongoing impacts of mining projects, including with Indigenous peoples with significant property interests and who are most affected by these projects. The dual role performed by the Department of Industry, Trade and Tourism (**DITT**) as both promoter and environmental regulator has led to the perception of regulatory or sectoral capture. The weak environmental provisions of the *Mining Management Act 2001 (NT)* (**MMA**) have given DITT a discretionary jurisdiction that largely operates behind closed doors and away from public scrutiny. Compliance, monitoring and enforcement functions appear to be either weak, or completely absent (for example, see the recent NT Supreme Court case in relation to the Frances Creek Mine, where it was revealed that no site inspections were carried out by DITT for the entirety of the mine's operations, despite significant issues with acid mine drainage[1]:). This substandard regulation has frequently resulted in adverse impacts for the Northern Territory's environment, and the Northern Territory's reputation as a regulator.

The most egregious example of regulatory failure with respect to mining in the Northern Territory is the McArthur River Mine. A recent report co-authored by the UNSW Global Water Institute and ECNT (**UNSW Report**, **attached**) shows that DITT's regulatory action has lagged many years behind the identification of significant environmental issues at the mine site, with environmentally catastrophic impacts.[2] One of the key environmental problems plaguing the mine was the incorrect classification of waste rock in the northern waste rock dump. Following the spontaneous combustion of the waste rock dump (publicly reported in 2013), it was revealed that instead of approximately 25% of the mine's waste rock being potentially acid-forming (PAF), the figure was closer to 90%. The UNSW Report demonstrated that as early as 2008, the Independent Monitor for McArthur River Mine had identified the potential misclassification of the waste rock as an "extreme risk". The Independent Monitor identified that tailings were oxidising rapidly and producing acid, and that the assessment of tailings as non-acid forming was likely to be incorrect. Despite every subsequent Independent Monitor report identifying misclassification of waste rock as a significant risk, DITT (and the NT Environment Protection Authority (**NTEPA**)) took no regulatory action that ECNT is aware of until 2014 (when the issue was referred for environmental impact assessment), allowing, in the interim, an expansion of the mine that doubled the size of the open pit and the waste rock dump itself, increasing the risk of acid mine drainage significantly. The mine concedes that monitoring will need to occur for some 1000 years after decommissioning of the site. It has now been over 12 years since the issue was first identified, and the "solution" (the Overburden Management Project) was only conditionally approved in late 2020, with sacred sites approvals still outstanding. Moreover, the disastrous decision to reduce McArthur River Mine's security bond against the advice of both the Independent Monitor and NTEPA has left the Northern Territory in an untenable position: closing the mine with such inadequate security would

[1] *Territory Resources Ltd v Secretary for Mineral Royalties (NT)* [2018] NTSC 12.
[2] UNSW Global Water Institute and the Environment Centre of the NT, *Monitoring the monitor: a temporal synthesis of the McArthur River Mine Independent Monitor reports* (February 2021).

leave the Northern Territory Government (and taxpayers) with an unfunded environmental disaster to remediate. ECNT is concerned that the problems identified by the Independent Monitor at McArthur River Mine are worsening in scale and severity, enabled by an ineffective regulatory regime. In 2018, the Independent Monitor characterised as "extreme", the risk that the McArthur River would redivert along its old course, causing the collapse of the mine wall and irreversible damage to the McArthur River and other water systems.[3] The risk is defined in the report as requiring "immediate intervention to eliminate or reduce risk at a Senior Management/Government level".[4] However, this risk does not appear to be addressed in the latest mining documents approved by the Minister, again indicating that regulatory action is lagging years behind the identification of significant environmental problems. This has created unacceptable multi-generational impacts on communities and landscapes.

ECNT supports the aim of the Proposed Mining Reforms as being to achieve a risk-based, transparent, robust and fair regulatory regime for mining. ECNT is concerned by the emphasis throughout the Consultation Paper on providing certainty to industry and investors, where environmental outcomes seem a secondary consideration. The NT's mining regulatory regime has provided a great deal of certainty to the mining industry and investors to date: the certainty that mining projects will be approved and operated with poor oversight and scrutiny. Mines such as Frances Creek have been left to their own devices. The primary objective of the Proposed Mining Reforms must be to improve environmental management and performance of mine sites throughout the Northern Territory, and to fix the regulatory system that has produced environmental disasters such as McArthur River Mine.

2. The need for a transparent and rigorous regulatory reform process

In order to restore public confidence in the capacity of the Northern Territory to regulate mining, it is vital that both the regulatory reform process and its outcomes are robust.

ECNT is concerned at the minimalist approach taken with respect to public engagement about the Proposed Mining Reforms. The Consultation Paper was open for comment for approximately two months, including the Christmas holiday period. There have been no public meetings or information sessions in major or remote centres about the Proposed Mining Reforms, despite their significance. It is a vastly different approach than that taken for similar significant resource sector reforms with respect to the onshore gas industry (including the Pepper Inquiry process).

