Environmental Defenders Office

Submission on Exposure Draft for the Environment Protection Legislation Amendment (Mining) Bill

18 September 2023

About Environmental Defenders Office (EDO)

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

Submitted to:

Department of Environment, Parks and Water Security
environment.policy@nt.gov.au

For further information on this submission, please contact:

Elanor Fenge
Managing Lawyer
Healthy Environment and Justice
T: (08) 8981 5883
E: elanor.fenge@edo.org.au

Natalie Czapski
Solicitor
Healthy Environment and Justice
T: (08) 8981 5883
E: natalie.czapski@edo.org.au

Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

Executive Summary

EDO welcomes the opportunity to comment on the draft Environment Protection Legislation Amendment (Mining) Bill (**EP Mining Bill**).

We commend the Northern Territory (**Territory**) government for taking this important step to reform our mining laws, which are extremely outdated and not-fit-for purpose. The release of the draft Bill is a landmark step towards implementing modern, best-practice laws for an industry which has been highly environmentally destructive.

In this submission, we identify the key areas in which this improves on the current scheme, whilst identifying several areas where we say the Draft Bill should be improved and strengthened. We make **37** detailed recommendations, summarised at **p 6**, as to how the legislation can be improved.

Our overall position is that this draft Bill, along with the Legacy Mines Remediation Bill (**Legacy Mines Bill**), should not be introduced to Parliament until the most critical shortcomings are addressed. We acknowledge some clear benefits in the EP Mining Bill, including the transfer of primary regulatory responsibility for the scheme to the Minister for the Environment (**Environment Minister**) and the Department of Environment, Parks and Water Security (**DEPWS**) and increased transparency around environmental (mining) licences (**Mining Licences**) and plans submitted under Mining Licences.

However, there is too much discretion in the current scheme, creating considerable uncertainty in terms of the likely environmental outcomes and for mining operators to be able to meet legislative requirements and have business certainty. Critically, the legislation does not include mandatory requirements for closure planning, which puts the Northern Territory significantly out of step with best practice and with other jurisdictions. All stakeholders would benefit from the inclusion of mandatory minimum content and increased clarity around the requirements of the scheme.

We further urge the Territory government not to rush introduction of the legislation into the Territory Parliament in October, but to take the appropriate amount of time required to get this landmark reform right, so the new regulatory scheme can appropriately address the ongoing legacies of environmentally and culturally destructive mining practices in the Territory. This includes allowing sufficient time for consultation and, ideally, co-design of key aspects of the scheme with Aboriginal Territorians who are most affected by mining operations.

Public consultation on the Bills should be extended to give sufficient time for input into this crucial reform process. The short time period for public comment has meant EDO has been unable to comprehensively address all of the issues in the Bill.

EDO has also provided a detailed submission on the draft Legacy Mines Bill. We recommend that the submissions be read together.

Table of Contents

Glossary

AAPA	Aboriginal Areas Protection Authority
ALRA	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
AAPA	Aboriginal Areas Protection Authority
Bills	EP Mining Bill and the Legacy Mines Bill
CEO	Chief Executive Officer, DEPWS
CLC	Central Land Council
DEPWS	Department of Environment, Parks and Water Security
DITT	Department of Industry, Tourism and Trade
EDO	Environmental Defenders Office
Environment Minister	Minister for the Environment, Northern Territory
EP Act	*Environment Protection Act 2019* (NT)
EP Mining Bill	Environment Protection Legislation Amendment (Mining) Bill
EP Regulations	*Environment Protection Regulations 2020* (NT)
Fund	Mining Remediation Fund
Heritage Act	*Heritage Act 2011* (NT)
Legacy Mines Bill	Legacy Mines Remediation Bill
Mineral Titles Act	*Mineral Titles Act 2010* (NT)
Mining Licence	Environmental (mining) licence
Mining Minister	Minister for Mining and Industry, Northern Territory
MM Act	*Mining Management Act 2001* (NT)
NLC	Northern Land Council
NT EPA	Northern Territory Environment Protection Authority
Sacred Sites Act	*Northern Territory Aboriginal Sacred Sites Act 1989* (NT)

Summary of Recommendations

Reform process overall and public consultation

1. Reform of the Territory's mining laws is absolutely imperative, but must not be rushed. There is a need to fundamentally improve and strengthen the EP Mining Bill and the Legacy Mines Bill (**Bills**) before they are introduced to Parliament.

2. Public consultation on the Bills should be extended to give sufficient time for Territorians, and especially Aboriginal Territorians affected directly by mining operations, to have input into this crucial reform process. Bills and explanatory materials should be available in First Languages, and proactive consultation should be done by the Northern Territory government in affected communities.

Transparency around deemed Mining Licences

3. All existing Authorisations and MMPs under the *Mining Management Act 2001* (NT) (**MM Act**), which are deemed to be Mining Licences under the Bill, must be included on the public register.

Repeal of Mining Management Act

4. Key details of mining activities which the operator must provide under the MM Act for approval in an MMP must be reflected in approval processes under the *Mineral Titles Act 2010* (NT) (**Mineral Titles Act**) and/or the new environmental licensing system.

Mine closure, rehabilitation and security bonds

5. There should mandatory minimum conditions for all Mining Licences which are specifically stipulated in the legislation. This should include a requirement that all mining operations have a fully-costed life of mine closure plan from the inception of mining operations.

6. Mines should have clearly defined and approved closure criteria which are subject to independent third party review and input from Aboriginal Territorians.

7. Successful rehabilitation should be determined against agreed upon closure criteria and outcomes in a closure plan. It is inappropriate for the Environment Minister to determine, on a subjective basis, if a mine site has been successfully rehabilitated.

8. Mining Licences should include requirements for progressive rehabilitation, especially for mining operations and extractive operations.

9. Mining security bonds should be calculated based on a set of mandatory factors which ensure that the security bond is adequate to cover the full costs of rehabilitating the mine site for all disturbances across the life of the mine, including post-closure monitoring, maintenance and reporting costs.

10. There should be transparency around the methodology used to calculate security bonds and provisions for third party review.

11. Independent expert review should be considered for both closure plans and security bonds, particularly for mining operations.

Licences and licence conditions

12. Draft standard licence conditions and risk criteria should be released and subject to public consultation prior to the legislative scheme being enacted.

13. There should be mandatory relevant considerations which the Environment Minister must take into account when setting the conditions of Mining Licence.

14. Public consultation should be available for decisions to modify the standard conditions, not just consultation with affected mining operators as under the current EP Mining Bill.

15. Consideration should be given to whether it is appropriate at all for there to be Mining Licences which are only subject to standard conditions, rather than being tailored to the specific impacts and environmental risk factors associated with a particular mine site.

Public consultation and review rights

16. Public consultation should be available on applications for all modified and tailored Mining Licences, not just those for which Environmental Approvals are required or have been granted. Under the EP Mining Bill as currently proposed, there is no scope for comment on proposed Environmental Approvals *or* Mining Licences for those activities with the greatest likely environmental outcomes and risks. This is a perverse outcome which should be resolved.

17. Public consultation should also be available on applications for standard condition licences, and whether a tailored or modified condition licence is more appropriate, rather than relying on operators to self-select on what kind of licence to apply for.

18. Critical public consultation rights should not be in the Regulations, but instead should be included in the *Environment Protection Act 2019* (NT) (**EP Act**) itself. Regulations are suited to administrative matters only, given they can more easily be amended without public scrutiny.

19. Similarly, merits review should be available for all decisions to grant Mining Licences, not just those for which Environmental Approvals have been granted. It is incongruent that there is no merits review available for Environmental Approval decisions or Mining Licence decisions for those activities with the greatest likely environmental impacts and risks.

20. There should be open standing requirements for merits review for all decisions relating to Mining Licences. Standing should not be restricted to those who have made submissions during

the original consultation process for a modified or tailored condition licence. At a minimum, standing requirements should be clarified to expressly provide that Aboriginal Territorians and in communities affected by mining are standing for merits review.

