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**ALEC's submission on 'regulation of mining activities: environmental regulatory reform'**

The Arid Lands Environment Centre (ALEC) is Central Australia's peak community environmental organisation that has been advocating for the protection of nature and ecologically sustainable development of the arid lands since 1980. ALEC actively contributes to the development of energy and resources policy through written submissions, community education and advocacy within the community.

ALEC welcomes the opportunity to respond to the Northern Territory Government's consultation paper on the 'regulation of mining activities: environmental regulatory reform' (the Reform). We would like to acknowledge the way the Department of Environment, Parks and Water Security (DEPWS) has responded to questions and clarified areas of concern.

The Northern Territory has a chequered history in relation to its ability to regulate mining. Examples of the regulatory regime failing to protect the environment in recent times include the McArthur River Mine and Frances Creek Mine, while historical issues with mining are prevalent with legacy mines such as Rum Jungle, Redbank and many others. Decades of poor mining practices having been legitimised by the regulatory process has substantially impacted the public's confidence in the industry. As established in the objectives of the Reform, building community confidence is of critical importance.

This is vital reform which will have substantial impacts for the environment, industry and communities across the Territory. We acknowledge that this is the start of an extensive reform process, and in some areas it is too early to have answers to specific details about the proposed regulatory changes. Nonetheless, our submission does at points critique detail, when we feel the detail ought to be an essential component of the Reform from the outset.

ALECs submission brings forward critical areas of focus from the consultation paper. First, we emphasise key aspects of the consultation paper



that we support or strongly support. This includes: the establishment of general (mining) environmental obligations or duties; attempts to improve public participation and transparency; care and maintenance; and, future considerations around residual risk payments and chain of responsibility legislation. Then, we focus on areas of concern: resourcing capacity of DEPWS; transparency and public participation; Aboriginal engagement and participation; transparency and accountability issues with the DEPWS CEO; merits review; making amendments to registrations and licences; the robustness of the reform; and, regulatory inconsistencies between different mining operators.

While supportive of some areas of this reform, ALEC holds serious concerns around the lack of detail, the robustness of the reform and issues to do with public participation and stakeholder engagement. ALEC recommends that some aspects of the reforms are substantially revised.

## **1. Areas of support**

### **a. General (mining) environmental obligations or duties (6.1)**

ALEC strongly supports the establishment of general (mining) environmental obligations or duties. As emphasised in the recent Independent Review of the EPBC Act<sup>1</sup> - Australia's peak environmental legislation - it is clear that for environmental regulation to be effective it must have clear objectives and outcomes as the centrepiece of legislation. In the Federal Government context this is proposed as National Environmental Standards. Environmental standards or obligations or duties, must prescribe all activities to a predetermined and desired outcome. The proposed obligations outlined in 6.1 are a critical platform in prioritising environmental protection. The establishment of a 'safety net' establishes a clear baseline of responsibilities. This is to the benefit of the environment, but also to mining operators, who are provided with clear expectations from the outset of what their obligations are. This will provide greater clarity for investors.

In addition to the obligations outlined in 6.1 and in answering consultation question 3. ALEC suggests that these additional obligations are necessary:

- That greenhouse gas emissions are minimised and reduced as practicable;
- That registration and licences approvals are dependent on the Northern Territory's carbon budget, and are legally bound to the Territory's

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<sup>1</sup> Samuel, G, 2020. Independent Review of the EPBC Act - Final Report.

net-zero emissions target by 2050;

- That Scope 3 emissions are mandatorily published;
- That ecologically significant species and communities, in addition to significant cultural sites are protected;
- That baseline ecological, cultural and water assessments be completed prior to exploration, production and land-clearing activities.

Understanding the impacts of an activity on the environment is critical prior to approval. The recent finding of 11 new species of stygofauna in the Beetaloo Basin demonstrates the importance of baseline data prior to projects being approved that may have negative impacts in ways that are currently unknown.<sup>2</sup>

#### **b. Environmental registrations and licences as statutory obligations (6.3 & 6,4)**

ALEC strongly supports the position that registrations and licences are statutory obligations and thus legally enforceable. It is imperative that the conditions of registrations and licences are legal artefacts.