It is critical that the reform process is of the highest integrity. The reform process should not be rushed. Timeframes and opportunities for public and stakeholder engagement should be clearly published on the Department of Environment, Parks and Water Security (**DEPWS**) and DITT websites, and carefully and transparently managed. DEPWS and DITT staff (and arguably Ministers) should visit and engage with communities directly impacted by poor mining regulation such as Pine Creek, Tennant Creek, Robinson River and Borroloola. Key DEPWS and DITT staff with

[3] ERIAS Group, *McArthur River Mine Independent Monitor: Environmental Performance Annual Report 2017-2018* (September 2018). At Appendix 1.
[4] Ibid.

responsibility for public engagement about the reforms should be identified on their respective websites and contact details given. Specific efforts should be directed at engaging Traditional Owners who have property interests in the majority of land in the NT (see "Indigenous engagement" heading below).

The mining industry and its representatives should not have special access to Ministers or senior bureaucrats with respect to the Proposed Mining Reforms, nor should other stakeholders. Stakeholders should be treated in the same way, with no preferential treatment. To increase transparency and accountability, the Northern Territory Government should immediately implement legislation requiring a register of lobbyists, and a lobbyist code of conduct.

ECNT is concerned by the dissolution of the Social Policy Scrutiny Committee, which was a key mechanism to ensure parliamentary accountability, transparency and scrutiny with respect to environmental reforms in the last term of government. The Social Policy Scrutiny Committee levelled the playing field somewhat, with engagement with members of Parliament brought out into the open, significantly enhancing the reform process and public trust in it. Without such mechanisms to ensure transparency and scrutiny, smaller stakeholders and members of the public are at a significant disadvantage to influence the parliamentary law-making process. In particular, the environmental sector in the Northern Territory is small and poorly-funded compared with the mining industry, putting the sector at considerable disadvantage if industry is given access to Ministers with respect to the Proposed Mining Reforms. Every effort should be made to ensure that stakeholders and the public have equality of access to government representatives throughout the reform process.

3. Resourcing, expertise and capacity

There is little point proceeding with regulatory reform unless the DEPWS is properly resourced to discharge its new regulatory functions. This was highlighted as a significant risk in the Pepper Report, with a full cost recovery model proposed for the regulation of onshore gas by the new regulator.

ECNT has serious concerns about the resourcing of DEPWS and the NTEPA in comparison with DITT. The most recent NT Budget Papers indicate that the NTEPA receives only $754,000 in funding annually. The DPEWS annual budget for its regulatory functions with respect to the *Environment Protection Act 2019, Waste Management and Pollution Control Act 1998* and the *Petroleum Act 1984* ("Environment management and policy") is $11.5m. Despite no longer having regulatory responsibility for petroleum (ie onshore gas), DITT's budget for Mines and Energy is $28.3m (split into resource industry development, mines services and energy services). ECNT is concerned that despite the significant increase in regulatory functions being performed by DPEWS (through its new jurisdiction with respect to onshore gas, and the new *Environment Protection Act*), this has not translated to sufficiently increased resourcing. Indeed, the Northern Territory Government appears to be funding the promotion of the resources industry to the detriment of its environmental regulation.

Regulatory resourcing is not just an issue in the Northern Territory. Lack of capacity and technical expertise at regulatory agencies has been raised as a problem a number of times in a national context, most recently in the Productivity Commission's report on regulation in the resources sector, where the Commission found that:[5]

> *Regulators face capability challenges and can lack transparency, which diminishes the quality of their decisions, imposes unnecessary costs and risks undermining public confidence in regulatory efforts.*

As the Productivity Commission states, "[e]lected governments have ultimate responsibility for establishing the pre-conditions for robust regulatory systems"[6] and as such, "[g]overnments should assess whether their regulators are appropriately funded, and the potential for greater cost recovery".[7]

ECNT concurs. As a part of the Proposed Mining Reforms, the Northern Territory Government should demonstrate that it will ensure that staffing levels, including staff with the necessary expertise, are sufficient to implement the proposed regulatory framework, including a robust and transparent system of compliance, monitoring, and enforcement. In particular, it will be necessary to ensure that DPEWS is appropriately staffed to take on the responsibility of regulating the environmental impacts of mining activities. It may be appropriate for a full cost recovery model for the resources industry (such as that proposed for the onshore gas industry) to be implemented with respect to mining.

4. Indigenous engagement, and Indigenous cultural heritage

ECNT is concerned by the complete absence of any specific reference to Indigenous engagement, or indeed to Indigenous people or lands at all, in the Consultation Paper.

