To: Department of Environment, Parks, and Water Security

Re: Environment Protection Legislation Amendment (Mining) Bill 2023

18 September 2023

Introduction

AMEC appreciates the opportunity to provide industry consultation on the draft legislation for the *Environment Protection Legislation Amendment (Mining) Bill 2023.* The efforts of the Department of Environment, Parks, and Water Security (DEPWS or the Department) to brief our Industry and answer the many questions the documentation has generated is appreciated.

As the first stages of this reform began in 2019 with the passing of the *Environment Protection Act 2019*, the lack of time to fully consult and workshop this more important reform is frustrating. While it was a 2016 Election Commitment, embarking on a fundamental reconfiguration of regulation in the 11 months prior to the 2024 election is challenging.

As outlined below, we consider that there are several sections that need greater consideration, redrafting, and the provision of basic information for further commentary.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national peak industry body representing over 560 mining and mineral exploration companies across Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over $100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make an essential contribution to the Northern Territory's economy, employing over 8,500 people. In 2021/22, the mining industry made up $5.7 billion of the NT Gross State Product, accounting for 35% of NT's economic output. In 2022/23 mining companies contributed a total of $367 million in mineral royalty payments, contributing 36% of the Territory's total own-source revenue.

The Territory Economic Reconstruction Commission and the subsequent Mineral Development Taskforce identified mining and mineral exploration as the way to grow the NT economy to $40billion by 2030.

General Remarks

The proposed *Environment Protection Legislation Amendment (Mining) Bill 2023* are a long-term commitment by the current Government in the Northern Territory, originally an Election Commitment in 2016. AMEC has been anticipating these reforms since that election, seven years ago. This consult has begun with less than a year to the 2024 election.

We would have welcomed further time to provide more detailed consultation.

Industry has noted, with concern, that the proposed amendments contrast with the narrative from the Government following the Territory Economic Reconstruction Commission and the Mineral Development Taskforce. While these reforms and the achievement of a $40Billion economy by 2030 are not mutually exclusive there needs to be attention to providing regulatory certainty and reducing sovereign risks.

As a priority we would welcome:

- Consultation on the risk criteria of the tiers
- Consultation on the standard conditions
- Clarification of the transitional requirements and expectations.

Further amendments

The following amendments are ones that Industry would welcome to improve the legislative framework.

Elevation of the role of the Minister for Mines

A key concern is the diminution of the Mining portfolio. The repeal of the *Mining Management Act 2001* shaves the portfolio's role to essential one of tenement management: issuing Mining Lease with reduced information.

The Mines Minister no longer authorises mining operations nor issues a closure certificate once mining has completed. The Legacy Mines Fund oversight is limited to the expenditure, with the setting and management of secuirities all within the environmental department. This combined with the overall decrease in the power held by the Minister for Mining and Industry we consider will lead to increase in cost and time of doing business in the Northern Territory.

The legislative focus is entirely on the regulation of environmental risks that come with mining and exploration activities. There appears to have been limited consideration of the sovereign risk to both the NT and industry, or the reality that mines create jobs, opportunities, and investment in the Northern Territory.

The Mines Minister needs to have a co-signature role for all matters relating to mining.

Mining and exploration defined differently.

The choice to group all mining and exploration activities as 'mining activities' ignores that while mineral exploration leads to mining, they are substantially different activities with different levels of disturbance.

There is a perception they have similar impact, rooted in the misconception that if exploration activities are undertaken then there will lead to there being a mine developed. This misconception is exacerbated by the choice of the Government to subsume exploration into the definition of mining. The Northern Territory has an opportunity to reduce confusion, and we consider should take it.

Eligible Mining Activities

The Eligible Mining Activity Framework was introduced into the Western Australian Mining Act as a key feature of the *Mining Amendment Bill 2021*. These reforms improve the efficiency of applications and assessments for mining activities.

Under the framework, mining tenement holders will be able to receive an automatic authorisation to undertake certain minimal ground disturbance activities, known as eligible mining activities (EMAs).

The intent is that EMAs will be those that pose a low risk to the environment and do not occur in sensitive environments. A proponent applying via an EMA will have to agree to standardised conditions and to meet certain rehabilitation outcomes[1]. It is proposed to include mineral exploration drilling.

