FINAL SUBMISSION

18 June 2019

Ms Julia Knight, Secretary
Social Policy Scrutiny Committee
Department of the Legislative Assembly
GPO Box 3721
DARWIN NT 0801

Lodgement via email: EPSC@nt.gov.au

Dear Ms Knight

Comments on the Revised Environment Protection Bill 2019

The Minerals Council of Australia Northern Territory Division (MCA NT) welcomes the opportunity to provide comment on the Northern Territory Government's revised Environment Protection Bill 2019 that was tabled on 16 May 2019.

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, and environmentally and socially responsible, attuned to its communities' needs and expectations.

Within this context, the MCA NT has advocated, through submissions on every Northern Territory Government draft policy, strategy, discussion paper and draft legislation, for policy and regulatory settings based on and commensurate with risk and developed via *bona fide* consultation with our organisation and members of Territory-based mining companies.

Comment on the four key terms of reference for the Social Policy Scrutiny Committee

In relation to the Social Policy Scrutiny Committee's remit to report to the Legislative Assembly on the revised Environment Protection Bill 2019, in relation to

a) whether the Assembly should pass the Bill

b) whether the Assembly should amend the Bill

c) whether the Bill has sufficient regard to the rights and liberties of individuals

d) whether the Bill has sufficient regard to the institution of Parliament.

the MCA NT has feedback on the first two of these only, and its position in relation to these is as follows:

The MCA NT, on behalf of the Northern Territory minerals industry, does not support the passage of the *Environment Protection Bill 2019*; however, if the Legislative Assembly proceeds to enact this legislation, then a number of significant amendments must be incorporated into a revised Bill to avoid materially damaging the industry without achieving desired benefits of improved environmental protection through improved (more efficient, more effective and risk- and evidence-based) environmental regulation.

The principal recommendation from the MCA NT is therefore that the Legislative Assembly **not pass the Bill in its current form. [Recommendation 1]**

If the Legislative Assembly is intent on passing the Bill, then a number of significant changes identified in this submission should be used to amend and prepare a revised Bill before it is tabled. **[Recommendation 2]**

General comments

In her second reading speech on 16 May 2019, the Minister for the Environment and Natural Resources ('the Minister') summarised the purpose of the Environment Protection Bill ('the Bill') as follows:

- To protect the Northern Territory's environment
- To promote ecologically sustainable development (ESD)
- To use environmental impact assessment (EIA) and approval processes to protect and manage the Northern Territory Environment
- To facilitate community participation in the EIA and Environmental Approval processes, including Aboriginal participation
- To provide certainty and consistency in decision-making for industry and the broader community.

The MCA NT acknowledges that several provisions of the Bill, if effectively and efficiently implemented through adequate resourcing of relevant departments and the NT Environment Protection Authority (NT EPA), are appropriate, with potential to achieve these objectives through government's continuing environmental regulatory reforms, including the revised Bill. Because many practical details regarding implementation have not yet been worked out, however, or have been deferred until the Regulations are developed, the industry fears that additional administrative, consultative and decision-making steps in the new Act will instead have the opposite outcome: even more protracted timelines for EIA and approvals, with significant additional costs to both industry and the government.

Significant deficiencies in the Regulatory Impact Statement Process

Confidence in the new Act has been further compromised by the way the government's Regulatory Impact Statement (RIS) process was managed. The primary objective of a RIS is to gather quality data on costs and benefits of implementing new (or amended) legislation to inform the government if it should proceed or instead direct resources into adjusting or improving the implementation of existing legislation.