Over 50% of land in the NT is owned by Traditional Owners under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, and much of the remainder of land is subject to native title rights and interests under the *Native Title Act 1993 (Cth).*

ECNT acknowledges that many, if not most, mines in the Northern Territory (McArthur River Mine is a notable outlier) have native title or land rights agreements, which give Traditional Owners some ability to be informed about mining operations on their country depending on the (confidential) terms and conditions of those agreements. Additional protection for sacred sites is provided through the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (**ALRA**) and the *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)* (**NTASS Act**). ECNT notes that there are many more Indigenous people and communities affected by mines in the NT who may not fall within the definitions of these pieces of legislation.

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[5] Productivity Commission, *Resources Sector Regulation - Study Report* (November 2020), Canberra. At p351.
[6] Ibid.
[7] Ibid, at p2.

In the wake of the destruction of Juukan Gorge in Western Australia, it is clear that legislation to protect Indigenous cultural heritage (and land and waters) from mining operations is inadequate. Existing protections are not sufficient to protect sacred sites, nor to ensure meaningful engagement with Indigenous peoples about mines proposed on their country or near their communities. There have been many instances in the Northern Territory of unauthorised damage to Indigenous cultural heritage, and country more broadly, by mines, including:

- the damage to a significant sacred site at Bootu Creek manganese mine notwithstanding the mine's knowledge of that site and the existence of mining agreements and authority certificates;
- the potential damage to sacred sites, and to the McArthur River and Borroloola more generally, from McArthur River Mine;
- leaching copper sulphate into Hanrahan Creek at the old Redbank copper mine; and
- acid mine drainage into the Edith River at Mount Todd gold mine.

Key regulatory decisions, such as the relatively recent approval of Nathan River Resources mine after a 7-year care-and-maintenance period, and the decision to reduce the security bond at McArthur River Mine, have not been communicated by government to the Indigenous communities which will be most affected.

Part of the problem is structural – while certain information is available to Traditional Owners and custodians (primarily through their representative bodies) and the public during the authorisation of mining projects (including through the environmental impact assessment process), very little information is publicly released post-approval. MMPs, the key regulatory tool governing mining operations, have (until very recently) been deemed confidential documents. There is no requirement for public reporting by mining companies on compliance with mining conditions, nor by DITT. After mines are authorised, their management and regulations are "black-boxed" and accessible only to mining companies and DITT.

ECNT recognises that aspects of the Proposed Mining Reforms will go some way towards rectifying this issue, with proposed requirements for publishing reports on environmental outcomes submitted in accordance with licence and registration conditions. ECNT strongly supports these proposals. However, they do not go far enough to engage Indigenous peoples about proposed and ongoing mining operations on or near their lands and communities.

The recently released final report into the review into the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* by Graeme Samuel (**Samuel Review**) stated that the federal government should bring in greater protections for Indigenous heritage immediately because of the legal "culture of tokenism and symbolism", rather than "genuine inclusion of Indigenous Australians".[8] The Samuel Review recommended the immediate adoption of a national

[8] Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report* (October 2020), Canberra: Department of Agriculture, Water and the Environment. At Chapter 2.

environmental standard for Indigenous engagement and participation in decision-making, with the following components:[9]

(a) Outcome: Indigenous Australians are empowered to be engaged and participate in decision-making, and their views and knowledge are respectfully and transparently considered in the legislative and policy processes that support the protection and management of the environment;

(b) Standard:

a. Engagement and participation of Indigenous Australians in decision-making should be enabled for activities at all scales.
b. Engagement and participation in decision-making should be undertaken with a view to ensuring the right of Indigenous Australians to be involved in the design, implementation, monitoring and reporting aspects of the activity.
c. Indigenous Australians should be adequately supported and resourced by the proponent or decision-maker, via their representative organisation, where their participation is a requirement of a statutory process under the legislation.
d. Indigenous Australians have the right to initiate their engagement and participation in decision-making with all parties undertaking activities related to the legislation.
e. The engagement and participation of Indigenous Australians should commence early. Indigenous Australians should be given adequate time for their own deliberation and decision-making processes to occur, to support their proper participation in legislative decision making processes.
f. The views and knowledge provided by Indigenous Australians should be transparently reported (where approval for publication from the owners of those views has been provided).
    i. a proponent or entity seeking approval or accreditation from the Commonwealth is required to demonstrate how views or knowledge have been included or excluded in a proposal and the reasons for doing so.
    ii. a decision maker or accredited decision maker is required to demonstrate how views or knowledge have been included or excluded in a decision, and the reasons for doing so.
g. Indigenous Australians have the right to self-determine the way their knowledge is shared and used. Knowledge holders have the right to control how their information concerning cultural practices, traditions or belief is collected, curated, integrated, analysed, used, shared and published.
h. Where prior approval for the use of knowledge is given by the Indigenous knowledge holders, all parties should commit to a two-way transfer of knowledge.
i. Enabling engagement and participation of Indigenous Australians in decision-making should be conducted in a way that demonstrates cultural awareness and competency.

