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The Chair
Northern Territory Environment Protection Authority
GPO Box 3675
Darwin NT 0801

By Email: ntepa.consult@nt.gov.au

Attention: Dr Bill Freeland

Dear Dr Freeland,

WASTE MANAGEMENT AND POLLUTION CONTROL ACT AND LITTER ACT REVIEW

We refer to the Issues Paper released on 15 September 2014 in relation to the 'Review of the Northern Territory's *Waste Management and Pollution Control Act* and the *Litter Act*'. Ward Keller is a Territory legal firm that provides advice to a wide range of clients working in industries across the Territory. We provide these submissions based upon our experience in the Territory working with such clients.

Before we address the specific issues raised by the Issues Paper we raise the following material issues:

Incomplete scope of review

The Issues Paper states that the review will consider the *Waste Management and Pollution Control Act* (***WPMCA***) within the broader Territory environmental management framework with a view to the Northern Territory Environment Protection Authority (***NT EPA***) providing advice on achieving appropriate and effective environmental policy and management for the Northern Territory and legislation related to the environment. The Issues Paper goes on to state that the review will consider the role and purpose of the WMPCA, improvements that can be made to legislation to assist the NT achieve ecologically sustainable development and non-legislative alternatives.

The NT EPA has not sought to address as part of the review those matters identified in section 26 of the *Northern Territory Environmental Protection Authority Act 2012* (***NTEPA Act***). The scope of the review should be expanded or re-orientated to include a specific focus on the following matters set out in section 26 of the NTEPA Act:

(a) the need to develop a strong, growing and diversified economy and a well-informed and engaged private sector that can enhance the capacity for protection of the environment;

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(b) the need to maintain and enhance international competitiveness in an environmentally sound way;

(c) the need to adopt cost effective and flexible policy instruments, including, for example, improved valuation, pricing and incentive mechanisms; and

(d) government economic policies and priorities for the Territory.

The Issues Paper does not identify or discuss any of these matters, nor does the Issues Paper explain why the NT EPA has chosen not to consider the above matters for consideration when performing its functions under section 25 of the NTEPA Act.

Regulatory streamlining should be a policy focus

The NT EPA's approach to the WMPCA does not address the key issue of regulatory overlap and the key policy objective of all Australian governments of reducing the environmental regulatory burden. In this regard, we note that the *Inquiry into the Development of Northern Australia—Interim Report* (June 2014, at 4.107) stated "Lengthy and complex approvals processes, particularly in relation to environmental approvals, have been identified as a significant impediment to the development of Northern Australia".

Governments, at Territory, State and Commonwealth levels, are actively working to reduce the number of environmental approvals required for businesses and projects in Northern Australia where the cost of business is significantly higher. The NT EPA, instead, has developed an Issues Paper which almost exclusively raises ideas to increase the number of approvals required, increase regulation and increase costs on businesses. The Issues Paper raises the following matters of expanded regulation:

- application of the WPMCA to actions outside the jurisdiction
- adding a waste hierarchy to the WPMCA
- adding more waste management activities to require licences
- imposing more data and information requirements on business
- raising the prospect of new taxes on waste
- additional legislative framework for the identification, registration, remediation and ongoing management of contaminated sites
- more environmental incident reporting obligations
- creating an extensive licencing regime for emissions and discharges
- adding a second layer of regulation to mining and petroleum sites through the concept of discharges and emissions
- expanding environmental offences

The NT EPA's approach is divorced from key policy objectives that the Government has stated are being sought to be implemented in the Territory.

The development of the Northern Territory has been identified as paramount to the social and economic future of Australia. A key aspect of development is attracting significant capital investment into industries that operate in the Territory such as mining, oil and gas, agriculture, pastoral and aquaculture. All of those industries are regulated in the Territory under specific legislation and by specific Departments with a level of expertise in the industry or sector. Investors seek stable legal and regulatory jurisdictions for investment over jurisdictions in which long-standing environmental regulation becomes more onerous (without sufficient reason) due to legislative change or interventionist regulatory expansion.