Involvement of Aboriginal Territorians

21. Genuine consultation and co-design with Aboriginal Territorians should be included in the EP Mining Bill. This includes involving Aboriginal Territorians impacted by particular operations in the setting of Mining Licence conditions, closure objectives and mine site rehabilitation.

22. The EP Mining Bill should recognise the need to provide materials in applicable First Languages and ensure materials are accessible for all remote Territorians.

Sacred sites and cultural heritage

23. Investigation, mapping and approvals pertaining to the protection of sacred sites under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (**Sacred Sites Act**) should occur as a pre-condition to granting any mineral title, and prior to the granting of any Mining Licence or Environmental Approval.

24. Comprehensive cultural heritage assessments, in consultation with Traditional Owners, and the preparation of a Cultural Heritage Management Plan (**CHMP**) should be required prior to granting any mineral title and prior to the granting of any Mining Licence or Environmental Approval.

Care and maintenance

25. Mining Licences for mining operations and extractive operations must include mandatory requirements for care and maintenance planning. An updated care and maintenance plan should be submitted and approved by the Minister if a mine goes into care and maintenance.

26. Mining companies should be required to notify the Territory and the public if a mine is entering into care and maintenance. The Minister should be required to give written approval for a mine to enter care and maintenance along with approving a care and maintenance plan.

27. Conditions of the kind suggested in s 124Z of the EP Mining Bill, which are directed towards minimising environmental impacts, remediation and rehabilitation, should be mandatory.

28. The Minister's power to amend conditions in a Mining Licence for a mine which is in care and maintenance should not be contingent on the mine being in care and maintenance for longer than 12 months.

29. Provisions in the EP Mining Bill to assess the financial capacity of mining operators to comply with their obligations as title holders should be extended to assess their ability to comply with

environmental and rehabilitation requirements under Mining Licences. This should extend to any company with a controlling interest in the company operating the mine, and to any company which takes over a mine site which is in care and maintenance.

30. There should be limitations on the amount of time a mining operation can spend in care and maintenance before they are required to actively close and rehabilitate the site or transfer the site to another operator with the financial and technical capacity to re-open the site or meet closure and rehabilitation requirements.

Compliance and enforcement

31. Provisions around performance management programs should be clarified, including to impose strict timeframes around the length of any programs and to prevent operators from being exempt from civil and criminal liability.

32. There should be third-party enforcement mechanisms in the legislation. In particular, Aboriginal Territorians should specifically be able to enforce rehabilitation requirements of operations on Country.

Chain of responsibility

33. Chain of responsibility requirements should be included in the reforms, as was originally intended for the whole of the mining industry before those requirements were restricted only to oil and gas activities under the *Petroleum Act 1984* (NT).

34. Chain of responsibility legislation should be modelled on the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) save than no limitation period for chain of responsibility actions should be prescribed.

Resourcing

35. Appropriate resources should be allocated to DEPWS to enable proper administration of the licensing scheme, including compliance and enforcement mechanisms.

36. A full cost recovery model should be adopted where the operator bears the costs.

Independent review

37. The Minister should have a broad discretion to order an independent peer review. A transparent risk assessment process should guide this process. In addition, an independent peer review should be compulsory in certain circumstances, namely for security bond reviews, closure plans and the setting of closure criteria and where activities are deemed to be high-risk.

1. Introduction

EDO welcomes the opportunity to comment on the draft EP Mining Bill.

EDO commends the Territory Government for taking this important step to reform our mining laws, which are extremely outdated and not fit-for purpose. This once-in-a-generation reform process, if implemented effectively, has the potential to significantly improve how mining is regulated for the benefit of Territorians and to ensure the ongoing preservation of the Territory's rich natural and cultural heritage. It also comes at a crucial time when Australia and the world must engage in urgent, large-scale energy transition away from fossil fuels to renewable energy. The Territory holds many of the minerals required for this transition.

It is important that we seize this opportunity and get this reform process right. The energy transition presents an opportunity to engage with environmental concerns, community consultation processes, and First Nations cultural heritage protection in a different way than has been the historical experience in respect to the fossil fuel industry and other mining developments. Industry carve-outs and weak or highly discretionary regulatory frameworks historically have been to the detriment of nature, community and human rights. Laws can, and should, be designed to deliver outcomes for climate, nature and communities.

Our mining laws should be designed to deliver outcomes for climate, nature and communities.

2. Observations on the EP Mining Bill

This submission identifies areas which are supported in the reforms and provides analysis and recommendations in relation to the following key issues:

- Regulatory separation
- Transparency
- Repeal of the MM Act
- Mine closure, rehabilitation and security bonds
- Licences and licence conditions
- Public consultation and review rights
- Involvement of Aboriginal Territorians
- Sacred sites and cultural heritage
- Care and maintenance
- Compliance and enforcement
- Chain of responsibility
- Resourcing
- Independent Review

We emphasise that the limited timeframe for public consultation on these very substantial reforms means that EDO has not been able to exhaustively analyse and address every aspect of the EP Mining Bill. We nevertheless make detailed recommendations in relation to the areas identified above. We also note that observations which were previously included in a public briefing note dated

6 September 2023 were prepared in a short time to assist others to engage in the submission process and do not represent EDO's final position on any issue identified.

We have been advised that the Territory government intends to introduce the EP Mining Bill and the accompanying Legacy Mines Bill into the Territory Parliament in the October parliamentary sittings, and accordingly, that no substantive extensions of time will be provided for submissions within this consultation process. In EDO's view, this is an error. These fundamental reforms should not be rushed. Given the significant areas for improvement which we have identified, we recommend extending the consultation process and taking the time to implement feedback and strengthen the Bills before they are introduced to Parliament.

The short consultation period also makes it likely Aboriginal Territorians living in remote communities close to significant mining operations are unlikely to have been able to engage effectively in the consultation process. In undertaking further consultation, we recommend that DEPWS and Department of Industry, Tourism and Trade (**DITT**) engage in proactive briefings within communities to meaningfully explain and obtain feedback on the reforms – this has not occurred to date. Consultation materials should also be provided in a variety of First languages and orally.

Recommendations for the reform process overall and public consultation

1. Reform of the Territory's mining laws is absolutely imperative, but must not be rushed. There is a need to fundamentally improve and strengthen the Bills before they are introduced to Parliament.

2. Public consultation on the Bills should be extended to give sufficient time for Territorians, and especially Aboriginal Territorians affected directly by mining operations, to have input into this crucial reform process. Bills and explanatory materials should be available in First Languages, and proactive consultation should be done by the Northern Territory government in affected communities.

Regulatory separation

EDO is pleased that the Draft EP Mining Bill moves environmental regulation of the industry under the licensing scheme to the Environment Minister and the DEPWS, under the EP Act, and away from the Minister for Mining and Industry (**Mining Minister**) and the DITT.[1] This means that the Minister and the Department responsible for promoting the industry will no longer have primary responsibility for environmental regulation, which is a significant improvement.[2]

[1] Currently, the Mining Minister is empowered under the MM Act to grant Authorisations to mining operators (s 35), calculate the amount of security to be provided by an operator as a condition of the Authorisation (s 43A(1)) and to approve Mining Management Plans which accompany an application for an Authorisation or variation of Authorisation (s 41) (and see ss 36 and 38 of the MM Act).

[2] We acknowledge the Environment Minister is the decision maker for environmental approvals under the EP Act, which already apply to mining activities. However, the existing transitional provisions in the EP Act mean that mining operations which had undergone or were undergoing environmental impact assessment prior to the EP Act coming into force have not needed separate environmental approvals: EP Act, Pt 14, Div 2.

Transparency

The EP Mining Bill also increases transparency around mining decisions in the Territory, by making it a requirement to publish Mining Licences, any transfers of Mining Licences, mining security bond amounts and plans submitted by operators under the legislation and licence conditions.[3] This is a significant improvement on the current scheme, where there is no requirement to publish Authorisations, security bond amounts or Mining Management Plans (**MMPs**) under the MM Act.[4] This will make it far easier for the public and affected communities to hold operators to account. and avoids lengthy processes under the *Information Act 2002* (NT) to try and access this kind of information.