[9] Ibid, at Appendix B2.

j. Monitoring, reporting and evaluation demonstrates compliance with this National Environmental Standard, including the assessment of the performance of all decision makers against this Standard.

It is incumbent on the Northern Territory Government (not mining companies) to ensure that Indigenous people are adequately informed and engaged through every stage of the mining regulatory process, from early exploration through to rehabilitation, decommissioning and monitoring, and that their views are taken into account in regulatory decisions. This should be required in the legislation. ECNT suggests that the Northern Territory Government should develop a statutory standard (with which both proponents and the government need comply) for Indigenous engagement along the lines of those proposed by the Samuel Review.

ECNT also supports a strengthening of sacred site protections with respect to mining projects. In particular, ECNT believes that sacred site clearances granted by NT land councils under s23(1)(c) of the *ALRA* or authority certificates granted by the Aboriginal Areas Protection Authority under the *NTASS Act (NT)* should be a mandatory (and statutory) precondition to the grant of a licence under the Proposed Mining Reforms. If the proposed work is on Aboriginal land, or where the government department or developer has commitments under an indigenous land use agreement or Joint Management Agreement, they must apply directly to the relevant Land Council. This would bring the mining regulatory regime into alignment with the onshore gas regulatory regime. Land councils or AAPA should be provided with access to all environmental plans, compliance and enforcement reports with respect to mines upon request, to assist them with their compliance, monitoring and enforcement functions.

5. Regulatory separation

The cornerstone of the Proposed Mining Reforms is regulatory separation between mineral resource management and environmental regulation. Following the Pepper Report, this is the model being implemented with respect to the onshore gas industry in the NT, and it accords with world's leading practice.

ECNT agrees that in order to address issues relating to the perception of sectoral capture and conflict of interest, it is necessary to have regulatory separation between DPEWS as the environmental regulator and DITT as the promoter of the mining industry.

However, ECNT is concerned that the Consultation Paper fundamentally mischaracterises the regulatory separation recommended by the Pepper Inquiry, and which would be required to achieve leading practice mining regulation.

The Pepper Inquiry recommended a "clear separation between the agency with responsibility for environmental impacts and risks associated with any onshore shale gas industry and the agency responsible for promoting that industry" (p 431). All environmental approvals and regulatory functions for the onshore gas industry in the NT thus sit with the Minister for the Environment/NTEPA/DEPWS. DITT retains responsibility for promoting the onshore industry, and the management of petroleum titles and the resource more broadly. A similar regulatory

separation can be seen with offshore gas regulation in Australia, with NOPSEMA having responsibility for environmental regulation (including approval of well operation management plans and environmental management plans), and NOPTA with responsibility for tenure including life of title administration.

Instead, the Consultation Paper proposes a separation of "regulatory responsibilities for environmental management from mining operation regulation". To achieve regulatory separation, the Consultation Paper proposes that DEPWS would have regulatory responsibility for licensing of mining operations, but DITT would retain approval power with respect to a new document called a "mining plan", which details infrastructure design, infrastructure management systems, staged extraction, decommissioning and mine closure". Of significant concern to ECNT, the proposed mining plan appears to incorporate a number of features which are directly relevant to environmental management of mine sites and should be within the regulatory jurisdiction of DEPWS, not DITT.

ECNT is also concerned that the Consultation Paper proposes that DITT will be responsible for authorising key environmentally significant mining activities, including closure plans and "legacy mine management". In ECNT's view, these functions are clearly environmental in nature, and should be within DEPWS' regulatory jurisdiction. The Consultation Paper in fact creates two overlapping regulatory domains with respect to environmental compliance and enforcement (with DPEWS to conduct compliance and enforcement for breaches of environmental obligations, and DITT to conduct compliance and enforcement activities for any alleged breaches of the MMA).

ECNT believes that the Consultation Proposes a hybrid environmental regulatory model which is inconsistent with the Pepper Inquiry recommendations and leading practice, and will not achieve regulatory separation. It facilitates sharing of environmental regulatory responsibilities that will lead to confusion and duplication of functions. It will increase regulatory complexity, not reduce or streamline it. All environmental approvals and oversight, including with respect to the matters proposed to be dealt with in "mining plans" must be vested in DEPWS (or preferably the Minister for the Environment, see "Licensing" heading below).

6. Licensing

ECNT cautiously supports the proposed creation of licences for mining operations, with DEPWS having responsibility for environmental approvals, and the monitoring, compliance and enforcement of licences and environmental outcomes (including remediation, rehabilitation and closure objectives). However, further information is needed about this proposed system. For example, and as discussed further below, it is critical that objective standards for mining operations are linked to licences, are transparent, are sufficiently prescriptive, and are enforceable. There must also be statutory mechanisms requiring public reporting against licence conditions and standards.