We note that to help attract investment the *Green Paper on Developing Northern Australia* (2013, page 57) stated that consideration needed to be given to reforming how new regulations are created and administered. This included considering concepts such as all approvals being managed by a single government department modelled on the Queensland Office of the Co-ordinator General. In this respect, we believe the NTEPA should consider the WPMCA from the perspective of seeking to:

- reduce, and not add, regulatory requirements;
- identify regulation and processes the NT EPA currently undertakes that are unwarranted and contrary to promoting investment and development; and
- identify aspects of the WPMCA that would be better managed or regulated by Departments or within other legislation.

The Issues Paper does not identify (and has not sought to identify) any existing regulations or NT EPA regulatory actions arising from the WPMCA that are superfluous, burdensome or unnecessary.

Renaming the WMPCA

In our experience it is common to hear people claiming that the Northern Territory does not have an environment protection act, in effect asserting that there is either no or insufficient general environmental regulation in the NT. However the WMPCA is in fact the Northern Territory's Environment Protection Act in that it:

- imposes general environmental duties;
- requires the approval or licensing of certain activities;
- establishes offences relating to the environment; and
- contains material enforcement, penalty and extension of liability provisions.

The WMPCA should be combined with the Litter Act and renamed the *Environment Protection Act*.

WMPCA monetary thresholds for environmental harm

A materially significant issue not considered in the Issues Paper is the unreasonably low monetary thresholds used for determining the different levels of environmental harm. The environmental harm concepts expressed are not reflected in the monetary thresholds that relate to them. For example:

"serious environmental harm" means environmental harm that is more serious than material environmental harm and includes environmental harm that:

(a) is irreversible or otherwise of a high impact or on a wide scale;

(b) damages an aspect of the environment that is of a high conservation value, high cultural value or high community value or is of special significance;

(c) results, or is likely to result, in more than $50,000 or the prescribed amount (whichever is greater) being spent in taking appropriate action to prevent or minimise the environmental harm or rehabilitate the environment; or

(d) results in actual or potential loss or damage to the value of more than $50,000 or the prescribed amount (whichever is greater).

There is no greater 'prescribed amount'. Penalties for serious environmental harm range from a minimum of $110,880 to a maximum of $2,770,560 for a company (plus up to 5 years imprisonment for directors). The concept of irreversible or wide scale harm and penalties over two million dollars are not consistent or relative to either a loss or damage or a cost to correct of a mere $50,000.00.

"material environmental harm" means environmental harm that:

(a) is not trivial or negligible in nature;

(b) consists of an environmental nuisance of a high impact or on a wide scale;

(c) results, or is likely to result, in not more than $50,000 or the prescribed amount (whichever is greater) being spent in taking appropriate action to prevent or minimise the environmental harm or rehabilitate the environment; or

(d) results in actual or potential loss or damage to the value of not more than $50,000 or the prescribed amount (whichever is greater).

There is no greater 'prescribed amount'. Penalties for material environmental harm range from a minimum of $55,440 to a maximum of $1,108,800 for a company. Once again, the concept of materiality expressed and penalties over one million dollars are not consistent or relative to either a loss or damage or a cost to correct of <u>any</u> amount from $1.00 up to $50,000.00.

Of course there is no monetary limit to causing environmental harm, it being any degree or duration of harm including unsightly or offensive conditions that are only a nuisance.

The Issues Paper does not review or assess this serious anomaly. We recommend that appropriate 'prescribed amounts' be consulted on and that they be automatically indexed (like the penalties).

Powers of authorised officers

In our view authorised officers are using section 72(k) of the WMPCA to issue direction where those directions should be issued pursuant to the pollution abatement notice provisions under Division 2 of Part 10 of the WMPCA. Division 2 requires a higher level of decision making and is more appropriate where an authorised officer is not on site dealing

with an unfolding environmental incident (which appears the essence of sections 71 and 72 of the WMPCA).

We recommend that either NT EPA processes be amended to accord with the intention of the WMPCA or legislative change is introduced to enforce the distinction.