Given the proposed amendment to cl 282 of the *Environment Protection Regulations 2020* (NT) (**EP Regulations**), we anticipate this information will be published on Territory Government websites, similar to Environmental Approvals and other documents required under the EP Act. Whilst this is a great step forward, we do not think this goes far enough towards ensuring that all Territorians, and particularly those in remote Aboriginal communities affected by mining, are fully informed and able to engage.

It is also unclear whether transitional provisions in the Bill will result in existing Authorisations and MMPs (deemed Mining Licences under the Bill)[5] being published on the public register. This should be clarified – EDO considers that these documents, and any plans or reports required to be submitted under existing conditions of Authorisation, should also be published.

We are pleased to see the inclusion of a discretionary power allowing the Minister to order publication of any report given to the Minister by the mining operator under the EP Act or the conditions of any licence, at a time and in the way the Minister decides. This could be used to require operators to provide reports in language and/or in locations accessible to the communities most affected by their operations.[6]

Recommendation for transparency of deemed licences

3. All existing Authorisations and MMPs under the MM Act, which are deemed to be Mining Licences under the Bill, must be included on the public register.

[3] EP Mining Bill s 70 (EP Regulations); EP Mining Bill s 124ZC(5) (EP Act).
[4] We acknowledge and commend the recent publication of some information about mining operations in the Territory on the following Northern Territory Government websites: 'Securities Held for Mining Sites', *Northern Territory Government* (Web Page, 2023) <https://nt.gov.au/industry/mining/decisions/securities-held>; 'Mining Projects', *Northern Territory Government* (Web Page, 2023) <https://industry.nt.gov.au/publications/mining-and-energy/public-environmental-reports/mining/mining-management-plans-reports/mines>; 'Exploration', *Northern Territory Government* (Web Page, 2023) <https://industry.nt.gov.au/publications/mining-and-energy/public-environmental-reports/mining/mining-management-plans-reports/exploration>; 'Authorised mining sites', *Northern Territory Government* (Web Page, 2023) <https://nt.gov.au/industry/mining/decisions/authorised-mining-sites>.
[5] EP Mining Bill, s 304 (EP Act).
[6] EP Mining Bill, cl 124ZZZ (EP Act).

Failure to carry across key details from the MM Act into the new scheme

EDO, in principle, supports a tiered licensing system to deal with the environmental risks and impacts of mining activities, which is overseen by the Environment Minister, and particularly noting that not all mining activities will be subject to Environmental Impact Assessment (**EIA**) processes under the EP Act. It is important that mining activities be subject to rigorous and transparent conditions to minimise and manage environmental impacts.

However, EDO notes that much of the content which is presently required under Authorisations and MMPs in the MM Act are not picked up in either the environmental licensing scheme in the EP Mining Bill, or in the amended Mineral Titles Act which deals with applications for mineral tenements.

Under the MM Act, when applying for an Authorisation for mining activities, and for any exploration activities involving substantial disturbance, the operator is required to submit an MMP.[7] Section 40(2) requires an MMP to include the following details:

(a) details of mining interest held for, or associated with, the mining site;
(b) details of the ownership of the mining interest;
(c) a description of the mining activities for which the operator requires an Authorisation;
(d) details of the organisational structure for carrying out the mining activities;
(e) details of the management system [being the 'environmental protection management system established, implemented and maintained under s 16(2)(c) of the MM Act];[8]
(f) plans of proposed and current mine workings and infrastructure;
(g) a plan and costing of closure activities;
(h) other details or plans required by the [Mining] Minister.

The Mining Minister can either approve the MMP and grant the Authorisation, or refuse to approve the MMP and refuse to grant the Authorisation.[9] The Minister must be satisfied that the management system for the site detailed in the MMP is appropriate for the mining activities in the plan, will, as far as practicable, operate effectively in protecting the environment, will, as far as practicable, protect water rights held in the vicinity of the mine site, and the mining activities in the plan will be "carried out in accordance with good industry practice".[10]

The requirements detailed above are not replicated in the Mineral Titles Act, which sets out the information the operator must provide when applying for a mineral title for exploration, extractive operations or mining operations, as well as the criteria the Mining Minster uses to assess such applications. The requirement for a "technical work program",[11] which is associated with some

[7] MM Act, ss 35-36.
[8] MM Act, s 4, definition of "management system". Section 16 of the MM Act requires the operator to ensure that the environmental impact of mining activities is limited to what is necessary for the establishment, operation and closure of the site: s 16(1). For that purpose, the operator must, *inter alia*, "establish, implement and maintain an appropriate environment protection management system for the site": s 16(2)(c).
[9] MM Act, s 36(4).
[10] MM Act, s 36(5).
[11] "Technical work program" is defined in the Mineral Titles Act, s 13.

types of mineral titles,[12] will be extended to Mineral Leases (**MLs**) under the EP Mining Bill,[13] but a technical work program does not pick up all the details contained in an MMP. Moreover, a technical work program for an ML is only required for the "first operational year of the ML",[14] even though MLs may be granted for any term the Mining Minister considers appropriate, and would presumably be granted for the full anticipated Life of Mine, sometimes a decade or more.[15]

The kind of detailed information currently contained in an MMP and assessed by the Mining Minister in the manner listed above is similarly not picked up in applications for Mining Licences under the EP Mining Bill. The applicant must provide "an assessment of environmental risks and impacts associated with the activity", provide "information required by the Minister to enable the Minister to calculate or recalculate any mining security required" under the Act, and any other information "required by the Minister". [16]

The absence of any mandatory requirements around closure planning in application processes and in licensing conditions is of particular concern to EDO. This is discussed in greater detail, **below**. At a broader level, EDO notes that MMPs, when they are made publicly available, provide information which enables the public to understand the extent of the resource, the infrastructure to be constructed, the scheduling of mining activities and the full scale of and impacts of a mining operation. The requirement for oversight and approval over these requirements should be retained in some form, even if the MM Act itself is slated for repeal.[17] Such information should also be publicly available.

Time has not permitted EDO to undertake a comprehensive analysis of the Mineral Titles Act and the EP Mining Bill against the requirements in other jurisdictions to regulate mining. However, we do observe that neighbouring jurisdictions, such as Queensland and Western Australia, have far more prescriptive requirements than the Territory for mineral title application processes relating to mining operations.[18] The absence of similar requirements in the Territory, exacerbated by the repeal of the MM Act, reduces transparency and creates considerable uncertainty.

---

[12] Currently, a "technical work program" must be submitted in some form for applications for mineral exploration licences (Mineral Titles Act, s 27), mineral exploration licences in retention (s 33) and extractive mineral exploration licences (Mineral Titles Act, s 47). A full list of mineral title types is contained in in s 11(1) of the Mineral Titles Act.

[13] EP Mining Bill (Pt 4), amending s 41 of the Mineral Titles Act.

[14] Ibid.

[15] Mineral Titles Act, s 41(3).

[16] See the requirements in EP Mining Bill, s 124ZC.

[17] The MM Act is proposed for repeal under accompanying the Legacy Mines Bill.

[18] See, for example, Chapter 6 of the *Mineral Resources Act 1989* (Qld), and the requirements for mineral mining lease development plans for certain prescribed minerals and thresholds. See also: Queensland Government, *Mineral mining lease development plan guideline: A guide to preparing and lodging a proposed initial or later development plan for prescribed mineral mining leases under the Mineral Resources Act 1989* (July 2023) <https://www.resources.qld.gov.au/__data/assets/pdf_file/0018/1503441/mineral-ml-development-plan-guideline.pdf>. For Western Australia, see the *Mining Act 1978* (WA), including Part IV, Div 3 as to mining leases. Applications for mining leases must be accompanied by either a mining proposal or a statement outlining mining intentions and either a mineralization report or a resources report: *Mining Act 1978* (WA), s 74. Major resource projects are done by way of a comprehensive agreement between the Government of Western Australia and proponents of major resource projects, given effect to by an Act of Parliament.

