

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

**Re: Environmental Chain of Responsibility Reforms**

**6 August 2021**

## **Introduction**

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

## **About AMEC**

The Association of Mining and Exploration Companies (AMEC) is a national industry body representing over 400 companies across Australia. Our members are explorers, emerging miners, producers, and a wide range of businesses working in and for the industry, with 30 member companies actively exploring, mining and developing projects in the Northern Territory.

The mining and exploration industry make a critical contribution to the Australian economy, employing over 255,000 people. In 2018/19, these companies collectively paid over \$39 billion in royalties and taxation, invested \$36.1 billion in new capital and generated more than \$283 billion in mineral exports. In 2019/20, \$2.8 billion was spent on minerals exploration, representing an 18% increase from the previous year.

## **The Proposed Legislative Framework**

### **General Feedback**

AMEC is supportive of policy and regulation that provides risk-based environmental protection. However, policy that is poorly implemented, and poorly managed can have significant adverse impacts on the mining and mineral exploration industry. A certain and transparent policy framework is vital to encourage investment into the Territory and support upcoming projects that will bring significant benefits to the Territory through royalties and job creation.

The proposed CoR legislative framework poses several concerns for Industry. The proposed framework indicates that CoR laws intend to ensure that government is not left to "pick up the tab" when obligation holders do not or are unable to meet their statutory obligations. However, this will increase compliance costs borne on Industry and duplicate costs incurred to address residual risk. Industry already pays securities in the form of environmental bonds and levies into the Mining Remediation Fund (MRF) to ensure that Government is able to step in to remediate areas of environmental harm in the rare instance that a company is unable to meet environmental obligations.

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

## The TERC Reports

In November 2020, the Territory Economic Reconstruction Commission (TERC) published its final report highlighting the rapid development that is required to achieve the Government's stated goal of a \$40 billion economy by 2030. The TERC report acknowledges a range of changes that will need to be implemented to reach this aspirational goal.

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

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

Introducing CoR will disincentivise investment and undercut the achievement of the goals of the TERC Report.

## Investment Attractiveness

The Northern Territory presents an incredible opportunity to grow Australia's mining industry. The Fraser Institute's Annual Survey of Mining Companies ranked the Territory as the 19<sup>th</sup> most attractive jurisdiction for investment in 2020, and 13<sup>th</sup> in 2019. This indicates that the mineral perspective in the Territory is widely recognised, however in order to further improve investment attractiveness into the region, it is important that Industry is supported and encouraged through stable and consistent regulation.

The introduction of CoR laws is a concern for AMEC as these laws pose significant investment barriers. Potential investors may view CoR laws as a disincentive as they consider the risk of being held financially liable for any environmental harm caused by a company. This is further complicated by the definition of a related person to include a person or company that otherwise may have benefited from the actions that have led to the existence of the environmental harm. Naturally, investors expect to benefit financially from the activities of a company they have invested in. The Information Paper indicates that, should these activities lead to environmental harm, these investors may be held financially liable as they fall under the definition of a 'related person'. Both Industry and investors require clarity on how investors will be treated in relation to CoR laws, to ensure that confident investment into the Territory can occur.

With the majority of the Territory underexplored, the Territory presents Australia's greatest potential for developing a pipeline of projects, to reap the economic and social benefits afforded by developing

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<sup>1</sup> [https://ntrebound.nt.gov.au/\\_data/assets/pdf\\_file/0020/952301/terc-final-report.pdf](https://ntrebound.nt.gov.au/_data/assets/pdf_file/0020/952301/terc-final-report.pdf)

mineral exploration and mining projects. The job creation, combined with the royalties that support the development of new roads, schools, and hospitals will be encouraged in the Territory with the adoption of a more certain regulatory system. The introduction of CoR laws, if improperly introduced, creates a great amount of uncertainty for investors that will only limit the Territory's opportunity to attract investment and potential Joint Ventures.

### **Related Person**

The definition of the 'related person' appears to be broad and as acknowledged by the proposed framework is "*inherently reliant on the concept of influence and whether a person or company has been in a position to influence behaviour, or benefit financially, from the actions that have led to the breach of statutory obligations and compliance concerns*". Extending the definition of a 'related person' to include someone who has been able to benefit financially from activities that have caused environmental harm, creates a great amount of confusion for both companies and investors.