Consultation matters

We provide the following submissions in relation to some of the specific matters listed for comment in the Issues Paper.

1. Should the Act contain explicit provisions to ensure that it applies to activities conducted outside the Territory that cause damage to the Territory's environment?

No. We do not consider this to be a live or relevant issue. Sufficient protections are in place.

2. Should the Northern Territory incorporate the waste management hierarchy into the Act? How could the hierarchy be used to encourage the minimisation of waste generation and/or improvements in reuse and recycling?

We do not consider this to be a live or relevant issue for Territorians. The insertion of such conceptual provisions may create uncertainty and unnecessary regulation in the legislative and regulatory context. We are also concerned that such provisions may be used to further the regulatory powers of the NT EPA into areas and places they are specifically excluded from.

3. How important is language in encouraging reuse and recycling? Would 'materials' or 'resource' management of similar phrasing change your perceptions about, and approach, to reuse and recycling?

We do not view this as a material issue.

4. What may be some of the impediments or hindrances to improving reuse and recycling in the Northern Territory? How could these impediments or hindrances be addressed?

No comment.

5. What types of waste management activities should require a licence?

Only those waste management activities that provide a real and material risk to the public should require a licence. 'Listed wastes' are extensive under the WPMCA and the *Waste Management and Pollution Control (Administration) Regulations*. The NTEPA should examine whether each of these are warranted.

6. How can we improve our knowledge about the type and amount of wastes being generated, reused and recycled in the Northern Territory?

No comment.

7. Should the Territory Government consider imposing levies? To what types of activities or wastes would the levy be applied?

No. In the NT EPA's recently released *Draft Waste Management Strategy for the Northern Territory*, the NT EPA states:

> "*Considering the types of waste that currently require interstate transport for treatment and disposal, there are opportunities for the waste industry to expand in the Territory. Particular expertise is required to treat or dispose of problem wastes locally and to increase rates of resource recovery. The Territory does not apply landfill levies for waste disposal. In other jurisdictions levies have been used to drive greater recycling and resource recovery…Further development in the North must be accompanied by a growing capacity within the waste industry to predict and provide the necessary waste management infrastructure, services and enterprise*."

The waste management industry will find it relatively harder to grow in the Territory if the NT EPA is successful in advocating for new taxes or levies. Such revenue measures are working against the Territory's objective of attracting jobs and business to an already high cost economy.

Introducing greater or more waste levies is particularly problematic because, as is stated, the growth of this industry would be highly desirable for the Territory. Attracting or creating a thriving waste industry will be in the best interests of addressing core environmental principles, economically sustainable development and mitigating cumulative impacts, as many other industries, sectors, activities and projects will create less environmental impact by having a reliable, safe and local place to centrally deposit waste. In this respect we note that central Australia may have natural and environmental advantages for waste disposal.

8. What other infrastructure and industries would improve opportunities for recycling and reuse? Would these be required before a levy could be imposed?

No comment.

9. Should the management of contaminated sites be given a greater focus in the Northern Territory?

No. No evidence has been presented that this is warranted.

10. How do you suggest we approach management of potentially contaminated sites?

No further regulation or bureaucracy is required to deal with potentially contaminated sites and no evidence has been presented that such material issues exist that a change in law is required.

Many contaminated sites or legacy sites are either Commonwealth sites (such as on the Cox Peninsular and nearby islands) or mining sites (such as Mount Todd and Redbank) or both (in the case of Rum Jungle). The Northern Territory has introduced a levy on mining securities under the *Mining Management Act* which is generating millions of dollars per annum to address the rehabilitation and management of legacy mine sites. Additionally, the *Mining Management Act* has prescriptive requirements for securities and these can be accessed when necessary by the Territory.

There is no policy rationale explaining why the WMPCA and the NT EPA need to be involved with any aspect of legacy mine sites. The WMPCA exclusion in section 6 should also include any past or present mine site where:

- the Department of Mines and Energy has had recourse to the Rehabilitation Fund for activities at the site;

- adequate securities are held by the Department of Mines and Energy for activities at the site;

- a proponent has applied for a mineral title or authorisation to develop or re-start operations.