The RIS process did not commence until well after the government had committed itself to developing a substantial consultation draft Bill (128 pages) and Regulations (79 pages), which were released in October 2018, with the RIS process not commencing until December 2018 or January 2019. Then, when the RIS was conducted, it was rushed (over a period of weeks or 2-3 months at most), with very little lead time. This meant that none of MCA NT's members who were interviewed in a teleconference by the consultant had time to locate, collate and provide actual data on the current costs of completing EIA and approval processes nor anticipated costs and benefits associated with processes in the draft legislation. This seriously limited the value that the RIS could possibly have had, in providing the government with **recent, timely and relevant data** on which to base its decision whether or not to proceed with its plan to reform the current 'broken' environmental regulatory system via new legislation rather than direct resources to get more out of existing legislation and administrative procedures.

Although past Territory goverments have not published the results from any RIS's it prepared, the Commonwealth, NSW and other governments **have** done so, and the present government came to power with a passionate commitment to transparency. Despite this, the government rejected a request from the MCA NT for a copy of the RIS that resulted from the belated and very truncated consultancy.

As a RIS Certificate has to accompany draft legislation tabled in government, this means that both the quality of the RIS and the outcome (in terms of benefit-to-cost ratio) have been deemed by the government to be satisfactory, and, because our industry will be significantly impacted by the new legislation, the government might have anticipated receiving a request from the MCA NT to review the RIS.

For these reasons, neither industry nor the government (nor the general public) can be confident that the benefit-to-cost ratio of enacting and implementing the new Environment Protection Act will be an improvement over the ratio for either maintaining the existing system or for an improved system, with more efficient implementation of existing regulation.

An overview of other aspects of the Bill

The Bill includes specific definitions of 'impacts,' 'significant impacts' and 'significant variations' and establishes principles of environment protection and management for decision-makers (although some of these have carried over deficiences from the 2018 Bill, that are identified in the 'Specific comments' section of the submission). The Bill also articulates what is expected from proponents, the broader community, government departments, the NT EPA and the Minister. All of these are important components of an improved EIA and Environmental Approvals framework, in terms of greater efficiency, effectiveness, consistency, transparency and an emphasis on appropriate risk assessment and management.

Because the key feature of EIA and approvals is that they are judgements, these components are aimed at strengthening the basis upon which these judgements are made, and improving the soundness and credibility of decisions. In this way, the government anticipates the new Act will achieve the objective of improving community confidence and trust in EIA and approvals processes.

Provisions of the revised Bill are aimed at both (a) reducing the likelihood of developments with potential or likely significant environmental impacts proceeding in the absence of appropriate EIA and approvals and (b) ensuring that proposed developments with minimal and manageable potential for significant impacts are either not formally assessed (and therefore not subject to the new Environmental Approvals) or are assessed at a level commensurate with likely risk. The MCA NT hopes that the provisions, if efficiently and effectively implemented, will achieve these objectives and looks forward to working with the government to resolve outstanding/deferred matters, including in drafting the associated Regulations.

Specific comments

The new ministerial Environmental Approval

The revised Bill and associated processes are consistent with the government's stated position that environment protection and economic development can and should proceed in tandem, which is consistent with key principles of ESD. Only projects with potential for significant environmental impact will require formal EIA and Environmental Approvals.

To further improve efficiency and reduce 'red tape,' the MCA NT recommends that wording in the current Bill be amended to require only those projects **for which significant environmental impacts are <u>likely</u>** to be subject to referral and formal assessment. **[Recommendation 3]**

Of significant concern to the MCA NT and the Northern Territory minerals industry is that the Bill introduces a new Ministerial Environmental Approval for proposals requiring at least some level of formal EIA, and this comprises granting the Minister power of veto over all proposed significant development projects for cases when the NT EPA recommends that approval not be granted.

A far more robust and considered process would be to refer any project for which the NT EPA has recommended no approval be given, to the Administrator.

Referring these projects to the Administrator would likely result in the NT EPA's advice being considered from a broader, 'whole-of-community' perspective (including social, cultural and economic) rather than just environmental, because the Administrator would be expected to refer these to Cabinet.

The NT EPA's advice would, for example, be assessed against the potential for the proposed development to provide substantial support to the government in achieving its objectives under the Economic Development Strategy, including sustainable economic development in regional and remote areas of the Northern Territory.