Recommendation for requirements currently contained in the MM Act

4. Key details of mining activities which the operator must provide under the MM Act for approval in an MMP must be reflected in approval processes under the Mineral Titles Act and/or the new environmental licensing system.

Mine closure, rehabilitation and security bonds

No mandatory requirements for life-of-mine closure plans and ongoing closure planning throughout the life of the mine

EDO is particularly concerned that the EP Mining Bill does not contain any mandatory requirement that mining operators provide a Mine Closure Plan, either on application for the relevant mineral title, or as a mandatory requirement under a Mining Licence. The EP Mining Bill includes only suggested conditions which the Minister *may* impose to manage environmental impacts, relating to closure planning, post-closure monitoring and maintenance plans and plans for progressive rehabilitation.[19] In contrast, as noted above, the MM Act includes minimum requirements which an MMP must contain for it to be valid, including "a plan and costing of closure activities".[20]

The MM Act also requires the Minister to assess whether the operator has met the closure criteria specified in the MMP to determine whether rehabilitation has been completed to the Minister's satisfaction such that a certificate of closure can be issued and any outstanding security returned.[21] The EP Mining Bill provides that unused mining security is refundable if "remediation, rehabilitation and closure requirements have been completed to the Minister's satisfaction" but does not mandate that any such requirements be set.[22]

Mining operations should have an approved Mine Closure Plan and an associated security bond, which covers the full rehabilitation costs associated with the mining activities to be carried out (recommendations around security bonds are discussed further **below**). Operators should have investigated and made plans to address all environmental harms associated with their planned mining works and have the funds required to rehabilitate the site, from the outset. This reduces the risk of operators going broke and/or failing to appropriately prevent or mitigate environmental harm, leaving the Territory with ongoing financial and environmental liabilities.

EDO's position is that a life of mine closure plan should be provided at the inception of the mining operation, regularly updated and re-approved and subject to independent third-party review. There should also be measurable and detailed closure criteria within a closure plan against which rehabilitation outcomes can be assessed. In addition, affected communities, including Aboriginal Territorians upon whose land mining operations are being conducted, should be able to review such

[19] EP Mining Bill, s 124W (EP Act).
[20] MM Act, s 40(2)(g).
[21] MM Act, s 46. Closure criteria is defined in s 46(3) to mean "the standard or level of performance, as specified in the mining management plan for the mining site, that demonstrates successful closure of the site".
[22] EP Mining Bill, s 132F(1) (EP Act).

plans and input into closure criteria and planned land end-uses.[23] There should also be objective third-party assessment of whether closure criteria and rehabilitation requirements have been met, rather than it being dependent on the Minister's subjective satisfaction.

The absence of any closure plan requirements altogether not only puts the Territory substantially out of step with best practice but also out of step with other jurisdictions. For example, Western Australia requires a Mine Closure Plan to be provided for when submitting a mining proposal as part of an application for a mineral lease,[24] which is subject to review every 3 years or at prescribed intervals,[25] and has detailed statutory guideline for the preparation and content of closure plans.[26] Queensland similarly has requirements for a Progressive Rehabilitation and Closure Plan.[27]

The EP Mining Bill also misses a crucial opportunity to mandate requirements for progressive rehabilitation. Progressive rehabilitation results in an improved understanding of site-specific rehabilitation challenges, reduces overall closure costs, results in better closure and rehabilitation outcomes, and reduces overall liability for the company and the government. This is also important in reducing environmental and financial risks which may arise if a mine goes into an extended period of care and maintenance and/or is ultimately abandoned (see further discussion on care and maintenance, **below**).

The EP Mining Bill expressly recognises that long-term post-closure, monitoring, management and reporting requirements may exist at a mine site and stipulates that conditions pertaining to these issues can be included in Mining Licences as a means of addressing environmental impact, including after the mining activity is completed or the mine site is closed.[28] The EP Mining Bill also recognises that a mining security bond may need to be retained beyond the term of a Mining Licence to meet post-closure monitoring and reporting requirements.[29] This is important, noting that one of the most significant environmental challenges faced by mining operators and by the Territory are the long-term environmental impacts posed by mining projects. In some cases, this may require post-closure monitoring and reporting over many decades, if not hundreds or thousands of years, and the maintenance of landforms and structures to manage mine tailings and waste rock if left on site. However, the efficacy of these provisions is dependent on having mandatory closure plans which are tied to security calculations, to ensure these environmental impacts are dealt with.

[23] We acknowledge that there may be opportunities for this kind of input within processes under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth). EDO does not work within that space and does not seek to comment on those processes.
[24] *Mining Act 1978* (WA), s 70(1), see definition of "mining proposal" and definition of "guidelines". See: Western Australia Department of Mines, Industry Regulation and Safety, *Statutory Guidelines for Mining Proposals* (Statutory Report, effective from 3 March 2020 (updated in June 2023) <http://www.dmp.wa.gov.au/Documents/Environment/REC-EC-114D.pdf>.
[25] *Mining Act 1978* (WA), ss 82(1)(ga), 84AA.
[26] WA DMIRS (n 25). https://www.dmp.wa.gov.au/Documents/Environment/REC-EC-111D.pdf
[27] See, for example, s 126C of the *Environmental Protection Act 1994* (Qld) (**Qld EP Act**) which sets out requirements for a Progressive Rehabilitation and Closure Plan (**PRCP**).
[28] EP Mining Bill, ss 124W, 124ZA (EP Act).
[29] EP Mining Bill, s 132C(9) (EP Act).

Failure to clarify and meaningfully strengthen provisions around the calculation of mining security bonds

Whilst greater detail has been included in the draft EP Mining Bill about the factors relevant to calculating mining security bonds, we understand there is currently no intention to change how mining securities are calculated in the Territory as a matter of practice. EDO has ongoing concerns about how security bonds are calculated. These include insufficient funds being allocated to appropriately rehabilitate mine sites, and a failure to calculate security bonds on a life of mine basis for all activities which have been approved and cause disturbance.[30]

The EP Mining Bill provides that the Environment Minister has to calculate the value of the security associated with each Mining Licence[31] (noting that a security is a compulsory element of a licence), but does not include any mandatory factors for that calculation, only a series of discretionary factors. Whilst EDO agrees with the relevance of the factors which have been identified, we consider that security bonds should be based on a fully-costed, life of mine, closure plan with clearly articulated closure criteria. This should include sufficient funds for post-closure monitoring, maintenance and reporting. It is concerning that security bond provisions are highly discretionary in the EP Mining Bill and are not tied to any requirement for a Mine Closure Plan.

Moreover, whilst there is a requirement under the EP Mining Bill to publish security bond amounts,[32] there is no requirement that the *methodology* adopted be published, making it very difficult to scrutinise security bond decisions. It is also inappropriate that the formula for calculating a security bond in a particular case can be included as a condition of an individual Mining Licence in the absence of a rigorous framework in the legislation based on the full closure costs.[33]

The legislation also does not allow for review of security bonds by landowners and communities most affected by a particular mine, other than as part of a review of the conditions of a tailored or modified Mining Licence where no Environmental Approval is required.[34] Even in those cases, effective review would be difficult in the absence of the underlying methodology and calculations being public. This is a huge, missed opportunity, noting that ultimately the costs of any insufficient security bonds will be borne by the Territory and Territory taxpayers.

This approach to security bonds should be revisited, both in the legislation and as a matter of policy, and review rights should be included and strengthened.

[30] The failure to set adequate security bonds also has flow on effects for the size of the Mining Remediation Fund (**Fund**), which is currently in the MM Act and is proposed to be transferred into the new Mines Legacy Bill. This is because each operator must pay an annual levy equal to 1% of the security bond, part of which goes into the Fund: MM Act, ss 44A-44B; Legacy Mines Bill, ss 22-23.

[31] EP Mining Bill s 132C(1) (EP Act).

[32] EP Mining Bill cl 282 (EP Regulations); EP Mining Bill, s 124ZC(5) (EP Act).

[33] EP Mining Bill, s 132C(5) (EP Act).

[34] See later in this submission for further discussion of third party review rights.