The biggest challenge facing the Territory in relation to legacy mines is that rehabilitation of environmental issues will only occur when a willing proponent is found to re-start the mine and generate sufficient income to devote to rehabilitation. As such, the Department of Mines and Energy should be the body charged with all regulation of legacy sites to ensure that proponents can be encouraged to invest in legacy sites, the most likely way that real and positive environmental rehabilitation outcomes will be achieved in an economical manner.

Furthermore, we have concerns that entities spend a disproportionate amount of time dealing with NT EPA regulation and approvals compared to the time spent actually fixing environmental issues.

11. How can we improve the WMPC Act to ensure the right incidents are reported by the right person at the right time?

No change is required. The law is sufficiently clear and onerous.

12. How do you suggest we approach management of emissions and discharges to the Northern Territory environment?

The totality of existing legislative, regulatory and taxation requirements (both Commonwealth and Territory) impose a material burden on industry and may have contributed in part to the recent collapses of mining companies in the Territory, and the decision by some companies in the Territory to cease expansions or operations.

The extension of the WMPCA into mining and resources through expanded regulation of emissions and discharges directly contradicts the legislative purpose and intent of the WMPCA. The second reading speech for the *Waste Management and Pollution Control (Consequential Amendments) Bill 1998 (NT)* includes the following:

> *"The new legislation will apply to non-mining industries and activities. The Department of Mines and Energy will continue to be the one-stop-shop for addressing on-site waste management issues on mining and petroleum tenements. This will occur through the relevant mining and petroleum legislation, which is being reviewed and is to be amended, where necessary, to ensure consistency with the provisions of the Waste Management and Pollution Control Bill."*

The second reading speech for the *Mine Management Amendment Bill 1998 (NT)* includes the following:

> *"It is appropriate that the Mine Management Amendment Bill should be introduced at the same time as the Waste Management and Pollution Control Bill. Together they form a complementary package. To avoid duplication, the Waste Management and Pollution Control Bill generally excludes mining activities as these are controlled through existing mining legislation. To ensure consistency, both bills provide the same access to provisions of the Environmental Offences and Penalties Act."*

It is worth noting in this regard that the economic prosperity of the Territory is heavily linked to major projects, and particularly to the growth of the oil and gas industry including through LNG operations in the Territory. The *Green Paper on Developing Northern Australia* (2013, page 39) notes that major projects in northern Australia can require up to 70 different primary and secondary licences, permits, approvals and authorisations. LNG projects can require up to 390 regulatory approvals. There is no need to add to more regulation through the WMPCA in the area of discharges and emissions.

13. What are the benefits or costs associated with your suggested approach?

Making the Territory an attractive place to invest and being consistent with the Government's stated position of reducing red tape.

14. How effective is the northern Territory's current regulatory regime in managing emissions and discharges?

Sufficiently effective.

15. Are there opportunities to more closely align the management of emissions and discharges with the risk posed by the emission or discharge?

No comment.

16. What types of emissions and discharges should be managed under the WMPC Act?

Only those emissions and discharges that are shown to be relevant to the Territory and pose a real and material risk to the environment should be managed under the WMPCA.

17. How can we best manage diffuse pollution sources.

There is no evidence presented that this is a real or material issue. No change should be made, particularly because pollution abatement notices can fulfil this function.

18. How effectively can your proposed approach to the management of emissions and discharges manage diffuse pollution sources?

No comment.

19. How can we ensure appropriate management of a site continues once an activity has ceased?

There is no evidence presented that this is a real or material issue. No change should be made.

20. What compliance and enforcement tools should be included to ensure that the WMPC Act can be appropriate enforced?

No additional compliance or enforcement tools are required given the extraordinarily broad and onerous nature of the existing provisions. No specific or credible evidence is provided for requiring any change.

21. Do you have recommendations on the types of offences that should be included in the WMPC Act?

No. The existing offences are sufficiently broad and onerous.

