Environment Centre NT
protecting nature | living sustainably | creating a climate for change

9 August 2021

Environment Policy
Department of Environment, Parks and Water Security
16 Parap Road
PARAP NT 0800

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

To Whom it May Concern,

Consultation on environmental chain of responsibility laws

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 environmental regulatory reform information paper on "Environmental chain of responsibility laws" ("Consultation Paper").

ECNT is supportive of the Northern Territory Government's continuing work on environmental regulatory reform, particularly relating to mining. This reform program presents 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. Fracking in the Beetaloo Basin and proposed petrochemical manufacturing at Middle Arm, both supported the Northern Territory Government, have the potential to create additional toxic sites. Introducing some form of chain of responsibility provisions is necessary to ensure that polluters actually pay for the environmental damage that they cause, consistent with the 'polluter pays' principle set out in section 24(2) of the *Environment Protection Act 2019 (NT)* ("EP Act").

ECNT commends the Northern Territory Government on its proposal to introduce environmental chain of responsibility provisions to the EP Act and the Environment Protection Regulations 2020 ("CoR Proposal") and, in particular, for going beyond the specific recommendation in the Pepper Inquiry to include all environmentally harmful activities, rather than just onshore gas development.

However, ECNT's view is that the current CoR Proposal is too limited to have much effect and would not prevent taxpayers from having to foot the bill for environmental liabilities in the situation when a larger company who originally develops a project sells to a smaller, less-capitalised company near to the end of a project's economic life. We therefore recommend that DEPWS investigate and consult on the introduction of 'trailing liability' and provisions to 'call back' previous licence holders (and their related companies) to fulfil their environmental obligations, as the Australian Government is proposing to introduce in relation to the decommissioning of offshore oil and gas infrastructure.[1] These would not necessarily impose new environmental obligations on those carrying out environmentally harmful activities but would make it more difficult to avoid existing environmental obligations. As the Australian Government's original consultation paper suggests, 'trailing liability'

[1] See the proposed legislative amendments available through this page: https://www.industry.gov.au/regulations-and-standards/regulating-offshore-oil-and-gas-in-australian-commonwealth-waters/offshore-oil-and-gas-decommissioning-framework-review

and 'call back' provisions would have the likely effect of encouraging companies with environmental regulatory obligations to carry out thorough due diligence on potential buyers to ensure that potential purchasers would be able to fulfil any rehabilitation obligations.[2]

Some of the effects of 'trailing liability' and 'call back' provisions may be able to be achieved through amendment of the existing CoR Proposal. To that end, we recommend strengthening the CoR Proposal by:

a) Expanding the definition of "related person" to specifically include previous holders of the particular environmental obligation (eg the previous holder of an environmental approval) and the related companies of those previous obligation holders. It is important that related companies of previous obligation holders are included as related persons so as to prevent complicated corporate structures from hampering the ability of the regulator to pursue the corporate entities that have financially benefitted from the environmentally damaging activity.

b) Expanding the definition of "relevant connection" to include assessment of both the financial benefit that the potentially related person derives, or has derived, from the activity of the company, rather than just focussing on influence (as the CoR Proposal does). For instance, in the CoR provisions in the *Environment Protection Act 1994 (Qld)*, there is a two-pronged definition for "relevant connection", one prong being financial benefit and the other being influence over the last two years (s363AB(2)) The time limit does not seem to apply to the financial benefit prong so arguably could apply to previous obligation holders. We recommend that there be no time limit in relation to the "financial benefit" prong so as to include previous obligations holders who have financially benefitted back to the beginning of the project. The limit on the liability of previous obligation holders should relate to the infrastructure they used or created.[3] For instance, a previous obligation holder that had only created one mine pit should not be liable for the effects of an additional pit created by a subsequent obligation holder.

In addition, ECNT's view is that it is unnecessary to restrict the CoR Proposal to 'high risk companies'. We recommend adopting the approach taken in the *Environment Protection Act 1994 (Qld)* which allows a CoR order to be given to a related person alongside an order given directly to the obligation holder, which does not have to be a 'high risk company' (s363AC). In the case of an obligation holder which is a 'high risk company', a CoR order can be issued directly to the related party without having to issue an order to the high risk company itself (s363AD).

We look forward to continuing to engage with the Northern Territory Government to strengthen its environmental regulations to ensure, among other things, that they consistently implement the 'polluter pays' principle. It is our strong view that the taxpayer should not be left to foot the bill for cleaning up toxic sites that only exist because of the profit-seeking activities of project proponents.

If you have any questions, please do not hesitate to contact Kirsty Howey on kirsty.howey@ecnt.org.

Yours faithfully,

[2] Australian Government Department of Industry, Innovation and Science. (October 2018) "Discussion Paper – Decommissioning Offshore Petroleum Infrastructure in Commonwealth Waters". Available here: https://consult.industry.gov.au/offshore-resources-branch/decommissioning-discussion-paper/

[3] See for instance the commentary in the Australian Government's discussion paper, p 30.

Shar Molloy
Co-Director
Environment Centre NT

Kirsty Howey
Co-Director
Environment Centre NT