Recommendations for mine closure, rehabilitation and security bonds:

5. There should mandatory minimum conditions for all Mining Licences which are specifically stipulated in the legislation. This should include a requirement that all mining operations have a fully-costed life of mine closure plan from the inception of mining operations.

6. Mines should have clearly defined and approved closure criteria which are subject to independent third party review and input from Aboriginal Territorians.

7. Successful rehabilitation should be determined against agreed upon closure criteria and outcomes in a closure plan. It is inappropriate for the Environment Minister to determine, on a subjective basis, if a mine site has been successfully rehabilitated.

8. Mining Licences should include requirements for progressive rehabilitation, especially for mining operations and extractive operations.

9. Mining security bonds should be calculated based on a set of mandatory factors which ensure that the security bond is adequate to cover the full costs of rehabilitating the mine site for all disturbances across the life of the mine, including post-closure monitoring, maintenance and reporting costs.

10. There should be transparency around the methodology used to calculate security bonds and provisions for third party review.

11. Independent expert review should be considered for both closure plans and security bonds, particularly for mining operations.

Licence conditions and discretion

Too much discretion given to the Environment Minister to determine licence conditions, including any standard or minimum conditions

The EP Mining Bill gives the Environment Minister complete discretion to approve what standard conditions should be imposed on all mining operators holding Mining Licences - whether universally or for different kinds of mining activities. There are no suggested or minimum standard licence conditions set out in the draft EP Bill, nor are there any mandatory relevant considerations which the Minister is to take into account when setting licence conditions.

The EP Mining Bill also does not include any requirement for proposed or draft standard conditions to go out to the public for consultation, although there are requirements for public consultation around risk criteria.[35] Consultation on modifications to standard conditions, once set, are only undertaken with affected operators.[36] Members of the public should be able to comment on the

[35] EP Mining Bill, cl 233D (EP Regulations).
[36] EP Mining Bill, cl 233N (EP Regulations).

standard conditions, and any review of those conditions, given how important they are to the setting of licences. This is also important as there is no comment available in relation to the decision to grant a standard condition licence (including a decision that a standard, rather than a modified or tailored licence, is appropriate).

EDO understands that the Territory Government intends to consult about both draft standard conditions and draft risk criteria once the Bills have passed. However, it is difficult to properly engage with and comment on the impacts of the EP Mining Bill and its likely efficacy in the absence of any guidance being issued about the standard conditions and risk criteria. This includes the kinds of topics which will be covered by standard conditions and risk criteria and the level of granularity at which this is intended to operate. Consultation and the inclusion of some standard conditions prior to the Bills being introduced to Parliament would also allow more informed community input on the impacts of the legislation as whole prior to the legislation being passed. This is especially because these conditions and criteria are integral to how the different licence tiers operate.

In addition, we query whether it is appropriate that mining activities, and especially mining operations and extractive operations, be subject to these standard conditions *only*, as opposed to having some modified or tailored conditions. All mine sites should have conditions which are appropriately designed to address the environmental impacts and risk factors unique to the mine site.

Recommendations for licences and licence conditions:

12. Draft standard licence conditions and risk criteria should be released and subject to public consultation prior to the legislative scheme being enacted.

13. There should be mandatory relevant considerations which the Environment Minister must consider when setting the conditions of a Mining Licence.

14. Public consultation should be available for decisions to modify the standard conditions, not just consultation with affected mining operators as under the current EP Mining Bill.

15. Consideration should be given to whether it is appropriate at all for there to be Mining Licences which are only subject to standard conditions, rather than being tailored to the specific impacts and environmental risk factors associated with a particular mine site.

Public consultation and review rights

Public consultation, participation, access to information and access to justice are fundamental to good environmental law and sound environmental decision-making. In this section we highlight where the proposed laws need to be strengthened to ensure robust public participation and appropriate accountability through third party review rights.

Availability of public comment on Mining Licence decisions, but not in all cases

For the first time, members of the public will have an opportunity to comment in some instances before the Minister decides whether to grant a Mining Licence and on other decisions which inform Mining Licences. Although this is a big improvement on the current system, where no public comment is available in relation to any application for an Authorisation and approval of an MMP, we think more is needed.

We have already commented on the lack of review rights in relation to the setting of standard conditions and decisions to grant standard condition licences, **above**. Public consultation should also be available on applications for standard condition licences, and whether a tailored or modified condition licence is more appropriate, rather than relying on operators to self-select on what kind of licence to apply for.

We also recommend that the proposed provisions pertaining to public consultation rights be moved from the EP Regulations to the EP Act. Regulations are suited to administrative matters only, given they can more easily be amended without public scrutiny.

Inclusion of some merits review for Mining Licence Decisions, but not all, including not merits review for mining activities with the most significant environmental impact

The EP Mining Bill also has important opportunities for merits review of certain Mining Licence decisions in the Northern Territory Civil and Administrative Tribunal (**Tribunal**).

However, EDO does not think the merits review provisions in the EP Mining Bill go far enough. Merits review provisions in the draft EP Bill should be extended to allow for review of Mining Licences in the Tribunal even where the relevant mining activities are also subject to an Environmental Approval. Alternatively, the decision to grant an Environmental Approval should be subject to merits review under the EP Act, which is not presently the case.

There are some opportunities for public consultation during the Environmental Impact Assessment (**EIA**) process which leads to an Environmental Approval. However, the opportunities for public comment depend on the tier or method of EIA adopted.[37] At the end of the assessment process for an Environmental Approval, the Northern Territory Environment Protection Authority (**NT EPA**) will prepare an Assessment Report and recommendations for the Environment Minister,[38] and then the Environment Minister will decide whether to grant Environmental Approval and under what conditions.[39] There is no opportunity for public comment at this stage of the decision-making process.

If the EP Mining Bill is operating in the way it is intended, then the operations with the most significant environmental impact should be subject to an Environmental Approval, as well as a Mining Licence. However, in those circumstances, there will be no merits review of the conditions

[37] Public consultation requirements are set out in the EP Regulations.
[38] EP Act, pt 5 div 2.
[39] Ibid, divs 3, 6.

in *either* the Mining Licence or the Environmental Approval. This is a perverse outcome which should be remedied.

EDO further considers that there should be open standing for merits review of Mining Licence decisions, rather than any such review being restricted to "directly affected" persons and those who have made "valid and genuine submissions" for Mining Licence decisions where public consultation rights are available. This is important to provide accountability and facilitate access to justice in environmental decision-making. At the very least, EDO recommends clarifying standing rights to expressly confirm that Aboriginal Territorians on whose land mining activities occur and communities who are impacted by mining operations (including off-tenement impacts) are able to challenge Licence Decisions, as well as representative environmental groups.[40]

Recommendations for public consultation and review rights

16. Public consultation should be available on applications for all modified and tailored Mining Licences, not just those for which Environmental Approvals are required or have been granted. Under the EP Mining Bill as currently proposed, there is no scope for comment on proposed Environmental Approvals *or* Mining Licences for those activities with the greatest likely environmental outcomes and risks. This is a perverse outcome which should be resolved.

17. Public consultation should also be available on applications for standard condition licences, and whether a tailored or modified condition licence is more appropriate, rather than relying on operators to self-select on what kind of licence to apply for.

18. Critical public consultation rights should not be in the Regulations, but instead should be included in the EP Act itself. Regulations are suited to administrative matters only, given they can more easily be amended without public scrutiny.

19. Similarly, merits review should be available for all decisions to grant Mining Licences, not just those for which Environmental Approvals have been granted. It is incongruent that there is no merits review available for Environmental Approval decisions or Mining Licence decisions for those activities with the greatest likely environmental impacts and risks.

20. There should be open standing requirements for merits review for all decisions relating to Mining Licences. Standing should not be restricted to those who have made submissions during the original consultation process for a modified or tailored condition licence. At a minimum, standing requirements should be clarified to expressly provide that Aboriginal Territorians and in communities affected by mining are standing for merits review.