The current drafting does not consider a pathway to provide for an automatic approval. Allowing an EMA will enable the government to reduce the administrative burden of approvals that while procedural is important to ensure they are conditioned appropriately.

Progressive rehabilitation

Ensuring explicit 'head powers' exist in the legislation for the provision for the progressive rehabilitation of mine sites and the consequential return of the security would be welcome. It has been discussed in Industry that the provisions for the recalculation of security may allow for the delivery of progressive rehabilitation. However, a clause that specifies that recalculation of securities is possible for the rehabilitation and remediation of sites would be welcome. Progressive rehabilitation incentivises international best practice and the speedy rehabilitation and remediation of sites.

Specific concerns with current draft

Below are clause by clause details of specific concerns and questions that arise from the current drafting. Most have been raised with the Department through the consultation briefings, and are reiterated here:

S 124 G General Environmental Duties

Clarity is sought on how compliance with general environmental duties will be managed differently in comparison to the application of the risk criteria for the tiered licences? It unclear what the priority of these general environmental duties will have compared to the conditions placed on a licence holder. A licence holder should be bound to the quantified conditions of their licence not to a sweeping legislated requirement (and liability) of a general duty.

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[1] A copy of the amendments (primarily S103A), the Explanatory Memorandum and the second reading speech are available here: https://parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=33182B578BA4669448258773002B85FC

S 124 H Obligations of mining operators – legacy mine feature

On the face of it, the obligation of a mining operator of a mine site with a legacy mine feature proposed in this legislation appear sensible. Current practice delineates that 'unsecured mining activities' are not the responsibility or a liability of the current tenure holder. However, the obligations for legacy mine features should be dealt with directly through the conditions on tenure rather than via a broad legislated remit if an operator does choose to operate on a legacy mines feature.

The clause, (c) (ii) in particular broadens the risk for operators, with the breadth of 'any action' leading to liability for the entire legacy mine feature. A threshold of what quantifies as an adverse impact would is needed. While all in the Northern Territory want legacy mine features appropriately remediated, it is the Legacy Mines Fund provides an avenue to do so. It should not be the responsibility of the current tenure holder unless they undertake commercial activities on the feature.

S 124 S: Risk criteria

AMEC welcomes the introduction of a new, three tier, licensing system to manage mining activities, underpinned by general environmental duties. However, we are concerned at the lack of detail as to what those tiers are. What are the risk criteria and standard conditions that will underpin the operation of this model? It is extremely difficult to comment on the proposed legislation if there is no detail provided to inform how the tiers will work in practice.

As noted above the introduction of an Eligible Mining Activities framework would be welcome as most mineral exploration activities can work within a prescribed framework. There is also widespread Industry understanding that 'mining activities' to develop a mine will demand an Environmental Impact Assessment and a bespoke tailored approval. This is standard practice nationally and accepted by Industry. What is unclear is what activities will be within the 'tailored' approval, with the concern that companies will be forced into the modified approvals.

It has been stated during consultation that the Department believes that exploration projects will only require an environmental (mining) licence if they may cause 'substantial disturbance'. While substantial disturbance is clarified in the regulations there is concern of misinterpretation in the community. Future guidance material on what exploration activity can occur without a licence is needed.

S 124 T Standard Conditions

AMEC welcomes the use of standard conditions as best practice. However, similarly to S 124 S, detail of what is proposed is needed. Standard conditions that are outcomes focused, enforceable, site specific, documented and justified are needed.

The Government should prefer outcome-based conditions in preference to management-based conditions or specified actions or procedures conditions.

124X (3) Water extraction licensing

It is a frustrating inconsistency that despite the push to consolidate to one framework: water extraction licensing will be separate. This division is 'baking in' duplication of regulators into the environmental

approvals process. The separation does not align with the Government position of a single legislative framework.

S 124 ZA Conditions may apply after mining activity completed

A persistent concern for AMEC is that there needs to be a clear path to relinquish liability following completion of the mining activity. At a minimum this Section needs to include a clause requiring that the condition specify an end date for its obligations.

S 124 ZC Application for a licence

There is concern amongst Industry that if the rights for a mineral are prescribed to a different explorer than the tenure holder, as is common practice, they may not be able to apply for an environmental licence.

The inclusion of a specific clause identifying that a licence may be granted for more than one operator to operate on a single mine site, with the permission of the Title holder, would resolve this uncertainty.