22. How could the offences be improved to ensure that the WMPC Act can be appropriately enforced?

The Issues Paper contends that it is problematic that criminal offences require the prosecution to meet a burden of proof as to actual harm. We have significant difficulty in accepting changes that would allow proof of pollution to be taken as proof of actual harm because it is otherwise 'difficult, costly and time consuming' to prove.

The concept that specific undertakings given should deliver benefits that go beyond mere compliance with the law should not be accepted. We also disagree with restitution orders for areas not impacted by waste or pollution.

The WMPCA provides a wide ranging range of compliance powers beyond prosecutions, including:

- preventative action and remediation requirements, section 97(a);
- negative publicity, section 97(c);
- forfeiture, section 98;
- compliance plans, Part 7 and section 59;
- environmental audit plans, Part 6 and section 49; and
- pollution abatement notices, section 77.

These tools are sufficient to achieve the desired environmental outcomes. There is no reference in the NT EPA Issues Paper to any examples where these tools have been insufficient or inadequate.

The Issues Paper states that the offences rely on complex, multi-faceted definitions of environmental nuisance, environmental harm and serious environmental harm, as well as broad definitions of pollution, contaminant and waste. The real point is not that the definitions are too complex or multi-faceted but that they are too broad and in too many circumstances parties contravene the provisions and simply rely on the NT EPA not to prosecute.

Definitions should be linked to real and tangible events that can be scientifically demonstrated to have had a negative consequential effect on the environment. The addition of a requirement for environmental harm to alter the environment would bring additional clarity to the offences.

23. What sanctions and remedies should be available under the WMPC Act?

No more than what exists. Refer above.

24. Is littering a problem in your community?

No comment.

25. As a municipal or shire council do you want littering provisions to apply within your area of responsibility?

No comment.

26. Is the placement of advertising material a problem in the Territory? Is the current regulation sufficient? Is additional regulation required?

No comment.

27. Would provisions such as those in Queensland and Tasmania which make it easier for the public to participate in litter enforcement assist to manage illegal dumping and letter?

No comment.

28. Should the Northern Territory 'deem' certain members of the public to be responsible for litter?

No.

29. What other actions or incentives could be implemented to reduce the incidences of illegal dumping?

Have the Darwin City Council remove the use of tags to enter the Shoal Bay Waste Management Facility. The Palmerston waste facility works well without such a wasteful and inefficient system.

30. Should the Northern Territory consider development of a broad environment protection act similar to other jurisdictions? What might be advantages or disadvantages of adopting an environment protection act over issue specific legislation?

Refer opening comments.

31. In addition to matters currently contained in the WMPC Act and *Litter Act*, what other maters could be included in any environment protection act?

Nil.

32. Are there matters currently contained in the WMPC Act or *Litter Act* that could be better managed through an alternate mechanism, such as policy, rather than through legislation?

No comment.

33. Is there an increased role for local government in the regulation of waste and pollution in the Territory? What is that role?

No comment.

34. How could enhanced community involvement improve the Northern Territory's management of waste and pollution and improve environmental outcomes for the Territory?

No comment.

35. Should the WMPC Act include requirements for the NT EPA to seek public comments on the application for a licence or the proposed conditions of a licence? If so, how could an efficient and effective process operate?

There should be no provisions requiring more than one set of public consultation (ie under the *Planning Act* and the WMPCA).

36. Who should be allowed to appeal a decision made under the WMPC Act? What should be the basis for that appeal?

No third party appeals should exist.

Conclusion

We appreciate the fact the submissions in relation to the Issues Paper were to be made from 15 September 2014 to 31 October 2014 (6 week period). However we note that analysis and feedback from the NT EPA is to occur over a 5 month period from November 2014 to March 2015 with a discussion paper to be released 2 months later in June 2015. We therefore trust that the provision of this submission in late November will not result in its failure to be considered.

If you have any queries, or wish to discuss any aspect of this submission, please contact me.

Yours faithfully
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