[40] As to representative environmental groups, consider, for example the standing provisions in s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Involvement of Aboriginal Territorians

EDO is concerned by the failure of the Bills to properly recognise the role, responsibilities and the deep connection Aboriginal communities, traditional owners, and Aboriginal landowners[41] have with the Northern Territory environment. The vast majority of mining developments in the Territory occur on Aboriginal-owned land or land which is subject to the rights of native title holders. The Bills do not even refer to Aboriginal people and communities. In this regard, the Bills as currently framed fail to grasp the social, cultural and environmental impacts of mining projects on Aboriginal Territorians.

The failure to expressly involve Aboriginal Territorians in environmental decision-making about mining or grant appropriate consultation and review rights is particularly unacceptable in relation to Aboriginal landowners who have recognised legal rights in relation to land. Approximately half of the land in the Northern Territory is under Aboriginal freehold, including 80% of its coastline.[42] Much of the remainder of the Territory is subject to native title under the *Native Title Act 1992* (Cth), including land under pastoral leasehold. However, it is crucial that all traditional owners and Aboriginal communities are also consulted. For example, traditional owners must also be consulted where there is no determination of native title or registered native title claim in a particular area, and where native title rights may well be continuing and subject to *Native Title Act* protections. There is also presently no recognition of the need to provide materials in applicable First Languages or ensure materials are accessible for all remote Aboriginal Territorians.

There is a need for genuine consultation and co-design with Aboriginal Territorians to be embedded in the Bills. Traditional owners should be involved in setting closure objectives, reviewing mining operations and mine site rehabilitation and in setting and reviewing the conditions of Mining Licences.[43] They are the most affected by toxic mine sites on Country and historically have been disempowered from these processes. EDO supports standards and requirements in national and state and territory laws that are co-designed by First Nations peoples and incorporate rights under the UN Declaration on the Rights of Indigenous Peoples, in particular, the requirement for free, prior, and informed consent.

As discussed **above**, the Bills also provide that not all Mining Licences are subject to merits review. Where it is available, standing is limited to those who are "directly affected" or who make a genuine and valid submission in the process.[44] This is not acceptable in terms of the need to make

[41] We use the term, 'Aboriginal landowner' in the context set out by the Northern and Central Land Councils in their joint March 2021 submission: Central Land Council & Northern Land Council, *Regulation of mining activities – environmental regulatory reform Joint submission* (1 March 2021<https://depws.nt.gov.au/__data/assets/pdf_file/0011/984944/clc-nlc-submission-01-mar-21-environmental-regulatory-reform.PDF>. 'Aboriginal landowner' refers to Aboriginal people who have legal rights in relation to land, including Aboriginal Land Trusts holding Aboriginal land under *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) and native title holders for areas subject to an approved determination of native title that native title exists and areas subject to registered claims.

[42] Office of Aboriginal Affairs – Northern Territory Government, *Aboriginal Land and Sea Action Plan* (Report, 2022) <https://aboriginalaffairs.nt.gov.au/__data/assets/pdf_file/0007/983383/land-and-sea-action-plan.pdf> 6.

[43] As acknowledged above in n 23, there may be opportunities for this kind of input within processes under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth) – EDO does not work in this space and does not comment on those processes.

[44] EP Act, s 277; and see EP Mining Bill (cl 57), amended Schedule to the EP Act.

submissions to then access review rights. There is a need for Aboriginal landowners to have standing for merits review of all decisions made under these reforms.

Recommendations for involvement of Aboriginal Territorians:

21. Genuine consultation and co-design with Aboriginal Territorians should be included in the EP Mining Bill. This includes involving Aboriginal Territorians impacted by particular operations in the setting of Mining Licence conditions, closure objectives and mine site rehabilitation.

22. The EP Mining Bill should recognise the need to provide materials in applicable First Languages and ensure materials are accessible for all remote Territorians.

Sacred sites and cultural heritage

Failure to deal with cultural heritage assessment and sacred sites assessment as a pre-condition to granting mineral titles and environmental (Mining Licences)

In the wake of the Juukan Gorge Inquiry, the Department has missed an opportunity to strengthen protections for Aboriginal cultural heritage and sacred sites in the Northern Territory.

Protection of sacred sites and Aboriginal cultural heritage should be considered at the forefront of any project and assessments and approvals should be completed and obtained as a pre-condition to the grant of a mineral title and environmental (mining license).

Aboriginal cultural heritage and sacred sites are protected in the NT under the (**Sacred Sites Act** and the *Heritage Act 2011* (NT) (**Heritage Act**). Both of these regimes allow for approvals to be provided to proponents to permit particular works.

Under the Sacred Sites Act, a proponent can apply to the Aboriginal Areas Protection Authority (**AAPA**) for an Authority Certificate which sets out the conditions for conducting works in a particular area of land or sea to ensure sacred sites in the area are not damaged. Anyone proposing to use or work on land in the Northern Territory may apply to AAPA for an Authority Certificate to cover their proposed activities. Certificates are based on consultations with custodians and provide clear instructions on what can and cannot be done in and around sacred sites. AAPA can only grant an Authority Certificate in the following two situations:[45]

- If it is satisfied that the work or use of the land could proceed without there being a real risk of damage or interference with a sacred sit on or in vicinity of the land; or
- The custodians of the sacred site have made an agreement with the person (or company) that wants to use the land or carry out works and an Authority Certificate is in accordance with that agreement.

[45] *Sacred Sites Act,* s 22.

Similarly, under the Heritage Act, a proponent can apply to the Heritage Council for a permit which outlines conditions they must follow to ensure the protection of archaeological places and objects.[46]

There is no requirement that these approvals by applied for and obtained prior to making an application for a mineral title or environmental (mining license). When an application is made under the Sacred Sites Act or Heritage Act, the engagement and consultation process with Traditional Owners commences. As a matter of best practice, Traditional Owners should be consulted at the earliest opportunity to ensure they play a key role in the consultation and decision making processes.

The Department should also seek guidance from Traditional Owners during a co-design process regarding whether the Bill should mandate the development of a cultural heritage management plan (**CHMP**), prior to the granting of a mineral title, Mining Licence and/or Environmental Approval. We note other jurisdictions require the negotiation and agreement of a CHMP to protect Aboriginal cultural heritage. See for example, sections 87 and 88 of the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) which require the development of a CHMP when an environmental impact statement or other environmental assessment is required or section 49 of the *Aboriginal Heritage Act 2006* (Vic) which requires the development of a CHMP when an environmental effects statement is required.

Overall, EDO considers the EP Mining Bill could be strengthened to require an Authority Certificate or Heritage permit (if relevant), and/or CHMP be obtained and provided with an application for a mineral title under the MT Act or environmental (mining license) under the EP Act.

Recommendations for sacred sites and cultural heritage:

23. Investigation, mapping and approvals pertaining to the protection of sacred sites under the Sacred Sites Act should occur as a pre-condition to granting any mineral title, and prior to the granting of any Mining Licence or Environmental Approval.

24. Comprehensive cultural heritage assessments, in consultation with Traditional Owners, and the preparation of a CHMP should be required prior to granting any mineral title and prior to the granting of any Mining Licence or Environmental Approval.

Care and maintenance

Requirements to deal with care and maintenance should be significantly strengthened, including to require mandatory care and maintenance plans and to place limitations on how long mines can spend in care and maintenance.

The Territory has a long history of abandoned and legacy mines with significant and unremedied environmental impacts, with the costs left to be borne by the taxpayer, as well as ongoing environmental issues with its presently operating mines. These reforms miss a crucial opportunity

[46] *Heritage Act 2011* (NT), s 76.

to strengthen the framework pertaining to care and maintenance mines, and thereby reduce the risk that such mines will simply collapse, leaving environmental and financial liabilities to be managed by governments and communities.

