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Dear Peter and Alistair

Progressing changes to the *Mining Management Act*

Thank you for the opportunity to meet with you on 24 March 2011 regarding the Department of Resources proposed changes to the *Mining Management Act (MM Act)*.

By way of background, the Environmental Defenders Office (NT) Inc is an independent Community Legal Centre specialising in public interest environmental and planning law. EDO NT is part of an Australian national network, ANEDO, which aims to empower the community to protect the environment through the law. Our services include providing free legal advice, engaging in law reform and educating the community in the areas of environmental and planning law.

EDO NT welcomes the opportunity to comment on the proposed changes to the *MM Act*. Due to the short timeframe, EDO NT has focussed on making general comments for the inclusion and operationalisation of the principles of Ecologically Sustainable Development in the *MM Act*. EDO NT has drawn on work within the ANEDO network to form these comments¹.

Objects of the *MM Act*

The objects of the *MM Act* should include the implementation of the principles of Ecologically Sustainable Development (ESD) as the overarching objective, as articulated in the National Strategy on Ecologically Sustainable Development (NSESD) and the Inter-Governmental Agreement on the Environment (IGAE). The objective of ESD should underpin all the objectives of the *MMA*.

These objects of ESD should be supported by provisions throughout the legislation that require decisions and actions undertaken to be consistent with the objects or in accordance

¹ Environmental Defenders Office NSW, *Submission on Discussion Paper: Proposals for Amendment to the Mining Act 1992*, September 2005

with the objects. By doing this, the objects are operationalised as opposed to simply aspirational.

The importance of managing resources in accordance with the principles of ESD has been explicitly recognised nationally since 1992. This is reflected in Chapter 5 of the NSESD which explicitly states that the efficient management of the renewable and non-renewable resources on which the mining industry depends should be 'in accordance with the principles of ESD' (see p37 of the NSESD).

Definition of environment

If the Department of Resources is genuinely looking to manage the full range of environmental impacts relating to mining activities, the definition of environment should be broadened. The restriction of environment to environment 'on a mining site' should be deleted. The continuation of this definition means there is a gap in regulation of off-site environmental impacts as a result of mining activities. An example of a broad definition of the environment taken from the NSW *Protection of the Environment Operations Act* is:

environment means components of the earth, including:

- (a) land, air and water, and
- (b) any layer of the atmosphere, and
- (c) any organic or inorganic matter and any living organism, and
- (d) human-made or modified structures and areas,

and includes interacting natural ecosystems that include components referred to in paragraphs (a)–(c).

EDO submits that there should be a duty to take into account to the fullest extent possible all matters effecting or likely to effect the environment. This section would require the decision-maker to take into account to the fullest extent possible all matters effecting or likely to effect the environment including provisions and instruments under other legislation which aim to protect the environment. The section should explicitly list these pieces of legislation.

Community engagement

Public participation in decision-making is a principle of ESD. The key obstacles to effective ongoing engagement between the mining industry, DOR and stakeholders and communities includes:

Early engagement – Community consultation will be tokenistic if it occurs too late in the process. Early engagement has the benefit of identifying key issues important to stakeholders at an early stage so that they may be addressed early.

Who is engaged – Public consultation should include any person with an interest in the issue. This is best done by ensuring information is widely available, for example on the web. The definitions of a stakeholder must not be geographically limited. For eg, a Darwin-based environment group may be able to provide support and resources to a remote local, host or affected community engage in a consultation process.

Commercial in confidence clauses – These clauses are often used to prevent the community from gaining access to information. While there may be a need for certain commercial information to remain confidential, where there are overriding issues or public interest involved (such as the impact on the local health of the community and environment) it is essential that a transparent process be established to ensure the community had all the necessary information.

Capacity to engage – The principles for engagement must recognise the difference in capacity to engage between stakeholders. For example, shareholders and employees may have better resources and access to information than remote indigenous communities. Where there is a clear resource deficit and inability to engage, the proponent for the development must ensure resources are directed to relevant stakeholders. It is also necessary to broaden the public's access to scientific and technical assistance.

Time frames for consultation – The principles must ensure that appropriate time frames are created for consultation taking into account remoteness, holiday periods, and coordination of stakeholder groups involved eg indigenous stakeholders.

Notification – There must be an onus on the proponent and relevant department to go through a process of identifying stakeholders and notifying them at an early stage of the development proposal.

International best practice – Australia, due to its richness in natural resources and its fragile ecological assets should strive towards implementing community and stakeholder engagement principles according to international best practice. See the *Aarhus Convention* (<http://www.unece.org/env/pp/>) for further information on these principles.

Adherence to the principles of ESD in the mining industry

Rehabilitation - It has to be ensured that upon completion of the mining operations, the affected environment receives full satisfactory rehabilitation. The conditions, according to which rehabilitation has to be performed, have to be kept transparent. This also gives communities in close proximity to the operations site an opportunity for input as to the rehabilitation.

Off-title impact - For rehabilitation purposes, it is not sufficient to perform the rehabilitation solely on the area covered by the operations title. For the rehabilitation being sufficient, the impact of the operations on the environment surrounding the area covered by the title need to be taken into account. If these areas have been affected, they also have to be rehabilitated.

Security deposits - In order to ensure full satisfactory rehabilitation, the security deposit amount should equal the full rehabilitation costs.

Mine closure planning strategy - Prior to commencement of the operation, there should be a statutory requirement for the operator to provide a mine closure strategy. Even closed mines can still have an impact on the environment. This strategy should address rehabilitation issues and also clarify plans as to whether operations are going to be resumed at a later stage, and what environmental management strategy will be applied in the meantime.

Monitoring environmental performance - Prior to giving out new authorizations, or prior to renewing them, the environmental performance of the operator should be monitored.

Review of decisions

Third party rights

There are currently no third party rights seek the review of the grant or variation of authorisations or the grant of a *Mining Management Plan* under Part 8 of the *MM Act*. In accordance with the principles of ESD, the community should have legal rights to seek merits review of the grant or variation of the grant of authorisations or the grant of *Mining Management Plans*. This would require a process whereby authorisations and *Mining*

Management Plans are publicly notified to provide the public opportunity to make public submissions.

Enforcement

To increase enforcement powers under the *MM Act*, there should be a development of associated offence and penalty provisions for all requirements under the *MM Act*. EDO notes that it is important to support the implementation of offence provisions and penalties with comprehensive compliance and enforcement policy supported by adequate resources for implementation and sufficient powers being vested in enforcement officers.

Offences

An effective and flexible enforcement regime requires a hierarchy of offences based on: Tier 1 – intentional offences, Tier 2 – strict liability offences where a defence of honest and reasonable mistaken belief exists; and Tier 3 – absolute liability offences where penalty notices may apply.

Continuing offences

There should be continuing offences for title holders and former titleholders to create a sufficient deterrent for large companies.

Certainty of conditions

Effective enforcement requires certainty of conditions. If certain permissions are to form defences to environmental offences, for example, the *Mining Management Plan* as proposed, then these permissions must be required to form certainty of conditions where breaches can be easily identified in order to be effectively enforced.

Authorisations and variation of authorisations

The Minister should be required to have regard to the principles of ESD when determining an authorisation or variation to an authorisation. EDO is concerned with proposed amendment 20 seeking to remove the mandatory requirement that the variation improve protection of the environment. This amendment would reduce the environmental rigour attached to mining activities which fall within the scope of variations to authorisations and effectively allow a loophole for environmental protection.

EDO looks forward to commenting further on the proposed amendments to the *MM Act* if a further discussion paper is to be released and when the draft bill is prepared.

Yours sincerely

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