In effect, the process above is what happens in Queensland when proposals are declared 'coordinated projects,' and are subject to review and approval by the Coordinator General.

If, after an EIA process is completed, advice from the NT EPA to the Minister is to NOT grant approval (i.e. when the NT EPA provides the Minister with a statement of unacceptable impact instead of a draft approval), the Minister should refer the project to the Administrator, for further review and consideration, particularly for major projects or projects expected to generate significant social and economic benefits.

[Recommendation 4 (the most critical amendment to be made to the Bill, if it is to be tabled)]

The MCA NT does not believe that provisions in Section 71: Consultation on proposal to refuse to grant Environmental Approval, can provide adequate assurances to industry and the broader public that the best decision would be made if the Minister is required only to

(a) make reasonable efforts to obtain the views of any statutory decision-maker who the Minister considers may hold views in relation to the matter; and

(b) consider any written comments received from the statutory decision-maker.

In addition to this concern, the MCA NT notes that introduction of an Environmental Approval will provide another opportunity for nuisance or vexatious appeals in addition to the current (and continuing) project approvals by relevant consent authorities (e.g. approvals or authorities to develop mines); however, once the current loophole in the definition of people with standing, based on having made a 'genuine and valid submission' (Section 276), the potential for vexatious appeals or injunctions in relation to these approvals should be minimised. (This deficiency is described below, in discussion of Section 276: Standing for judicial review.)

The MCA NT supports the proposed linking of EIA and approval processes and requiring the Minister to decide on approvals within 30 days of receiving the NT EPA's Environmental Assessment Report, the MCA NT acknowledges the potential that this can result in streamlining the current protracted timeframes for EIA and approvals for mineral and other proposed developments. It also agrees that the new approval could be considered a 'bankable' commodity by the industry, in terms of improving attractiveness of a project proposal for potential investors.

The MCA NT endorses the provision in the Bill that Environmental Approvals continue to be the responsibility of the government and not the independent/advisory NT EPA.

Declaration of environmental objectives and referral triggers

The need for *bona fide* consultation with industry and the broader community in declaration of environmental objectives and referral triggers by the Minister was raised in the MCA NT's 2018 submission (Recommendation 7) but not implemented in development of the 2019 Bill.

In relation to declaration of environmental objectives, Section 28 merely states that declaring environmental objectives (aimed at targeting and streamlining EIA) will require the Minister to abide by a process set out in the future Regulations. Neither the Bill nor the explanatory statement includes a commitment that adequate consultation will be required in this process to be outlined in the Regulations. The only

references to this commitment are in Fact Sheets, released in conjunction with release of the 2019 Bill, which have no legal standing (e.g. Fact Sheet 25, Frequently Asked Questions).

The same is true for declaration of referral triggers (Section 30): neither the Bill nor explanatory statement explicitly require the Minister to adequately consult the public before declaring these triggers, and the only references to public consultation being included in the future Regulations are in Fact Sheets, that have no statutory authority.

The MCA NT therefore recommends that Sections 28 and 30 (Ministerial declaration of environmental objectives and referral triggers) of the Bill be amended to explicitly state that the processes to make these declarations will involve bona fide public consultation. **[Recommendation 5]**

The MCA NT notes that unlike the declarations above, the explanatory statement for Section 36 (relating to declaration of permanent protected environmental areas) does reference public consultation: The regulations will specify processes for making permanent declarations of protected environmental areas, which will include requirements for public consultation. The MCA NT recommends that this wording be incorporated into an amended version of the 2019 Bill. **[Recommendation 6]**

Definitions and principles of ecologically sustainable development

The 2018 MCA NT submission on the consultation draft of the Environment Protection Bill recommended that the Bill be revised to provide an adequate definition and description of 'strategic proposals' and 'strategic assessments' [Recommendation 20]. Although these definitions in the current Bill are still inadequate, the Explanatory Statement (for Section 49) provides useful background and a practical example.

