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Attention: Kathleen Davis

Dear Environment policy team

SUBMISSION ON THE REGULATION OF MINING ACTIVITIES - ENVIRONMENTAL REGULATORY REFORM

Ward Keller welcomes the opportunity to provide submissions on the *Regulation of Mining Activities - Environmental Regulatory Reform* consultation paper jointly released by the Department of Environment, Parks and Water Security (**DEPWS**) and the Department of Industry, Tourism and Trade (**DITT**) on 9 December 2020 (**Consultation Paper**).

In its final report to the Chief Minister on 30 November 2020, the Territory Economic Reconstruction Commission (**TERC Report**), recognised the diverse mineral potential of the Northern Territory and the critical role the Northern Territory resource sector has on the economic growth of not only the Territory, but on the nation as a whole.[1] The TERC Report found that:

> *The Territory Government needs to increase industry confidence to invest by providing certainty, clarity and the necessary frameworks for investment, including the acceleration of minerals-related regulatory reform.*[2]

Ward Keller supports this view, which echoes the sentiments of industry and investors that the Territory is not performing at a level comparative to its size and opportunities.

In order to increase competitiveness and achieve the long term economic targets set out in the TERC report, it is essential that industry operates with in a supportive, efficient regulatory framework overseen by a skilled and capable regulator. The reforms to environmental regulation of mining activities proposed in the Consultation Paper are premised on a principle that regulators must be independent from those it regulates. Our preferred view is that minerals-related regulatory reform must be consistent with leading-practice in order to deliver the maximum benefits to industry and the Territory.

Leading-practice does not demand a change to the regulatory control of environmental management of mining activities. The Productivity Commission's Report on Resources Sector Regulation released on 10 December 2020 (**RSR Report**) found that *'effective coordination among agencies within a jurisdiction reduces uncertainty, facilitates timely processing and minimises overlaps and inconsistencies.'*[3] Western Australia, South

[1] Northern Territory Government, *Territory Economic Reconstruction Commission – Final Report*, 63.
[2] Ibid, 60.
[3] Australian Productivity Commission, *Resources Sector Regulation – Study Report*, 44.

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Australia and the Northern Territory are highlighted as examples of leading practice in this area.

1. Current regulatory framework

The Consultation Paper recommends a separation of regulatory functions to address concerns held in relation to independence of regulatory control and perceptions of conflicts of interest in regulatory decision making between the mining industry and its regulatory authority, the Department of Industry, Tourism and Trade (DITT). This approach is inconsistent with the referral practices within other Australian jurisdictions, does not reflect leading-practice and arguably will only serve to transfer the perception of conflicts of interest from DITT to the Department of Environment, Parks and Water Security (**DEPWS**).

Ward Keller does not agree with the transfer of regulatory control of environmental management from DITT to DEPWS and recommend that the current regulatory framework for the conduct of mining operations, including environmental obligations, be retained. The Northern Territory government can improve the performance of the existing regulatory framework and its interaction with industry by implementing coordinated, consistent and efficient referral arrangements between all co-regulators.

2. Environmental Registration and Licencing Scheme (ERLS)

Ward Keller generally supports a tiered approach to environmental regulation, with the regulatory requirements commensurate with the level of risk. Increased clarity and transparency is required on what 'risk-based outcome focussed' regulation will actually look like for industry.

Consideration should be given to the low impact authorisation models of both Western Australia and Victoria for the no registration/licence required tier. This may include for example low impact exploration activities, small scale mining activities and small quarries.

The CEO should not be able to unilaterally amend a licence without first providing the operator with notice and the opportunity to respond to any proposed amendment. Such amendment to a licence should only be in relation to environmental management.

Project proponents should have the opportunity to prevent the release of certain documents that might otherwise be made public, consistent with the approach of section 57 of the *Information Act 2002*.

3. Approval timeframes

The Northern Territory offers long term economic benefits from a successful mine development, however there is inherent uncertainty in timeframes throughout the project approval lifecycle which significantly decreases investor confidence.

The Territory should amend regulations to introduce statutory approval timeframes to ensure accountable and transparency in regulatory decision making, particularly in exploration activities which should have fast track provisions. This provide certainty as to process and encourage investment in the Territory minerals sector.

4. Third party peer review

The RSR Report identified that regulatory capability is seen as a key factor in approval delays and timing uncertainty for industry. This can be addressed in the Northern Territory by government providing well-resourced regulators and retaining suitably qualified staff with industry-relevant technical skills and experience.

Ward Keller does not support third party peer reviews under direction of the Chief Executive Officer. Industry invests significant time and resources to have environmental proposals prepared by qualified consultants. The environmental regulator should have the necessary skills, qualifications and expertise to evaluate and make decisions in relation to environmental impacts of high risk activities within reasonable periods determined by statute. The cost of third party reviews required due deficiency of regulatory capability should not be borne by industry.