While ECNT accepts that MMPs have largely been an ineffective regulatory tool for the management and regulation of mine sites, there is a significant risk that if they are dispensed with, this will decrease transparency in the management of mining operations in the NT.

Environmental organisations have fought for many years for the public disclosure of MMPs, a battle which has only recently been (partially) won. While the Consultation Paper states that environmental management plans (EMPs) may replace MMPs, it is not clear how these will materially differ from MMPs, nor whether they will be made available for public comment prior to approval. The public needs to be informed about of how commitments made by mining companies in such plans, and conditions imposed by DEPWS, are being adhered to, monitored and enforced. EMPs should be made available for public comment prior to approval, consistent with the onshore gas regulatory system. The requirements for EMPs need to be set out in the legislation, and linked to standards, as discussed further below.

The Consultation Paper proposes that the licensing system will be supported by general mining environmental obligations and duties designed to minimise impacts on the environment that all mining operators must comply with. ECNT believes that the proposed obligations listed on pages 8-9 are weak, vague, and would be largely unenforceable. To instil public confidence in the mining regulatory system, it is essential that the standards that mining companies must adhere to are transparent and enforceable. Any licence conditions must clearly link to these standards.

Instead of a list of vague environmental obligations, ECNT suggests a system similar to Queensland's, where the legislation provides for the development (in consultation with the public) and approval of standards for mining operations, which would be made enforceable through licence conditioning, with an attendant requirement for plans and annual reporting against each component of the standard. This would improve certainty for all stakeholders, ensuring that environmental standards for mining are well understood and consistent across the board (allowing some flexibility). It would operate in a similar way to the current requirement for a code of practice in the onshore gas industry with which gas companies must comply. It would ensure that mining companies are legally accountable for compliance with well understood standards.

For example, the Queensland standard for mining lease projects contains reasonably detailed standards for the following:[10]

- Financial assurance;
- Land disturbance (including surface area, disturbance of trees);
- Air quality;
- Noise emissions;
- Erosion and sediment control;
- Topsoils and overburden management;
- Hazardous contaminants;
- Nature conservation;
- Roads and tracks;

[10] https://environment.des.qld.gov.au/__data/assets/pdf_file/0022/90139/rs-es-exploration-mineral-development-projects.pdf

- Campsites;
- Waste management;
- Service maintenance and storage areas;
- Drilling, excavating and sampling;
- Exploration drill holes;
- Gridlines and geophysical surveys;
- Monitoring, reporting and emergency response procedures; and
- Rehabilitation.

For more hazardous or toxic mine infrastructure (eg tailings dams, surface water ponds, water management systems more generally), stand-alone standards could be developed. For example, Queensland has developed a separate code of environmental compliance for hazardous waste dams.[11]

ECNT notes that proposal on page 12 of the Consultation Paper that regulations will identify a consultative process involving the mine industry and other stakeholder groups to develop risk criteria and conduct reviews of the risk criteria and registration conditions. Depending on how this is structured, this could give a lot of influence to the mine industry in relation to the stringency of the licensing/registration system. Similar to the development of environmental standards, it is critical that the public is proactively engaged with the development of any risk criteria (and their review).

ECNT also recommends that the legislation require annual reporting by mining companies on their compliance with licences, and annual compliance/enforcement reporting by DEPWS.

ECNT is concerned about a number of additional matters regarding the proposed licensing regime, including regarding the DEPWS CEO's power and discretion with respect to the new regime. In particular:

(a) In ECNT's view (and consistent with the regulatory regime for the onshore gas industry), the Environment Minister rather than the DEPWS CEO should have approval power with respect to licences, registrations and ancillary functions. ECNT refers to page 432 of the Pepper Report, which highlights the importance of the executive (that is a Minister) being the accountable decision-maker:

> *This approach is consistent with Australia's Westminster system. It is an important accountability mechanism. In short, if the public does not approve of Ministerial decisions with respect to any onshore shale gas industry, its disapproval may be exercised at an electoral level.*

(b) ECNT is very concerned about the wide discretion of the CEO of DEPWS with respect to "performance improvement agreements", which would have the effect of indemnifying companies from criminal or civil proceedings for a breach of a licence

[11] https://environment.des.qld.gov.au/__data/assets/pdf_file/0030/88761/era-ses-high-hazard-dams.pdf

condition. While the Consultation Paper states that these are not intended to be used as a compliance tool (p 12), it seems that this is precisely what is proposed (see, for example, p 16 of the Consultation Paper under the heading "environmental compliance and enforcement"). ECNT is concerned that this discretionary power has the potential to give protection to non-compliant mining operators who are in breach of the law, and that this power could be used arbitrarily. A number of questions remain unanswered about these agreements, including the circumstances in which they could be entered into, what happens in the case of serial non-compliance, what public input there will be about them, and whether decisions to enter into these agreements are reviewable. It is inappropriate to give this discretionary power to the CEO of DEPWS. ECNT is not convinced such agreements should form part of the regulatory regime at all.