#### **c. Attempts to improve public participation and transparency (6.7)**

ALEC strongly supports the measures that will be made available to the public for comment, which includes all environmental registrations and licensing schemes under the EP Act. Although ALEC does have concerns around these efforts to improve public participation and transparency do not go further. We discuss this more below.

#### **d. Care and maintenance (7.5)**

ALEC supports the Reforms endeavours to provide a statutory definition of care and maintenance, in addition to providing environmental obligations that will be required to be met by mining operators during this period.

#### **e. Future considerations around residual risk payments and chain of responsibility legislation (9.1 & 9.2)**

ALEC is strongly supportive of future reforms pursuing residual risk

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<sup>2</sup> Rees GN, Oberprieler S, Nielsen D, Watson G, Shackleton M, Davis JA, 2020. Characterisation of the stygofauna and microbial assemblages of the Beetaloo Sub-basin, Northern Territory. CSIRO, Australia.

payments and chain of responsibility legislation in the Northern Territory. With the risks current, ALEC recommends that these reforms be included immediately as part of these new reforms.

Residual risk payments ensure that industry stakeholders are held accountable to the ongoing management costs that are required to rehabilitate the land and/ or to minimise ongoing environmental degradation. Without residual risk payments, the costs are left to the Territory Government, with the impacts felt by the local community and the environment. Residual risks provide a safety net for the Government to ensure that ongoing risks are managed and paid for by industry.<sup>3</sup> ALEC is in favour of a full breadth of residual risks to be legislated (as per question 29). This includes managing failures, monitoring and maintenance, environmental management and rehabilitation costs. ALEC wants to ensure that if residual risk payments are introduced as part of the reform that they do not reduce the size of securities, but are an additional cost for mining operators. Residual risk payments must be mutually exclusive to the security payment.

Similarly, there are substantial benefits to applying chain of responsibility laws to mining and other environmentally impacting activities. Chain of responsibilities would grant the Territory the opportunity to expand its power and ensure that companies and their related parties bear the cost of managing and rehabilitating sites.

Related parties may be holding companies, parent companies, certain landholders and persons with a relevant connection to a company that is completing a relevant activity. This is relevant when the proponent may be in financial distress and may default or go into administration. It provides the Government with necessary protections to pursue related parties or associated companies to cover the costs that were not met by the defaulted proponent. It may allow the Government to issue an Environmental Protection Order (EPO) to a related person or company who has a relevant connection to the company. This may include a person or company that gains significant financial benefit or was in a position of influence. An EPO is an order that ensures the related person or company does something about the environmental issue, as opposed to a fine or a penalty.

ALEC strongly believes that the chain of responsibility legislation should have broader powers and be applicable to all industries under the EP Act. There is no reason why it should only be limited to mining operations.

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<sup>3</sup> State of Queensland, 2018. Managing residual risks in Queensland: Discussion paper.

These reforms would provide legal protections and securities for the Northern Territory Government to ensure they are not liable to cover the costs of ongoing environmental rehabilitation or maintenance. However, clear articulation of what a related person or company is under the chain of responsibility legislation is required. In addition, an explicit understanding of the discretion given to the regulator is necessary to ensure that the legislation does not act as a disincentive for investment in the Northern Territory.

## **2. Areas of concern**

### **a. Resourcing capacity of DEPWS**

While ALEC welcomes DEPWS gaining authority of approvals around environmental matters, ALEC nonetheless holds concerns with the resourcing capacity of the Department. ALEC acknowledges the substantial workload of the Department, dealing with EPBC bi-lateral agreement responsibilities, implementing the 135 recommendations of the Fracking Inquiry, including the Strategic Regional Environmental and Baseline Assessments, in addition to the many other functions of the Department. ALEC strongly urges that any additional responsibilities that DEPWS acquires is matched by additional funding and resourcing capacity. The efficacy of these reforms are dependent on resourcing capacities of the departments to ensure effective compliance and enforcement of the regulations.