S 124ZD Request for Information

The "stop the clock" provisions included need a prescribed process to manage their use otherwise the proposed timeframes are fictional. We recommend that the drafting place a limit on the number of RFI a company can be asked for and grant a right for the company to elevate the RFI to the Minister for an explanation. Industry experience is that RFI creates delays.

S 124ZG Environment (mining) licence not to be inconsistent with environmental approval

This Section creates uncertainty for Industry, and a potential invalidity problem for licenses under legal challenge. It is unclear why this section is necessary: careful drafting of conditions should mean they are not inconsistent between the licence and the approval. A licence holder may unintentionally be acting in breach of their conditions if there is an inconsistency that becomes apparent through legal challenge.

S 124ZK Time for the decision on environmental (mining) licence

AMEC welcomes the inclusion of prescribed timeframes. However, we note that there is no clarity as to what is meant by exploration activities (i.e., does it include drilling?), nor is there any detail as to why those timeframes were provided.

Under the definition of 'required time', it is unclear why every single activity demands a determination by the NT EPA as to whether a referred action or a strategic proposal is required for a standard condition. AMEC asks that this be reconsidered. If the NT EPA could prescribe that certainty activities may be managed by standard condition licence that would streamline approvals and remove this obvious delay. It is widely assumed in conversations in Industry that what can be applied for under a standard condition will be known, and what cannot be, will also be known.

The standard condition timeframes are slower than other jurisdictions. An exploration drilling permit in an environmentally sensitive area has a statutory timeframe of 15 business days in Western Australia. A timeframe that the Department of Mining, Industry Regulation and Safety achieves over 90% of the time. In the coming six months, drilling activities in nonenvironmentally sensitive areas will be automatically approved via a notification process. The legislative framework is in place with the

administrative delivery underway. Therefore, it is unclear why a standard condition licence in the Northern Territory demands 30 business days of attention. Particularly, when a modified licence, which by definition needs government attention, takes 10 days longer?

S 124ZP Review of Conditions

A lack of a trigger for a review of conditions is a deficiency in the drafting of 124ZP. The Environment Minister is given considerable ambit to simply review conditions by 124ZP (3) - to undertake a review at any time. This is a procedural fairness issue. Conditions are assumed to be drafted so that they are able to withstand the passage of time and be outcome focused.

A power to arbitrarily change conditions undercuts the certainty of the approval granted as a government may review and amend conditions despite the lack of breach or failure of performance by the licence holder. It is unclear whether the operations can continue during this review, but is assumed unlikely, this too needs clarification.

We recommend that a threshold for a review of conditions should be the breach of a condition that the company has been unable to rectify after being provided an opportunity to do so.

The process for reviewing conditions needs to be clearly identified. We consider:

- Standing for the review of conditions be explicitly limited to the licence holder.
- Clarification is provided so that the operations can continue (at least in part) during the review;
- Licence holders be given a right of appeal to the conditions; and
- The Minister be required to make a statement of reasons to Parliament for the review of conditions.

A review of a licence is of significant concern to any operating entity, particularly one who is listed on the Australian Securities Exchange (ASX) and will have to report this review. The arbitrary power of the Minister to call in and review existing conditions needs to be curtailed.

S 124ZQ General powers of Minister to amend environmental (mining) licence conditions

This section needs to be redrafted as it creates significant sovereign risk for the mining and mineral exploration industry. The threshold for review is the 'reasonable opinion' of the Minister is low.

S124ZZ Revocation of the Environmental (Mining) Licence

There is concern within Industry that this Section, while bound by the new 124ZZC Show Cause Process, will be able to be delegated via Section 278 of the *Environmental Protection Act 2019*. The power to revoke an Environmental Mining Licence must be held solely by the Minister. Industry request that this Section be limited to one that is unable to be delegated through amendment to Section 278 of the Environmental Protection Act.

S 124ZZE Obligations under environmental (mining) license

While it is Industry expectation that mining companies will rehabilitate the area in which they mine, the drafting of this Section is of cause of concern for Industry. Specifically, clause 1, should have the

words “or cease to have effect” removed. A consequential amendment would be in clause 2 to specify the mining operator whose licence for a mining activity is revoked or suspended rather than the broad “is or was”. This Section extends liability beyond closure and relinquishment, and if the Government accepts the relinquishment of tenure and closure of a site, the liability must cease.