(c) ECNT is very concerned by the suggestion that the CEO of DEPWS can amend the conditions of a licence as part of a licence review or at other times. Again, this gives a significant degree of discretion to a senior bureaucrat. It is unclear what public engagement or consultation there will be in advance of changes to licence conditions, or the circumstances in which it could happen. It would be an unacceptable outcome, for instance, if the licence conditions deviated significantly from what was proposed during an environmental impact assessment process.

7. Compliance, monitoring and enforcement

As highlighted above, one of the key characteristics of the current regulatory system is a lack of transparency regarding compliance and monitoring of, and enforcement against, mining operations. The Supreme Court case about Frances Creek mine (referred to above)[12] shows that there are real questions about whether any rigorous compliance, monitoring and enforcement activities are undertaken at all by DITT. It is crucial that rigorous requirements are established for public reporting against licence conditions and standards, as well as DEPWS' enforcement activities. These functions must be adequately resourced by the Northern Territory Government.

ECNT supports the tightening of definitions for reportable incidents, and public reporting by both mining companies and government regarding responses to these incidents. In the 2018 Independent Monitor report for McArthur River Mine, the Independent Monitor noted that 106 of the mine's groundwater monitoring bores showed exceedances greater than the trigger value, which were not reported, apparently due to a distinction informally accepted by the mine and the regulator between an "incident" requiring reporting under s29 of the MMA, and an "exceedance" which did not require reporting.[13]

ECNT suggests, as recommended by the Pepper Inquiry in relation to onshore gas, a strengthening of provisions for civil penalties, infringement notices, enforceable undertakings, remediation and rehabilitation orders, revocation, suspension or variation orders, and injunctions similar to those

[12] See n 1 above.
[13] ERIAS Group, above n 3, at pp 4-133 and 4-393.

NOPSEMA is empowered with respect to offshore gas (see the *Regulatory Powers (Standard Provisions) Act 2014 (Cth)*).

8. On/off tenement regulatory approach

ECNT strongly supports the abandonment of the on/off tenement approach to environmental management of mine sites, where DITT has jurisdiction on the mine site (under the MMA), and the NTEPA/DEPWS has jurisdiction off the mine site (under the *Waste Management and Pollution Control Act 1998 (NT)*).

The on/off tenement approach is a major flaw in the NT's current mining regulatory system. The MMA essentially permits pollution on NT mine sites, as long as it is done in accordance with an approved MMP. The environmental protection obligations in the MMA are qualified. MMPs must only "as far as practicable" operate effectively in protecting the environment (s36(5)(a)(ii)). Compliance with them protects mining operators against polluting activities that might otherwise constitute offences under the legislation. For example, the general offence in the MMA against releasing waste or contaminants on or off site is neutralised as long as the operator complies with its MMP (s33 of the MMA). Further, offences for causing other forms of environmental harm (ss26 and 26A, 27 and 27A and 28 and 28A) are only established if offenders also breach one of a list of weak environmental obligations. On the mine site operators have wide parameters as long as MMPs are complied with. This makes mining regulation a jurisdiction of discretion, where whatever DITT decides is acceptable, becomes what is enforceable (or not). And historically this has also been a secret jurisdiction - the confidentiality of MMPs (as the key regulatory tool governing mining operations on the mine site) has meant that it has not been possible for the public to ascertain how mining impacts on site are being managed.

Given the temporal and spatial nature of many mining impacts, this is an enormously risky and illogical regulatory system. Offsite impacts may be hidden or delayed. For example, acid mine drainage from tailings dams, open pits and waste rock dumps moves slowly and incrementally, infiltrating and contaminating waterways over millennia. By the time these impacts are felt off-site, there is little the NTEPA or DEPWS can do under any legislation.

It is far preferable to have a single agency regulating the new environmental licensing scheme and environmental impacts off the mine site, as proposed in the Consultation Paper. However, it is not clear to ECNT what reforms are proposed to facilitate this outcome. Further, given that the *Waste Management and Pollution Control Act 1998 (NT)* governs off-site contamination and pollution, it is not clear to ECNT how this can be achieved without reform to this legislation as well.

9. Care and maintenance

ECNT notes that mines that are in "care and maintenance" pose a risk to the NT's environment, and indeed have been the cause of significant environmental contamination in the NT (for

example, Mount Todd and Redbank mines). Care and maintenance arrangements have been used as a shield to avoid environmental accountability, and are a significant liability for the Northern Territory Government.

There is also a lack of transparency around care and maintenance arrangements, and what is required to "restart" a mine. For example, the Nathan River Resources iron ore mine was quietly "re-approved" recently after many years in care and maintenance, despite the previous operator being prosecuted for environmental damage.