Mines may enter care and maintenance at any stage of operations. Whilst the expectation is that mining has ceased temporarily, and operators are managing sites with the intent to recommence mining, the reality is that mines may stay in care and maintenance for significant periods of time, effectively avoiding closure and rehabilitation requirements. Lengthy care and maintenance periods also draw down a company's financial reserves, as mining infrastructure must be maintained without any income being generated.[47] There is an increased risk that companies will collapse, leaving mine sites to be on-sold to new operators who may not have appropriate technical or financial capacity, or otherwise entirely abandoned.[48]

This is an ongoing issue in the Territory. For example, there are three iron ore mines in the Territory which are in or have recently been in care and maintenance, being the Nathan River Resources (**NRR**) mine, the Roper Valley iron ore mine, and the Frances Creek iron ore mine. All three of these mines have had multiple operators and been replete with environmental issues:[49]

- What is now the NRR mine first opened in 2013 and operated only for a short time before going into care and maintenance in 2015 when its initial owner went into liquidation.[50] It was eventually on-sold and re-opened in 2020. It operated for barely a year before going into care and maintenance.[51] The operator was recently prosecuted for breaches of its Waste Discharge Licence during its short period of operation.[52] There is no publicly available information on how the site is now being managed.

- The Roper Valley iron ore mine has had numerous owners since it first operated in 2013, and similarly operated for only a short period of time in 2021-22 under its latest owner before going into care and maintenance.[53] Recently, the Territory government was required to intervene and

[47] M Pepper, 'Care And Maintenance A Loophole or Lifeline? - The Policy and Practice of Mines in Care and Maintenance in Australia' (PhD Thesis, Murdoch University, 2020) 11.
[48] Ibid.
[49] See, for example, Felicity James, 'NT government failures allowed environmentally damaging mining to continue 'unchecked'', ABC News (online, 4 May 2019) <https://www.abc.net.au/news/2023-01-25/nt-government-paid-mining-erosion-work-roper-valley-iron-ore/101867794>; Jano Gibson, 'Mining company Nathan River Resources fined $340,000 for releasing contaminated wastewater into river in NT', ABC News (online, 19 October 2022) <https://www.abc.net.au/news/2022-10-19/nathan-river-resources-fined-over-contaminated-mine-wastewater/101550016>; Daniel Fitzgerald, 'NT government paid $400,000 for stabilisation work on Roper Valley iron ore mine', ABC News (online, 25 January 2023) <https://www.abc.net.au/news/2023-01-25/nt-government-paid-mining-erosion-work-roper-valley-iron- ore/101867794> ('Fitzgerald').
[50] Ben Creagh, 'NT iron ore mine set for a revival' *Australian Mining* (Web Page, 15 February 2018) <https://www.australianmining.com.au/nt-iron-ore-mine-set-revival/>.
[51] Jon Daly, 'Mothballed NT iron ore mines reopen amid soaring demand for steel in China', ABC News (online, 7 December 2020) <https://www.abc.net.au/news/rural/2020-12-07/nt-iron-ore-mines-reopen-to-meet-chinese-demand-for- steel/12950170>; The Nathan River Resources website indicates that the mine went into care and maintenance in November 2021: see 'Overview, Nathan River Resources (Web Page) <https://www.nathan-river.com/>.
[52] Gibson, above n 50.
[53] Daniel Fitzgerald, 'NT government paid $400,000 for stabilisation work on Roper Valley iron ore mine', ABC News (online, 25 January 2023) <https://www.abc.net.au/news/2023-01-25/nt-government-paid-mining-erosion-work-roper-valley-iron- ore/101867794> ('Fitzgerald').

undertake $400,000 of urgent re-stabilisation work to reduce the risk of sediment laden run off leaving the mine site during the upcoming 2022-23 wet season.[54]

- The Frances Creek mine went into care and maintenance in 2015, and briefly recommenced shipping iron ore in 2021.[55] The current status of this mine is unclear, but it is slated to restart production this year.[56]

Unfortunately, the EP Mining Bill does not provide an effective framework to better manage, and ideally prevent, the kinds of issues which have arisen with care and maintenance mines in the Territory. The Bill includes an updated definition of a "care and maintenance period" and includes suggested Mining Licence conditions which may be included for mines in care and maintenance.[57] Mining operators are also obliged, during a care and maintenance period, to "maintain structures and facilities and implement an appropriate program of maintenance to ensure that structures and facilities do not cause environmental impacts".[58]

However, there are no further requirements around care and maintenance mines. EDO recommends the following elements be included in the framework:

- A mandatory requirement for an operator to have a plan for care and maintenance under any Mining Licence for mining operations and extractive operations.[59] This must be updated regularly, and specifically updated and approved by the Minister if a mine goes into care and maintenance. All such plans should be publicly available.

- There should be a requirement for operators to notify the Territory government and the public if a mine is entering into care and maintenance. Further consideration should be given to requiring Ministerial consent for a mine to enter care and maintenance in conjunction with a care and maintenance plan being approved.

- Notification and/or approval should operate as a trigger for other actions, such as revisions to the care and maintenance plan, and a review of licence conditions, including around closure and rehabilitation. The Minister's power in s 124ZQ(1)(g) to amend the conditions of a Mining Licence should not require mining activities to be suspended for a period of 12 months or longer – although it appears that other provisions in ss 124ZP and 124ZQ could also be engaged to

[54] Ibid.
[55] Nickolas Zakharia, 'NT Bullion ships first iron ore from Frances Creek', Australian Mining (online, 24 June 2021) <https://www.australianmining.com.au/nt-bullion-ships-first-iron-ore-from-frances-creek/>.
[56] 'Developing Projects', Resourcing the Territory (Web Page) <https://resourcingtheterritory.nt.gov.au/minerals/mines-and-projects/developing-projects>.
[57] EP Mining Bill, s 4 (amended definitions) (EP Act); EP Mining Bill, s 124Z. In addition, the definition of a "mining activity" in s 13A includes "operations for the monitoring, management and maintenance of a mining site during a care and maintenance period".
[58] EP Mining Bill, s 124G (EP Act).
[59] We note that the Territory Government has published guidance requiring the preparation of a care and maintenance plan and stipulating that such a plan should be lodged as an amendment to an MMP under the MM Act, available here: Georesources Division, Department of Resources (Qld), *Mineral Mining Lease Development Plan Guideline* (July 2023) <https://www.resources.qld.gov.au/__data/assets/pdf_file/0018/1503441/mineral-ml-development-plan-guideline.pdf>.This is a non-statutory document. We consider that there must be prescriptive statutory guidance around care and maintenance planning under the EP Mining Bill.

trigger a review of licence conditions in a shorter timeframe to manage environmental risk. It should be mandatory to review licence conditions if a mine is in care and maintenance for more than a short period of time.

- Conditions of the kind suggested in s 124Z of the EP Mining Bill should be mandatory, not discretionary: operators must be required manage a mine site in way that minimises environmental impacts, and there should be appropriate and tailored conditions around rehabilitation and remediation activities, given the risk of companies avoiding closure and rehabilitation requirements in extended care and maintenance periods.

- Provisions in the EP Mining Bill to assess the financial capacity of mining operators to comply with their obligations as title holders should be extended to assess their ability to comply with environmental and rehabilitation requirements under Mining Licences.[60] This should extend to any company with a controlling interest in the company operating the mine, and to any company which takes over a mine site which is in care and maintenance.

- There should be timeframes around how long mines are in care and maintenance without mines being required to take further steps to fully close and rehabilitate the site (or otherwise transfer the site to an operator which has been assessed to have appropriate financial and technical capacity to continue operations or meet those requirements).

The risks and liabilities associated with care and maintenance mines are further exacerbated by the absence of any mandatory requirements in the EP Mining Bill for closure planning overall or to calculate security bonds on a life of mine basis, as well as the absence of requirements around progressive rehabilitation. As discussed further below, there should also be comprehensive chain of responsibility requirements around mining operators to ensure that environmental obligations and liabilities are not left unresolved where companies enter care and maintenance and then become insolvent.

Recommendations for Care and maintenance

25. Mining Licences for mining operations and extractive operations must include mandatory requirements for care and maintenance planning. An updated care and maintenance plan should be submitted and approved by the Minister if a mine goes into care and maintenance.

26. Mining companies should be required to notify the Territory and the public if a mine is entering into care and maintenance. The Minister should be required to give written approval for a mine to enter care and maintenance along with approving a care and maintenance plan.