S 124ZZS Amendment of conditions of environmental (mining) licence or grant of environmental (mining) licence instead

The amendment of conditions will alter the commercial expectations of transferred licence. This section grants the Minister the ability to rewrite the conditions of a licence, irrelevant of the performance of the operator. This undercuts the commercial decisions of the proponent to transfer and the validity of the licence. If a company has not breached the conditions than the Minister should not have the ability to amend conditions.

Joint ventures are common arrangements between two commercial entities undertaking a specific mineral exploration project. It is common for a smaller mineral exploration to hold a project and seek a larger, better resourced partner to invest in a joint venture. Frequently a joint venture arrangement will grant an ownership interest in the project, subject to the larger company achieving certain expenditure commitments over an agreed period. This is done to ensure the necessary resources are focussed on the developing the project.

It is unclear how this section would apply in the instance of a joint venture, with the risk being a project would be transferred but the environmental conditions would be amended. What would trigger a review?

AMEC is opposed to this section as it is drafted as conditions should be drafted to not be beholden to who will perform them but to the achievement of outcomes. The Minister already has powers under the Fit and Proper Person test to challenge the credentials of the recipient of a licence. This section creates significant regulatory uncertainty.

S 124ZZZF Environmental Protection management system

What is an Environment Protection Management System(s)? The proposed amendments do not provide any detail. These documents will likely be considerable and their drafting a significant administrative burden for both Government and the licence holder.

S 124ZZG Notice to Minister of completion of mining activity.

While AMEC is supportive of the prescription statutory timeframes, it is unclear why this specific activity attracted a required time, and one as narrowly defined as 30 business days. Noting that a licence holder will have strong incentives to remove the liability of holding the mining activity.

S 124ZZU –S 124 ZZY Environmental offenses

Across these Sections reference is made to a “person” committing an environmental offense. This language is specific and could be read to devolve responsibility to either an employee, a contractor, or even an unrelated individual on a mine site. An offense against the license condition should be held against the licence holder (i.e., the organisation) not a person.

Clarification of this language choice is sought.

S 124ZZZ Publication of reports

This Section should be amended so that the Minister must consider the commercial sensitivity of the information that is being sought to be published. Industry is supportive of increasing transparency and ensuring the wider public understand that world-class science is undertaking in the mining and exploration sectors. However, mining, and mineral exploration is a highly competitive sector, and the commerciality of information should be considered.

S 124ZZZG Obligations of operator – management systems

Clarity on how the Department of Environment, Parks and Water Security intend to manage the compliance with section would be appreciated. While the sentiment of the section is understood, greater detail is sought on the procedural detail is needed. For example, what is considered an "appropriate management structure of competent persons for the site"? It is unclear whether if the Department consider the management structure is inappropriate, or individual within pass a competency test, whether the licence is at risk of being in breach? Industry notes that these matters could be more easily and appropriately handled through the drafting of conditions on licences rather than inclusion as an obligation under the legislation.

S 132B Purpose of mining security

The definition of a security has changed from the *Mine Management Act* to the proposed legislation. This expansion of the definition of security has shifted their use to being a regulatory tool rather than a purely a security held to rehabilitate. Industry is concerned that the broader definition which includes provision for under S 132B, (e), the "*payment of any amount payable to the CEO by the mining operator for anything done by the CEO under this Act in relation to the mining operator's obligations under this Act*". Regulation 234A does provide a process for the accessing of the security, however it is an unwarranted expansion as a security should only be accessed as a last resort rather than potentially treated as a bank account.

S 199A Monitoring and management notice – environmental (mining licence)

This section creates a trailing liability for the mining and mineral exploration sector. If a licence expired, was revoked, or cancelled a company's liability to the Government has ceased. It is unclear why this power is needed to extend to companies once their licence has expired, revoked, or cancelled as it is reasonable to expect that the Government will have performed sufficient compliance and due diligence to have identified concerns prior to expiry, revocation, or cancellation. If the Government fails to do so then the Government should bear that cost.

This section creates an indefinite liability that is arbitrary and undercuts the commerciality of projects in the Territory.