ECNT supports reforms to provide clarity around care and maintenance arrangements on NT mine sites. Operators should still need to comply with licence conditions, or face prosecution or surrender of the mineral leases. There should be public reporting against licence conditions during the care and maintenance period, as well as an increase in monitoring by the regulator during this time. Mines in care and maintenance should not be able to simply "reanimate" without public consultation and engagement about the proposed approval process (including, if necessary, a further environmental impact assessment). Time limits should be imposed on care and maintenance operations.

10. Financial provisioning – security bonds and environmental bonds

The inadequacy of mining security bonds are a liability for the Northern Territory, and ultimately Australian taxpayers. ECNT supports the transfer of the assessment of security bonds to DEPWS, but believes that this approval power should rest with the Minister, not the CEO of DEPWS. Decisions with respect to security bonds must be subject to merits review by third parties. The legislation must clarify that the security bond must cover 100% of closure and rehabilitation and monitoring costs in the event of a default. The methodology for calculating security bonds must be made publicly available, and subjected to peer review and public consultation.

While ECNT notes that best practice financial provisioning for mines encourages progressive rehabilitation activities, it is critical that a strong regulatory framework be established to achieve this. ECNT refers to Queensland's recent regulatory reforms as an example of the prescription that is required to achieve effective progressive rehabilitation regulations.

ECNT supports the incorporation of residual risk payments into the statutory framework as a matter of priority, and preferably as part of the assessment of the security bond. Where residual risks are significant and likely to last for many years, it may not be appropriate for the mining company to surrender the tenement.

11. Closure and rehabilitation planning

ECNT agrees that "best practice mining management requires planning for mine closure to be integral to mine feasibility studies, mine development and operational planning, with detail increasing as the mine moves towards closure, rather than left to the end of mining operations." While the MMA does require closure plans to be incorporated into MMPs, ECNT disagrees with the suggestion in the Consultation Paper that mine closure planning is at present adequately

incorporated into all stages of mining. Further, there is very little transparency around closure planning for major mines in the NT, with MMPs (and the closure plans contained in them) largely confidential.

This is far from best practice, which requires consultation with the public about closure plans and closure criteria from the very beginning of the regulatory process. For instance, in Queensland, proponents of mining projects are required to submit progressive rehabilitation and closure (PRC) plans as part of their application for an environmental authority. The purpose of these plans is "to plan for how and where environmentally relevant activities will be carried out on land in a way that maximises the progressive rehabilitation of the land to a stable condition and... provide for the condition to which the holder must rehabilitate the land before the authority may be surrendered" (*Environmental Protection Act 1994 (Qld)*, s126B). Proponents must consult on what the post-mining land use should be (s126C). The expectation is that land will be returned to a "stable condition", which is defined as (s111A):

(a) the land is safe and structurally stable; and

(b) there is no environmental harm being caused by anything on or in the land; and

(c) the land can sustain a post-mining land use.

If the land will not be able to be returned to a stable condition, the proponents must explain why (s126C). They must also include timeframes for progressive rehabilitation of the mine site (s126C).

ECNT recommends the Northern Territory Government implement mine closure and rehabilitation reforms consistent with those recently enacted in Queensland. We **attach** for your reference a series of three useful articles by Ji Yen Loh in the Australian Energy and Resources Law Bulletin, comparing Queensland's mine closure laws to international best practice.

12. Rights of review

The rights of review for decisions made under the MMA are limited. Merits review is generally only limited to the proponent, and is not available to third parties. As stated in the Pepper Inquiry (p 420), in any mature and robust regulatory system, both judicial review and merits review should be available. It is vital that key decisions by DEPWS under the new mining regulatory regime are subject to merits review by third parties. The Pepper Inquiry said (p 420-1):

> *Merits review fosters better decision-making. The Commonwealth Administrative Review Council considers that 'the central purpose of the system of merits review is improving agencies' decision-making generally by correcting errors and modelling good administrative practice' and that 'merits review ensures that the openness and accountability of decisions made by government are enhanced'. Merits review facilitates transparency by providing a forum where all the facts and issues relevant to a particular decision can be tested. This transparency results in better decision-making because a decision-maker who knows that his or her decision may be subject to a public review on the*

merits will take particular care to ensure that it is defensible. Improved decision-making and transparency means that the public and other stakeholders will have more faith in the decision-maker and the decisions made. This is crucial for any regulator of any onshore gas in the NT and will encourage the establishment of a [social licence to operate].”

ECNT notes that the Northern Territory Government backflipped on providing third party merits review with respect to environmental assessment and approvals during consultation about the *Environment Protection Act 2019*, despite advising the Pepper Inquiry that these reforms would take place.

It is imperative that merits review be available to third parties in relation to decisions made under the new mining regulatory regime for the reasons set out in the Pepper Inquiry. These merits review provisions should mirror (to the extent possible) the merits review provisions being implemented for onshore gas in the NT, with NTCAT being given jurisdiction to hear proceedings. There is no rationale for taking a different approach with respect to mining.