27. Conditions of the kind suggested in s 124Z of the EP Mining Bill, which are directed towards minimising environmental impacts, remediation and rehabilitation, should be mandatory.

[60] EP Mining Bill, s 44A (Mineral Titles Act).

28. The Minister's power to amend conditions in a Mining Licence for a mine which is in care and maintenance should not be contingent on the mine being in care and maintenance for longer than 12 months.

29. Provisions in the EP Mining Bill to assess the financial capacity of mining operators to comply with their obligations as title holders should be extended to assess their ability to comply with environmental and rehabilitation requirements under Mining Licences. This should extend to any company with a controlling interest in the company operating the mine, and to any company which takes over a mine site which is in care and maintenance.

30. There should be limitations on the amount of time a mining operation can spend in care and maintenance before they are required to actively close and rehabilitate the site or transfer the site to another operator with the financial and technical capacity to re-open the site or meet closure and rehabilitation requirements.

Compliance and enforcement

It is vital that compliance and enforcement powers directed towards ensuring mining companies do the right thing and comply with their licence conditions are strengthened. We are supportive of DEPWS assuming compliance and function powers in relation to mining activities and being able to draw upon a range of mechanisms within the EP Act.

Having said that, we have some concerns about performance management programs, and the fact that mining operators who are failing to comply with amended standard conditions cannot be subject to criminal or civil proceedings while a performance management program is in place.[61] The performance management program process could be extremely protracted, with numerous steps before the Minister can terminate a performance management program.[62] There should also be the potential for third party enforcement, for example by Aboriginal landowners and communities, where the regulator fails to take action (ie. to enforce rehabilitation).

Recommendations for Compliance and enforcement:

31. Provisions around performance management programs should be clarified, including to impose strict timeframes around the length of any programs and to prevent operators from being exempt from civil and criminal liability.

32. There should be third-party enforcement mechanisms in the legislation. In particular, Aboriginal Territorians should specifically be able to enforce rehabilitation requirements of operations on Country.

[61] EP Mining Bill, s 124ZY (EP Act).
[62] Ibid s 124ZV (EP Act).

Chain of responsibility

EDO urges the NT Government to ensure chain of responsibility legislation is included in the EP Mining Bill. It should be modelled on the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld). In our view, this reform is urgently required in the NT mining context, and not just to petroleum companies. It is imperative that the Northern Territory Government and community is protected against the financial consequences of environmental damage and future legacy mine sites. Where an entity responsible for the damage becomes insolvent, a parent company or a director(s) should be held responsible.

In addition, if a mining company shows early signs of financial distress, an environmental protection order should be available to compel a person undertaking environmentally relevant activities to comply with their environmental obligations. Under the Queensland provisions, the *Chain of Responsibility Act* enables an environmental protection order to be issued to related persons[63] of the company undertaking the activity and related persons of 'high risk' companies.[64] This is urgently needed in the NT to protect the NT community and taxpayers.

EDO agrees with the Northern Land Council (**NLC**)/ Central Land Council (**CLC**) that the NT should not prescribe a two-year time limit on action under chain of responsibility legislation.[65] There is no reasonable reason for this constraint, especially when the potential for mines to enter a lengthy period of care and maintenance and the full life-cycle of a mine is considered.

Recommendation for Chain of responsibility:

33. Chain of responsibility requirements should be included in the reforms, as was originally intended for the whole of the mining industry before those requirements were restricted only to oil and gas activities under the *Petroleum Act 1984* (NT).

34. Chain of responsibility legislation should be modelled on the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld) save than no limitation period for chain of responsibility actions should be prescribed.

Resourcing

Ensuring that the regulator is appropriately resourced

The EP Mining Bill allocates DEPWS a range of powers to administer the licence scheme and initiate action for breaches . The ability to regulate mining properly and in a way that prevents and

[63] *Environmental Protection Act 1994* (Qld), s.363AC.
[64] *Environmental Protection Act 1994* (Qld), s.363AD.
[65] See Central Land Council & Northern Land Council, *Regulation of mining activities – environmental regulatory reform Joint submission* (1 March 2021) at 47.

minimises environmental harm is dependent not only on the quality of the new laws but on the resources which DEPWS has to properly administer and enforce the law.

It is not clear how the new regime will be funded and resourced. There will be significant costs of not only reforming the system, but ongoing administrative costs including resourcing and training suitable operational staff.

One option is that the proposed licencing scheme charge administrative fees to licence holders. The amount of the administrative fee should be commensurate with the environmental risk and regulatory complexity of the mine. Good environmental performance should be rewarded, and the regime should build in financial capacity to discount administrative fees for mines that consistently demonstrate good environmental performance.

The environmental approvals system and licensing regime should reward proponents with a good environmental track record. The rewards could comprise a lighter regulatory touch and lower administrative fees. This is consistent with the risk-based licensing system applied in New South Wales and is an extension of the risk-based approach to regulation, championed by the Australian National Audit Office: "Adopting a risk-based approach to regulatory administration can have benefits for both regulated entities and regulators. Compliance costs for regulated entities can be minimised with entities assessed as lower risk being subject to a lighter touch compliance approach without unnecessary intrusion by regulators. On the other hand, higher risk entities may be subject to more scrutiny by a regulator and incur additional compliance costs which are offset by improved regulatory outcomes and benefits for the community."[66]

The proponent or license holder, not the NT, should carry the risk of non-performance.

Recommendations for Resourcing:

35. Appropriate resources should be allocated to DEPWS to enable proper administration of the licensing scheme, including compliance and enforcement mechanisms.

36. A full cost recovery model should be adopted where the operator bears the costs.

Independent Review

EDO welcomes the inclusion of provisions in the EP Mining Bill which allow the Minister to order an independent peer review of information or reports prepared under a Mining Licence.[67] In our view, this is a vital power which in no way duplicates expert reports obtained by applicants. It is especially important that the Minister have a broad-ranging power to seek independent peer reviews and expert advice given the reality of increasing environmental risk. In this regard, it is important that a

[66] See Allan Hawke, DEPWS, *Review of the Environmental Assessment and Approval Processes* (Report, May 2015) <https://depws.nt.gov.au/__data/assets/pdf_file/0011/262919/hawke-review-of-the-northern-territory-environmental-assessment-and-approval-process.pdf> 9.
[67] EP Mining Bill, Pt 13, Div 3A (EP Act).

transparent risk assessment process be used. It is unrealistic to assume government has the internal technical expertise when assessing highly technical, complex information.

As stated above, we consider that the Minister should have a broad discretion to order an independent peer review. It is also vital that a fresh independent peer review be produced in each case, addressing the specific environmental and socio-economic circumstances as opposed to a 'prepare once, use many' approach.

EDO also considers that there are some circumstances in which an independent peer review should be compulsory. Where activities are deemed to be high-risk, or if there is serious concern as to potential impacts on ecosystem receptors, a peer review should be compulsory. An independent peer review should also be required for security bond reviews, closure plans and the setting of closure criteria.

Recommendation for independent review:

37. The Minister should have a broad discretion to order an independent peer review. A transparent risk assessment process should guide this process. In addition, an independent peer review should be compulsory in certain circumstances, namely for security bond reviews, closure plans and the setting of closure criteria and where activities are deemed to be high-risk.

3. Conclusion

EDO commends the Territory government for taking this important step to reform the Territory's mining laws. Reform of the system is much needed and should absolutely be prioritised. Whilst the new scheme, as drafted, includes some clear benefits and improvements around regulatory separation and transparency over environmental licensing, we identify many areas in which the scheme could be improved. Most critically, the scheme fails to include mandatory requirements around closure planning which accord with best practice and are crucial to safeguarding the Territory against significant financial and environmental liabilities associated with mining activities. Reform of the Territory's broken mining laws cannot be rushed. Introduction of the EP Mining Bill into Parliament should be delayed until deficiencies in the Bill are addressed and appropriate consultation is undertaken with those communities most affected by mining.

Thank you for the opportunity to make this submission. We look forward to continuing to engage with the Department on this important reform process and would be happy to answer any further questions regarding this submission.