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

### **High Risk Company**

The proposed framework indicates that the CoR's redirection powers will be limited to that of a 'related person' of a 'high-risk company'. AMEC has concerns with the provided definition of a 'high-risk company' to be an appropriate trigger for CoR.

Specifically, the framework states that a company that has failed to comply with a previously issued compliance notice will be deemed a 'high-risk company'. This does not acknowledge the various number of situations in which a compliance notice may be issued, and AMEC does not consider that this offence should necessarily deem a company as high-risk.

The failure to comply with an environmental approval under the EP act or environmental management plan is also cited as a reason for CoR to be implemented. The complexity of environmental approvals means that minor breaches may occur unintentionally. The single line on page 11 of the Information Paper, does not supply sufficient clarity as to what is considered the trigger threshold for a breach in practice. Greater detail is needed.

The proposed framework also does not provide any definition for the term 'financial difficulty'. A company can be deemed high risk if they have failed to comply with an environmental approval under the EP Act if there is reasonable concern that the company is in financial difficulty. However, financial difficulty is not defined. The Department must provide clarity around what is considered financial difficulty, specifically for the purpose of defining a high-risk company that may then be held responsible for environmental harm.

## Decision Making Powers

The decision to redirect statutory obligations by issuing an EPN in relation to CoR laws is proposed to reside with the CEO. CoR laws are complex and given that redirections of statutory obligations will be legally challenged, AMEC recognises this as a critical responsibility, that must therefore be held by the Minister and not delegated to the Department.

## Right to Appeal

Under CoR laws, it is important that a company or person who has been directly affected by the redirection of a statutory obligation hold a right to appeal and access to natural justice. A right to appeal is not detailed in the proposed framework, where it should be.

Companies must have the opportunity to provide evidence that they have followed due processes and have complied with all regulatory requirements to ensure that their activities do not provide environmental harm, or that actions have been taken to minimise, prevent or remediate any harm caused to the environment. This review process must be cost effective and transparent. The Department needs to clearly outline this process, so that the 'related person' is clear on both their obligations and their rights.

## Application of CoR

The proposed framework in the Information Paper does not properly address how CoR laws will be applied in practice. This lack of detail is a fundamental concern for AMEC.

The Department must ensure that there is a definite and well described process for how CoR laws will be applied once the 'related person' has been identified. Industry anticipate that the CoR will be subject to court action and the current ambiguity and lack of due process is alarming.

## Costs of Business

Each new mining project creates jobs, revenues for the local communities in which they operate, and potentially royalties for the Government. The cost of operating in the Northern Territory is understood to be higher than all other Australian jurisdictions. Currently, there is also excessive duplication in the requirements of various agencies, creating unnecessary delays and additional costs for businesses.

The Information Paper suggests that there is general misunderstanding of CoR as an additional cost to business. It is unclear to AMEC how this assessment was made. AMEC disagrees with the assertion that introducing CoR laws does not increase the costs of doing business. Increasing red-tape and compliance for Industry in the Territory in the form of CoR laws, will only disincentivise the advancement of projects, as company's view the threat of being held financially liable as a future cost to business. CoR laws will also increase the administrative costs for Industry. Companies will not only have to take further measures and incur costs to ensure they comply with CoR laws, but also take extra precautions to protect themselves and their investors from potentially being held liable for any environmental harm. These costs go beyond those that companies already incur to ensure their activities are compliant with environmental legislation, and that any environmental harm caused is minimised, rectified or remediated in line with current regulations.

As outlined in The Northern Territory Government Regulation-Making Framework: "*Consistent with COAG commitments and best practice regulation the Territory Government has adopted a formal*

process, the Regulation-Making Framework (RMF), which mandates the preparation of a Preliminary Regulation Impact Statement (PRIS) and the potential preparation of a Regulation Impact Statement (RIS)<sup>2</sup>.

It does not appear a RIS was prepared prior to the publication of the Information Paper. In the case of the most recent environmental legislative reforms, a RIS was prepared after the Government had published an initial consultation legislative draft, part of which it had retracted, via media release.

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

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

A Preliminary Regulation Impact Statement should be drafted for CoR framework. Industry recommend that this is done in conjunction with Treasury that have the staff qualified to perform such an assessment.

### **Environmental Bonds**

The proposed framework specifies that CoR laws operate outside of, and independently from, other environmental financial regulatory mechanisms such as environmental bonds. AMEC does not consider that CoR laws should be considered independently from environmental bonds.