ECNT submits that there should be open standing with respect to judicial review of decisions under the Proposed Mining Reforms, consistent with the Pepper Inquiry and its implementation.

13. **Other matters**

Please see Annexure A for ECNT’s views on specific consultation questions (some are cross-referenced to this submission).

If you have any questions about this submission, please contact Kirsty Howey on kirsty.howey@ecnt.org. ECNT would like to acknowledge the contribution of Claire Boardman to the drafting of this submission.

Conclusion

Yours faithfully,

Kirsty Howey

Co-Director

Shar Molloy

Co-Director

Appendix A to the ECNT Submission

	Consultation Question	ECNT Response
1.	Is the approach of imposing general (mining) environmental obligations or duties to provide a 'safety net' and support for the licensing and registration scheme supported? If not, why?	Insufficient – environmental standards are preferred. See heading 6 (licensing) in main body of submission.
2.	What alternatives should be considered?	See heading 6 (licensing) in main body of submission.
3.	What other general (mining) environmental obligations should be included?	See heading 6 (licensing) in main body of submission.
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.	No comment.
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?	No.
6.	Are there mining related activities that are not currently required to be authorised that should be under these reforms?	No comment.
7.	Under what other circumstances should the CEO be able to amend the conditions of a licence?	See heading 6 (licensing) in main body of submission. ECNT's position is that the Minister, not the CEO should have approval power. The power to amend conditions of a licence should only be exercised in very limited circumstances (see concerns in body of submission).
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	No comment.

	necessary environmental protections and meets the objectives of the EP Act?	
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?	No comment.
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?	See heading 7 (compliance and enforcement) for recommendations with respect to improving compliance and enforcement.
11.	What improvements to the mining authorisation process do you consider would improve efficiency and effectiveness?	See heading 5 (regulatory separation) in main body of submission for ECNT's concerns regarding the "hybrid" model of environmental mining regulation proposed by the Consultation Paper. DITT should have no role in environmental management of mine sites (including through "mining plan" approvals).
12.	How can the mining securities framework be improved?	See heading 10 (financial provisioning) of main body of submission for ECNT's concerns and recommendations regarding improvements to the mining securities framework.
13.	How can the management of mining securities be improved to provide greater incentives and reward for progressive rehabilitation?	See heading 10 (financial provisioning) of main body of submission for ECNT's concerns and recommendations regarding improvements to the mining securities framework.
14.	What improvements could be made to the calculation of mining securities to better address potential environmental risks and impacts?	See heading 10 (financial provisioning) of main body of submission for ECNT's concerns and recommendations regarding improvements to the mining securities framework.
15.	What other matters would you like to see considered as part of a review of mining security assessment?	See heading 10 (financial provisioning) of main body of submission for ECNT's concerns and recommendations regarding improvements to the mining securities framework.

16.	Should mining operators have standing to seek a merits review of the proposed environmental and/or infrastructure security? Why?	See heading 12 (review of decisions) of main body of submission for ECNT's concerns and recommendations regarding merits review. These apply to decisions regarding environmental and/or infrastructure security.
17.	How should 'care and maintenance' be defined?	See heading 9 (care and maintenance) in main body of submission.
18.	What other mechanisms could be adopted to improve the management of environmental impacts during care and maintenance periods?	See heading 9 (care and maintenance) in main body of submission.
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?	See heading 9 (care and maintenance) in main body of submission.
20.	What, if any, standard obligations for environmental management during care and maintenance periods should be incorporated into the EP Act?	See heading 9 (care and maintenance) in main body of submission.
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?	It is not appropriate for DITT to retain regulatory control of legacy mine sites.
22.	In what ways can industry be encouraged and supported to play a larger role in undertaking remediation works on legacy sites?	Stronger enforcement, penalty and accountability mechanisms as proposed in the main body of the submission.
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?	No comment.
24.	How would the proposed transitional arrangements effect your mining activity?	No comment.
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?	No comment. It is very important that all current and legacy mining operations are transferred into the new system as expeditiously as possible. There should be no grandfathering of the old regulatory system. If this is proposed, this must be

		made explicit during the reform process so the public can comment.
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?	See comment.
27.	Are the proposed arrangements for non-finalised processes appropriate? If not, what alternative processes should be considered?	No comment.
28.	What arrangements would you propose for operators that wish to transfer the mining activity?	No comment.
29.	What elements would you like to see included in a residual risk framework?	See heading 10 (financial provisioning) in main body of submission.
30.	Are there specific matters that should be considered as part of developing a residual risk framework applicable to mining activities?	See heading 10 (financial provisioning) in main body of submission.
31.	What benefits might there be to applying chain of responsibility laws to mining and other environmentally impacting activities?	This is a high priority and should be implemented as soon as possible.