Recommendations in the MCA NT's 2018 submission, relating to the omission in the draft Bill of significant terms relating to ESD in the original 1992 Rio Declaration (Recommendations 14, 15 and 16) have not been addressed in the 2019 Bill. Section 18 of the Bill, the Decision-making principle, omits **economic** and **social** considerations in the suite of matters to be considered in judging whether a proposed development is likely to be 'ecologically sustainable.' The Decision-making principle in Section 18 should be amended to put these two terms back into the reference: Decision-making processes should effectively integrate both long-term and short-term **economic**, environmental, **socia**l, and equitable considerations. **[Recommendation 7]**

Similarly, Section 19, the Precautionary principle, omits the term 'cost-effective' from the full statement in the Rio Declaration: Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used a s a reason for postponing **cost-effective** measures to prevent environmental degradation. Wording in Section 19 should be amended accordingly. **[Recommendation 8]**

In addition, for the Bill to adequately reference the principle of Intergenerational equity (Section 21), it should not have omitted Principle 3 of the Rio Declaration in Section 21: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. The current sentence should be maintained as (1) with the sentence above added as subsection (2). **[Recommendation 9]**

These three omissions relating to ESD undermine industry trust and confidence in the new Act, because it begs the question why the government deliberately excised these terms from the universally-accepted wording of these principles or left the key principle regarding the right to development and did not incorporate them into current Bill in response to recommendations in 2018 submissions from the MCA NT and others (e.g. Ward Keller) on the consultation draft Bill.

Three-tiered assessment framework

The three-tiered EIA framework (assessment on referral documentation; by supplementary environmental report; or environmental impact statement, EIS) provides levels of EIA commensurate

with environmental risk, which should maximise efficiency, timeliness and cost-effectiveness of EIA and approvals processes.

Third party appeals against decisions

Efficiency and industry confidence in decisions made by the Minister, their department and the NT EPA will be supported by the provision that third party appeals will be limited to only judicial review and by only those persons 'directly affected by a decision of the NT EPA or Minister.' The revised Bill has, however, retained a dangerous 'loophole' from the previous draft Bill (October 2018) in granting standing to 'persons who have made a genuine and valid submission' during the EIA and approvals process without the Bill adequately defining what a 'genuine and valid submission' is.

In the current revised Bill, a 'genuine and valid submission' is defined only as a submission that (a) is not a form letter or (b) was not made after the end of the Submission Period.

The MCA NT considers these criteria too narrow to prevent parties from anywhere in the world, with no potential to be directly affected by a decision, to lodge appeals against ministerial, departmental and NT EPA decisions, purely from a basis of ideologically opposition to a project.

To close this loophole, the MCA NT recommends that the definition of a 'genuine and valid submission' be included in Section 4 Definitions in the Bill and include in Section 276 as well that these are submissions that provide **adequate grounds for concern about potential environmental impacts on the basis that these were missed in the EIA and approvals processes underpinning decisions. [Recommendation 10]**

Closure certificates

Section 211 indicates that the Minister may determine criteria to be met by an approval holder before a closure certificate can be issued in relation to an action. Neither the wording in the Bill nor in the explanatory statement requires the Minister to seek advice from relevant departments or ministers in setting these criteria. It is unlikely that the Minister would have adequate knowledge across the full range of commercial and industrial operations across the Northern Territory to set criteria that are practical, achievable and likely to meet environmental objectives.

The MCA NT therefore recommends that the Bill be amended to explicitly state that before the Minister sets these criteria, they must consult with and seek advice from those agencies and ministers responsible for the class of actions relevant to the closure certificate, e.g. the Minister for Resources for closure of mine sites. **[Recommendation 11]**

Establishment and management of environment protection funds

Sections 136 – 139 of the Bill empower the Minister to establish environment protection funds from security bonds and levies for projects (to cover the cost of remediating and rehabilitations sites, should an operation cease or be terminated prior to satisfactory rehabilitation) and set out provisions for payments into the fund, expenditures from the fund and recovery of amounts paid from the fund.