ALEC holds substantial concern around the most recent Budget Papers which suggest that the NTEPA receives only \$754000 in funding annually.<sup>4</sup> The DEPWS and NTEPA budgets are far smaller than the Department of Industry, Trade and Tourism (DITT), despite recent regulatory changes shifting responsibilities from DITT towards DEPWS (for example on-shore shale gas).

ALEC would hope that a centrepiece of the Reform would be a commitment to ensuring adequate staffing of the Departments and regulators. This would ensure that the intended purpose of the Reform can be best upheld. It is integral that DEPWS, including the NTEPA and DITT are adequately funded. In providing a well-funded, transparent system of monitoring, compliance and enforcement, the Reform will clearly demonstrate that the Territory Government is taking a contemporary and robust approach to mining

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<sup>4</sup> Northern Territory Government, 2020, p.111. Budget 2020-21. Budget paper no.3: agency budget statements.

regulations.

### **b. Transparency and public participation (6.7)**

ALEC holds concerns that the efforts laid out in the reform do not go far enough. ALEC does have significant issues with the removal of scrutiny committees which improve access to information for the public and holds elected officials to account. Historically, there have been major issues with the transparency of documentation surrounding mining approvals within DITT. Only recently were mining management plans made public for example. With these committees abolished, ALEC considers it vital that public participation and accountability goes well beyond simply advertising licences on a public register.

ALEC considers it important that affected communities are prioritised and included, so they can actively participate in the regulatory process. ALEC has concerns that participating in this regulatory process was not more easily available for public and stakeholder engagement. Were any affected communities directly engaged and informed around these regulatory changes? With the Reforms failure to mention or acknowledge Aboriginal people, it remains unclear whether those parties most likely to be impacted by mining activities, were fully consulted. We discuss this further below (see ‘Aboriginal engagement and participation’).

### **c. Aboriginal engagement and participation**

The Reform does not consider the perspectives of or the impacts of mining to Aboriginal people on Aboriginal land. With Aboriginal people gaining inalienable freehold title to the majority of the Territory’s land, and a substantial proportion of mining activities occurring on Aboriginal land, it is a noticeable exclusion. Will these reforms impact Native Title? How have the perspectives of Aboriginal communities and Aboriginal organisations influenced the Reform? How do these reforms build confidence in Aboriginal communities (as per the objectives of the reform)?

Major structural issues have been prevalent around the destruction of sacred sites negatively impacting Aboriginal culture. The recent Samuel’s review of the EPBC Act recommended urgently overhauling how Aboriginal stakeholders are engaged with.<sup>5</sup> It emphasises that the act does not fully support the right of Aboriginal Australians in decision making, that their

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<sup>5</sup> Samuel, G, 2020. Independent Review of the EPBC Act – Final Report (October 2020), Canberra: Department of Agriculture, Water and the Environment..



views are not fully valued, that the aspirations of Traditional Owners for managing their land are not being met and that the regulatory environment addresses Aboriginal culture in a tokenistic kind of way. These reforms have much to learn from the Samuel’s review findings, which recommends the co-design of policy and implementation to improve outcomes for Aboriginal Australians.<sup>6</sup> The review also suggests the establishment of National Environmental Standards for Aboriginal engagement and participation, developed by an Aboriginal-led process.

This reform has many gaps to fill in addressing how Aboriginal engagement and participation is going to occur, and what role Aboriginal people will have in informing the regulatory process.

#### **d. Transparency and accountability issues with the DEPWS CEO (6.2, 6.3, 6.4, 6.5, 6.6, 6.7 & 6.10)**

There are major issues to do with transparency and accountability associated with shifting the responsibilities of a Minister who is public facing and can more easily undergo scrutiny, compared to a largely unknown bureaucrat that is responsible for running the overall operations of the Department. CEOs are managers and administrators, with very different roles and responsibilities to a Minister.