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

These environmental bonds are already in place to provide for the remediation of sites if a company has been unable to meet their obligation. To consider environmental bonds independently from CoR laws would be inappropriate, as the two essentially hold the same purpose. Introducing CoR laws on top of the pre-existing requirement of environmental bonds, will only increase regulation and duplicate the costs borne on Industry for environmental remediation.

### **Mining Remediation Fund (MRF)**

The inclusion of the Mining Remediation Fund (MRF) into the *Mine Management Act 2001* (MMA) was to address the issue of legacy mines in the Territory. The MMA speaks broadly of the purpose of the funds of the levy, under Part 4A of Section 46B of the MMA:

#### 46B Purpose of the Fund

- (1) The purpose of the Fund is to hold money in trust to be used by the Agency in connection with minimising or rectifying environmental harm caused by unsecured mining activities.

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<sup>2</sup> [https://treasury.nt.gov.au/\\_data/assets/pdf\\_file/0020/490007/I-ECO-RMF.pdf](https://treasury.nt.gov.au/_data/assets/pdf_file/0020/490007/I-ECO-RMF.pdf)

AMEC considers the MRF to be an important mechanism in addressing the remediation of projects that have had significant environmental harm in the Northern Territory. As of June 2020, the NT Government holds \$41,128,000 of Industry funds in the MRF trust. It is understood that less than \$7,000 of these funds was invested into minimising or rectifying environmental harm caused by legacy sites in 2019-2020<sup>3</sup>. Industry lacks transparency and certainty from Government on where and how these funds have been expended to remediate legacy mines.

The proposed framework does not address how CoR will interact with the MRF, and it is unclear how it will interact with the definition of an unsecured mining activity in Section 46B of the *Mine Management Act 2001*.

### **Residual Risk Framework**

A residual risk framework appears to be one of the many ongoing environmental regulatory reforms proposed by the Northern Territory Government. Residual risk has not been consulted upon with Industry and has only been mentioned obliquely in a handful of paragraphs at the back of a consultation document in February 2021. AMEC asks that the Government makes its intent regarding residual risk payments clear.

If residual risk payments were introduced, they would duplicate a suite of pre-existing financial regulatory tools to ensure environmental protection. The ever-increasing range of fees is becoming increasingly complex for Industry. Environmental bonds, MRF levies and the proposed residual risk payments as well as CoR laws pose as a quadruplicate of fees and compliance for Industry with all serving a similar purpose. Government must address the effectiveness of individual tools that hold the same objective.

### **Transitional arrangements**

As discussed, the Information Paper provides little certainty for current tenement holders as to how this new impost on Industry will be introduced. Clarity on the transitional arrangements is needed, as some companies may choose to exit the Territory prior to this legislation's introduction.

The retrospectivity of this legislative reform must also be clarified, with AMEC fundamentally opposed to retrospective legislation.

### **Next Steps**

Clarification from the Government on whether it intends to progress with Chain of Responsibility, and the timing for doing so, would be appreciated by Industry. The Information Paper omits timeframes for the drafting of legislation and, critically, further consultation.

Further consultation prior to drafting (or the issuing of drafting instructions) is needed, as identified in our submission, this Information Paper has generated more questions than provided answers.

### **Closing comments**

The mining and mineral exploration industry is held to high standards in ensuring that mine sites are safely and effectively remediated once activities have ceased. Companies are required to rehabilitate

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<sup>3</sup> [https://industry.nt.gov.au/\\_data/assets/pdf\\_file/0006/942729/annual-report-2019-20.pdf](https://industry.nt.gov.au/_data/assets/pdf_file/0006/942729/annual-report-2019-20.pdf)

sites and pay the Government ongoing fees in environmental bonds and levies to the MRF to ensure that the environmental harm can be prevented, minimised or mitigated, should the Government be required to take action. These measures are already in place to ensure that companies are held responsible and fulfil their environmental protection duties.

Introducing CoR laws only disincentivise investment into the Territory and increases the burden of regulation on to Industry.

AMEC appreciates opportunities to consult as the suite of Northern Territory environmental legislative reforms continues.

**For further information contact:**

Neil van Drunen  
Director, WA, SA, NT & Industrial Policy  
AMEC  
0407 057 443

or

Dayna O'Leary  
Policy Adviser (WA, SA, NT)  
AMEC  
08 9320 5150