The MCA NT recommends that the Bill be amended to explicitly require such funds to be fully and properly acquitted on an annual basis (in line with statutory requirements for government-managed funds), and that reports from annual acquittals be made public. **[Recommendation 12]**

In addition, funds should not be subject to being transferred into general revenue but kept as separate funds, held in trust for the specific industry and purposes for which they were collected **[Recommendation 13].**

Introduction of financial provisions

Financial provisions, in the form of rehabilitation security bonds and levy (for addressing legacy mines), have been borne by the minerals sector in the Northern Territory for many years. The revised Bill

expands the application of these to development projects from other industry sectors. The MCA NT supports provisions in the Bill that ensure that no new bonds or levies will be put on mineral projects, which would comprise duplicating ('double-dipping') financial provisions already paid to the government.

The MCA NT also welcomes the government's decision to defer introducing a new 'financial assurance' to mineral and other projects, which would be applied at the closure of an operation, to cover the costs of dealing with any unacceptable environmental impacts that may occur up to 20 years or more after an operation/development lease has been closed and relinquished.

This is a very complex issue (residual risk) that the Queensland government (and possibly other jurisdictional governments) has been grappling with for years, and therefore merits a thorough review and adequate consultation before being introduced into Northern Territory legislation, e.g. at the next revision of the Act or when associated Environment Protection Regulations are developed. **[Recommendation 14]**

Transitional arrangements

Sections 296 – 300 in the Bill provide assurances to industry that current operations will not require reassessment and granting of an Environmental Approval under the new Environment Protection Act and neither will development proposals that have already commenced an EIA process that has not stalled for any substantial amount of time. These will be allowed to complete the current EIA and project approval processes and not require an Environmental Approval.

Section 301, however, indicates that if the EIA for a development proposal has proceeded to the stage when an environmental assessment report (EAR) has been prepared after commencement of the new Act, then an Environmental Approval will be required. The MCA NT is strongly opposed to this provision as it is unreasonable and unjust to require a proponent, who commenced an EIA process in good faith that it could reach completion under the current legislation, would at such a late stage, and potentially up to 4 years on, be assessed and require Environmental Approval under the new legislation.

This provision also appears to contradict Section 296, which states that if an assessment of a proposed action commenced under the former Act but an assessment report was not completed before the commencement (of the new Act) the former Act continues to apply to that assessment as if the former Act had not been repealed.

For these reasons, the MCA NT strongly recommends that project proposals requiring formal EIA, that have proceeded past the stage of receipt of approved Terms of Reference, be allowed to complete its full EIA process and project approval under existing legislation, i.e. the *Environmental Assessment Act* and relevant sectoral legislation, e.g. the *Mining Management Act.* **[Recommendation 15]**

Concluding statement

To realise the key objectives of the new Environment Protection Act (as stated in the Minister's second reading speech to the Legislative Assembly on 16 May 2019), to 'achieve responsible and sustainable development for the Northern Territory,' the government will need to

(a) revise the existing version of the Bill to incorporate the important amendments identified in this submission from the MCA NT **[Appendix A: List of recommendations**]

(b) adequately resource the relevant departments so that the provisions of the new Act are effectively and efficiently implemented; and

(c) follow through on ancillary legislation dealing with issues that have been deferred for subsequent consideration and incorporation into associated Environment Protection Regulations and/or the next (expanded) version of the Act, and ensure that industry and the broader Territorian community are engaged for *bona fide* consultation to develop these.

As stated above, the MCA NT appreciates the opportunity to comment on the revised *Environment Protection Bill* 2019, particularly in relation to the uptake of recommendations made in the previous submission, and would welcome opportunities to further engage with the government and the NT EPA on development of future environment protection policies, guidelines and legislation.