At a minimum this section should be amended to include a period of limitation for the trailing liability of a licence holder if their licence was revoked or cancelled. However, if a licence holder received a closure certificate than this section should not be applicable at all, as the Government has acknowledged a licence holder has discharged their obligations. If a proponent has received a closure certificate from the government, it should be reasonable to assume that any recourse for future liability is entirely closed.

S224 Definitions: Notifiable and Recordable incident

Greater clarity is sought on what constitutes either a notifiable or a recordable incident. The drafting of the definitions as they stand does not provide any transparency of what such an incident is and how they would be classed. While there are many potential incidents that could be considered to possibly be included the broad language "threatens material environmental harm or significant environmental harm" make their quantification difficult. Further - why is it important to differentiate between material and significant environmental harm?

There are certain incidents that should be reported and some of those should be recorded. It is unclear what the distinction between those incidents are. The inclusion of a reasonableness test to the definitions of a notifiable and recordable incident would also be welcome.

S228A Offence to interfere with place of notifiable incident.

As discussed above, greater clarity is needed for what is considered a notifiable incident. The inclusion of defenses in clauses 3 and 4 is welcomed as sensible policy.

S 233P Amendment of Standard Conditions

An amendment sought to this section is that the Standard Condition licence holders should be given a period in which to comply with the new Standard Conditions. A review of and amendment to standard conditions could lead to licence holders inadvertently being noncompliant. A grace period to allow compliance would be welcome.

S 274A Notice of defense must be given

It is unclear why the prosecutor must be given 10 business days written notice prior to the use of a defense in this Act before a charge is heard. AMEC considers this period should be reduced considerably or requirements be included to notify a defendant of the charges.

S 276 amended (Standing for judicial review)

It is unclear what the rationalization is that the supplying of a genuine and valid submission during the environmental impact assessment process or environmental approval process under this Act grants the writer an ability to contest the regulatory process through a judicial review. This amendment rewards those in the community who follow the submission process and allows for vexatious legal challenges.

Standing for judicial review should be narrowed to parties that are directly affected.

S303-312 Transitional provisions

The four-year period for mining activities, three years for Exploration and a single year for activities in care and maintenance to review their licenses and transition is creating concern in Industry. While the discussion with the Department has been to extend the period longer, AMEC considers the Government should instead deem the existing approvals that the Government has already granted. The investment uncertainty for a company that is moving toward development is considerable. If this reform is purely administrative then that must be clarified, as the concern is that this represents a reassessment. There is concern within Industry that this will reshape the financial modelling and future of operations.

Given the number of operations in the mining sector, we consider that the Government needs to calculate the cost to industry and weigh it against the administrative burden to Government.

Regulations

R233 B Declaration of risk criteria

As stated elsewhere, AMEC asks that the identification of risk criteria be expedited, and the Government does not wait for the passage of the legislation.

R233T Public consultation periods

AMEC believes that the increased opportunities for public consultation in the environmental licensing process will result in further delays in the approvals process. If the licence application is not subject to an environmental impact assessment, is it has been assessed as not having a significant impact on the environment. Why then should it be opened to further public consultation?

The regulations state that the *"comment period must be not less than 30 business days after the date of the notice"* while this states the minimum amount of public consultation it does not state a limit, leaving it open to interpretation for how long the application of an environmental (mining) licence can be commented on. The prescription of an upper limit in the regulations is needed.

The introduction of the new environmental (mining) licensing framework within DEPWS will result in an increase in assessments. The current drafting of the framework will demand staff attention. The Department will need to ensure that the appropriate number of staff and funding is budgetted to handle this.

Regulation 44A: Fit and Proper person test

Under the transitional provisions as they are drafted there will be required to obtain a new environmental (mining) licence to conduct mining activities, does this mean that both the titleholder and the operator (if they are different) would be required to hold an environmental (mining) licence, similar to the proposed *'fit and proper person test'*? This could result in needless duplication of processes.

Further consultation

AMEC has appreciated the opportunities to consult with the department and the open conversation that has occurred through this process.

It has become clear through those consultations that the proposed legislative framework still needs further amendment, and that all the details are yet to be finalised. This is concerning, and AMEC would welcome further clarity regarding the consultation timeframes proposed.

Final comments

AMEC welcomes the opportunity to provide further commentary to the Department regarding the implementation of these reforms. While there is a 2024 election deadline, the Government needs to consider the sovereign risk implications of such a timeframe.

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