5. Land Access

Industry has raised concerns that mandatory land access agreements will effectively provide land owners with the power to veto exploration and mining projects and significantly increase lead in times for project approvals.

Ward Keller does not support the introduction of compulsory land access arrangements for the mining and exploration industries and submits that existing legislative arrangements are effective and should remain unchanged. We recommend the policy of Land Access Agreements for exploration on pastoral leases be removed.

6. Care and maintenance

Care and maintenance is an operational phase where the operator suspends active mining and does not require a certificate of closure. Activities relating to the care and maintenance of a mining site are included in the Care and Maintenance MMP and the Authorisation for those activities will set out any additional environmental conditions.

As operators are already required to comply with environmental conditions no further mechanism is required to secure compliance. The legal rights and obligations of the tenement holder should not be restricted.

7. Mining securities

The Territory must be open and transparent on the issue of financial assurance and the calculation of security. While the NTG currently provides industry with an Advisory Note, forms and guidelines to assist with an operator's self-assessment of rehabilitation liability, rates and procedures are not set within the regulatory framework.

Section 43A of the *Mining Management Act* 2001 (NT) (**MMA**) allows regulations to be made with respect to the minimum amount of security, procedures relevant to the calculation of security or criteria on which the calculation is to be used. DITT has previously developed an on-line security calculation tool which was approved for use however ultimately not released to industry. The department should reconsider providing a contemporary security calculation tool for use by industry and regulate those matters contemplated by s43A MMA.

The NTG should consider a standard security rate for exploration sites, small mines and quarries with a low environmental impact.

Further information is required on the total amount of security bond currently held by government and the proposal to introduce a financial assurance system comprised of a security bond, levy and residual risk payment.

8. Managing Legacy Mines

The Territory should consider leading-practice in this area, including the Western Australian Abandoned Mines Program, which provides for transparent and accountable risk assessment process to prioritise the rehabilitation of abandoned mines. The program is supported by the Mining Rehabilitation Advisory Panel, a statutory advisory body to provide independent technical advice to government on remediation projects. Victoria also seeks independent technical advice through its Technical Review Board.

Currently the regulation 5C of the Mining Regulations require the Department of Tourism, Industry and Trade to include in its Annual Report certain information in relation to the Mining Remediation Fund, including the specific purposes for which money has been paid out and the activities carried out for that purpose. Regulatory reform should also impose a clear obligation on the Department, as a part of its internal control measures, to report the total rehabilitation liability of mining legacies as a contingent liability. This liability should be included in the annual financial statements required to be prepared by the Treasurer under the *Financial Management Act 1995* (NT).

9. Residual Risk Payments

Ward Keller supports the view of the Productivity Commission set out in the RSR Report that:

> *Governments must be willing to accept the liability for some level of residual risk and allow companies to surrender their liabilities. Companies that have satisfied their rehabilitation requirements and compensated governments for any remaining risks or management needs in good faith should not be liable for genuinely unforeseen problems that occur in the years following surrender…*

Mine closure certificates and security refunds should be evidence of full and final satisfaction of environmental obligations in relation to a site.

10. Chain of Responsibility legislation

Ward Keller does not support the introduction of chain of responsibility legislation whereby the Northern Territory government has the power to direct a 'related person' of a company to bear responsibility for rehabilitation obligations.

Such a proposal fails to recognise that the core purpose underpinning the creation of a corporation is to limit the liability of the owners. The definition of 'related person' has broad application under the *Corporations Act* (Cth) and will discourage investment if the financial burden of one company is to be borne by another.

11. Compliance and enforcement

We are concerned that no consultation questions is provided with respect to what appears to be a wholesale expansion of review of environmental decisions. The Northern Territory Government wisely limited merit review in enacting the *Environment Protection Act 2019* (**EP Act**) (s 277, Schedule). Merit review should not be expanded here except in substantially similar circumstances.

Activities for which licencing is required may have already been referred under the EP Act. Providing merit review where a project has already been through the referral process should be expressly precluded to avoid creating additional delay and uncertainty with no appreciable benefit.

This should extend not just to projects accepted for referral, but for projects not accepted for referral because NT EPA finds there will be no significant adverse environmental impact.

We also note this issue was addressed in the RSR Report which specifically referred to the EP Act:

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

The provisions of the EP Act should apply equally to the mining industry.

The principles of natural justice provide an operator with standing should they believe their security has been improperly calculated.

12 Proposed transitional arrangements

Existing mines in the Northern Territory should be grandfathered.

The RSR Report contains a range of leading-practices and recommendations relevant to the Territory. Any proposed reforms should be viewed in the context of the RSR Report and the TERC Report.

Yours faithfully
WARD KELLER

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