Should you require further information or clarification, please do not hesitate to contact me directly on 08 8981 4486.

Yours sincerely

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APPENDIX A

LIST OF RECOMMENDED AMENDMENTS TO THE *ENVIRONMENT PROTECTION BILL 2019* PRIOR TO PASSAGE BY THE NORTHERN TERRITORY LEGISLATIVE ASSEMBLY

Recommendation 1

That the Legislative Assembly not pass the *Environment Protection Bill 2019* in its current form.

Recommendation 2

That the amendments identified in this submission be used to revise and prepare a revised Bill before it is tabled, if the Legislative Assembly intends on passing the *Environment Protection Bill 2019*,

Recommendation 3

That wording in the 2019 Bill be amended to require only those projects for which significant environmental impacts are **likely** to be subject to referral and formal environmental impact assessment.

Recommendation 4 (the most critical/essential amendment of this MCA NT submission)

That, if after an EIA process is completed, advice from the NT EPA to the Minister is to NOT grant approval (i.e. when the NT EPA provides the Minister with a statement of unacceptable impact instead of a draft approval), the Minister refer the project to the Administrator, for further review and consideration, particularly for major projects or projects expected to generate significant social and economic benefits.

Recommendation 5

That Sections 28 and 30 (Ministerial declaration of environmental objectives and referral triggers) of the Bill be amended to explicitly state that the processes to make these declarations will involve *bona fide* public consultation.

Recommendation 6

That Section 36 of the Bill, regarding Declaration of permanent protected environmental areas, incorporate the following provision: The regulations will specify processes for making permanent declarations of protected environmental areas, which will include requirements for public consultation.

Recommendation 7

That the wording of Section 18 of the Bill on Decision-making principle be amended to include the terms 'economic' and 'social' that were omitted from the original UN Rio Declaration (1992):

> Decision-making processes should effectively integrate both long-term and short-term **economic**, environmental, **social,** and equitable considerations.

Recommendation 8

That the wording of Section 19 of the Bill, on the Precautionary principle be amended to include the term 'cost-effective,' as it appears in the original Rio Declaration, so that it reads

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used a s a reason for postponing **cost-effective** measures to prevent environmental degradation

Recommendation 9

The wording of Section 21 on inter-generational and intra-generational equity needs to be amended as follows, to be fully consistent with the 1992 Rio Declaration indicating the right to development. The clause will then have two subclauses, as follows:

1) The present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of present and future generations.
2) The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations

Recommendation 10

That the definition of a 'genuine and valid submission' be included in Section 4 Definitions in the Bill and include in Section 276 as well that these are submissions that provide **adequate grounds for concern about potential environmental impacts on the basis that these were missed in the EIA and approvals processes underpinning decisions.**

Recommendation 11

That the Bill be amended to explicitly state that before the Minister sets criteria for Closure Certificates, they must consult with and seek advice from those agencies and ministers responsible for the class of actions relevant to the closure certificate, e.g. the Minister for Resources for closure of mine sites.

Recommendation 12

That the Bill be amended to explicitly require that environment protection funds be fully and properly acquitted on an annual basis (in line with statutory requirements for government-managed funds held in trust), and that reports from annual acquittals be made public.

Recommendation 13

That monies in environment protection funds not be subject to transfer into general revenue but kept as separate funds, held in trust for the specific industry and purposes for which they were collected

Recommendation 14

That prior to incorporation of a new financial assurance into the next amendment of the Bill or in associated regulations (to address residual risk after closure and relinquishment of development leases), the government will engage in *bona fide* consultation with industry and the broader community, e.g. at the next revision of the Act or when associated Environment Protection Regulations are developed.

Recommendation 15

That a project proposal requiring formal EIA, that has proceeded past the stage of receipt of approved Terms of Reference, be allowed to complete its full EIA and project approval processes under existing legislation, i.e. the *Environmental Assessment Act* and relevant sectoral legislation, e.g. the *Mining Management Act.*