ALEC has significant concerns around why the approvals of registrations and licences, in addition to amendments to them, are at the discretion and authorisation of the DEPWS CEO (as well as other responsibilities). It is the duty of the CEO to uphold public sector principles as per Section 24 (2(b)) of the *Public Sector Employment and management Act 1993*. The CEO must as Section 5B(c) outlines, ensure that the public sector is directed towards “informing, advising and assisting the government objectively, impartially and with integrity” and in Section 5B(e(ii)) ensure that “appropriate levels of accountability are in place”. The CEO is the managerial head of the Department. The granting of mining approvals is inherently a political process and may represent a conflict of interest. It is a contravention of the principles that the CEO must subscribe, to be objective and impartial. In addition, it is a decision making process that is not authorised under the public sector principles, nor is it outlined in Section 24 which goes through the functions of the CEO. The authorisation of approvals without the Ministers consultation or input is a drastic change to the functioning of the

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<sup>6</sup> Samuel, G, 2020, p.60-62. Independent Review of the EPBC Act – Final Report (October 2020), Canberra: Department of Agriculture, Water and the Environment.

Department.

In the current context, the Northern Territory Government has accepted the recommendations of the Territory Economic Reconstruction Commission's Final Report in full and has asked agency CEOs to develop an implementation plan for the key focus areas.<sup>7</sup> This is a report that has recommended the significant expansion of mining activities across the Northern Territory. This reform then proposes that the DEPWS CEO to approve registrations and licences, in addition to an array of other responsibilities at their discretion. It elevates scepticism around how transparent the Government is, in addition to how the CEO with their additional powers, will be held accountable.

#### **e. Merits Review (6.12)**

The discretionary and subjective powers of the DEPWS CEO is again apparent around merits reviews. The reform proposes that standing will be provided to a 'directly affected person', in addition to the proponent and decision makers part of the process. However, who is a directly affected person? Without clear definitions and articulated processes, the reform comes across as technocratic. ALEC strongly supports a wide net to be cast in relation to who is a directly affected person around mining activities. This is vital as the spatial and temporal impacts of some mining activities are often not contained to a localised area. These discretionary powers, without public or political scrutiny may infringe on the rights of Territorians.

#### **f. Making amendments to registrations and licences (6.2 & 6.5)**

The Reform is scant on how amendments to registrations and licences will actually occur. Again, it is at the discretion of the DEPWS CEO and their "reasonable opinion" to determine whether amendments to the registration or licence are necessary.<sup>8</sup> Amendments are a natural part of the resource economy. Processes and technologies may change in response to fluctuations in the regional or global market, or changes in the financial circumstances of the corporation.

Instead of providing clarity, the Reform provides a very limited model for environmental management (Figure 1), outlining no process for how

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<sup>7</sup> Northern Territory Government of Australia, 2020. Territory Economic Reconstruction Final Report. Media Release. Newsroom. Accessed 17th February 2021: <https://newsroom.nt.gov.au/mediaRelease/34014>

<sup>8</sup> Northern Territory Government, 2020, p.13.Regulation of mining activities: environmental regulatory reform.





amendments will occur. What kind of changes need to occur for a registration to become a licence? What is meant by “the standard conditions and risk criteria included in the registration scheme will be subject to regular reviews”.<sup>9</sup> What is a regular review? ALEC considers it necessary that the government, regulators, industry and the public have a clear understanding of what a regular review is, and what constitutes an amendment.

It is also important to consider what happens when amendments do occur. Will the public have the opportunity to participate in this process? Will the proponent be required to undergo further assessment, or is this just at the discretionary powers of the DEPWS CEO?

### **g. The robustness of the reform**

The Reform lacks clarity, and leaves many questions to be asked:

- What is the “reasonable opinion” of the DEPWS CEO?
- In the context of licences and registrations, what is a ‘regular review’?
- What is an amendment?
- When does a registration become a licence?
- Who is a ‘directly affected person’?
- Who decides who a ‘directly affected person’ is?
- What collaboration will occur between DEPWS and DITT?
- What safety nets will be created to ensure no cracks are created in the splitting of responsibilities between DEPWS and DITT?
- How will DITT consult with the EPA?
- How will the new MMP equivalent actually work?
- What is the role of the Minister in the approval of registrations, licences and amendments?
- What is the role of the Minister in deciding who has standing in a merits review?
- Why does the DEPWS CEO have the discretionary powers in deciding who has merit for a review?
- How is the DEPWS CEO meant to approve mining registrations and licences whilst also remaining impartial and objective?
- How is the DEPWS CEO going to manage their responsibilities as the administrative and managerial head of the Department, while also holding political powers? Is there a conflict of interest?

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<sup>9</sup> Northern Territory Government, 2020, p.12.Regulation of mining activities: environmental regulatory reform.

- When amendments occur, will they undergo an environmental impact assessment process? Who decides?
- When amendments occur, will the public have the opportunity for comment? Who decides?
- What impact will this reform have on Native Title?
- How long can a mining operator be in care and maintenance?
- Is the Mining Remediation Fund working as intended?
- What guarantees are there that residual risk payments will be mutually exclusive from securities paid by the mining operator?

These are just some of the questions that the Reform provokes.

#### **h. Regulatory inconsistencies between different mining operators**

The Fracking Inquiry was a comprehensive report which outlined an array of recommendations for the shale gas industry. However many of the recommendations are extremely relevant to the mining industry at large. The question is then asked, why is the Government creating two-different forms of regulation for those within the mining industry in the Northern Territory? There are an array of recommendations that would be useful to consider embedding and/ or adapting as part of this reform. Potential recommendations to include or adapt, may include:

- Adapting 5.1, to develop a code of practice for decommissioning mines;
- Adapting 5.3 to develop a code of practice outlining minimum requirements to ensure the integrity of mining infrastructure;
- 5.5 to develop a wastewater management framework;
- 5.6 to draw on protocol and procedures from other jurisdictions, for the characterisation, segregation, potential reuse and management of solid wastes;
- Adapting 7.1 to ensure the Water Act is amended to ensure all mining companies are required to obtain water extraction licences;
- Adapting 7.2 that all mining activities are charged for their use of water;
- Adapting 7.5 that strategic regional environmental and baseline assessments are completed in mining regions;
- Adapting 7.8 so that mining activities do not cause substantial local drawdown of aquifers;

- Adapting 7.9 that the reinjection of wastewater into aquifers is prohibited;
- Adapting 7.18 that landscape and regional impacts are considered in the design and planning phase;
- Adapting 7.19, that mining activities must take into account impacts upon groundwater dependent ecosystems;
- Adapting 7.20, when relevant, that all subterranean aquatic ecosystems are identified prior to the commencement of mining developments;
- Adapting 8.1 that strategic regional terrestrial biodiversity assessments be conducted prior to production approvals
- 8.2 that a baseline weed assessment is conducted
- Adapting 8.3 that at all times mining operators have a dedicated weeds officer
- Adapting 8.4 that all mining operators must have a weed management plan for that licence site
- Adapting 8.5 that all mining companies be required with any statutory regional fire management plans within their licence area
- Adapting 8.6 that a study be taken to determine whether any threatened species will be impacted as a result of cumulative impacts.

And so on and so forth. The NT Government's commitment to protecting the environment while providing certainty for investment would benefit from a holistic approach to the mining industry like that done for the shale gas industry. Environmental protection requires a scientific basis with consistency of regulation and economic development requires equality of opportunity rather than discretion. The proposed amendments do not strike the right balance

### 3. Conclusion

These proposed amendments offer some insights into the mechanics of government. While ALEC supports the move towards environmental approvals for mining projects away from the Department responsible for promoting the industry, the challenge is to get the balance right.

It is integral that these reforms promote a robust and transparent regulatory regime that is supported by comprehensive monitoring, compliance and enforcement.

If you have any questions about this submission, please contact Alexander Vaughan - [policy@alec.org.au](mailto:policy@alec.org.au)

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