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Dear Secretary

Thank you for the opportunity to appear before the Committee for a second time. This letter constitutes a supplementary submission to the Committee in regards to the situation in the Northern Territory (NT) and the potential for this situation to exposure of the Commonwealth in the context of the Commonwealth's responsibilities under the Environmental Protection Biodiversity Conservation Act (1999).

The situation at Glencore's McArthur River Mine (MRM) is a stark and contemporary illustration of the inadequate mine rehabilitation regulatory regime in the NT. The Environment Centre of the NT (EC NT), amongst others, has called for MRM to be closed and for the site to be fully rehabilitated including back filling of the pit with waste material which is laced with "potentially acid forming" material in order to reduce, as far as practicable, the sites medium and long-term impacts.

I tender to the Committee attached to this submission, a summary of the situation at MRM in the form of a press release and briefing note from the EC NT dated August 27th, 2015. This briefing based on information obtained via a freedom of information request illustrates in detail the regulatory failures that have created the situation whereby the most logical course of action in regards to protecting the environment and minimizing the sites residual risk is to close the operation down.

The EC NT document catalogues a litany regulatory failures and a culture that clearly places the interests of Glencore above those of affected communities and the NT taxpayer. The long-term impacts and costs of MRM have been ignored. Glencore and subsequent NT Governments must take responsibility for the situation at MRM including placing so many jobs at risk.

Government's around Australia are beginning to acknowledge the need for wholesale reform of their mine rehabilitation regulatory regime. We have seen the Victorian Government impose a significant increase in the bonds for the brown coal mines in that state on the back of the Hazelwood

Inquiry. The NSW Audit Office found a number of serious issues related to that state's mine rehabilitation regulatory regime including;

- Inadequate rehabilitation cost estimates
- No financial mechanism to cover long-term risks from mine rehabilitation
- Ill-defined closure outcomes particularly for un-planned mine closures
- Inadequate monitoring of rehabilitation, and
- No mechanism to prevent mines being put in "care and maintenance" in perpetuity

As a result, the NSW Government has commenced a review of a number of key elements of its regulatory regime.

Queensland is undertaking a "root and branch" review[1] of its entire mine rehabilitation regulatory regime in response to a growing progressive rehabilitation deficit, inadequate levels of financial assurance, an increase in the number of abandoned mines and the recognition that the tax payer faces an unacceptable level of financial expose to poor or failed mine site rehabilitation. The Queensland Review is probably the most comprehensive in Australia's history.

Reforming the NT's mine rehabilitation regulatory regime

Given the situation in the NT, with particular reference to MRM as the contemporary example of the extent and nature of regulatory failure and capture in that jurisdiction, it is prudent for the new NT Government to consider a review and reform of its mine rehabilitation regulatory regime.

The Commonwealth has a vested interest in supporting reform in the NT and in particular the resolution of the situation at MRM. There are a large number of matters of national environmental significance (MNES) as specified under the EPBC Act relevant to MRM[2] . The ability of the Commonwealth to fulfill its obligations under the Act is being severely compromised due to the failed regulatory regime in the NT.

The situation in the NT, although possibly the worst example of a failed regulatory regime, is to varying degrees mirrored across other jurisdictions. In regards to protecting the Commonwealth Government's interests in regards to EPBC Act obligations in the NT and elsewhere, we believe the Commonwealth should commit to working with the state and territories (and the NT Government in particular) to develop a set of national standards covering the following:

1. Undertake a comprehensive review of state and territory security deposit/bond calculators to ensure they cover the full cost rehabilitation and reflects industry best practice
2. The design of enforceable progressive rehabilitation targets aimed at maximising the area of rehabilitation during the mine's operational life
3. Develop policy on final landforms including open pit voids, out of pit waste dumps and above ground tailings storage facilities to ensure that the public's expectations are met in regards to minimising the long-term impacts of mining.
4. Explore mechanisms to close the loophole that allows mining companies to place sites in perpetual care and maintenance thus avoiding fulfilling their rehabilitation obligations.
5. Adopt the ICMM/industry mine closure planning guidance to design and mandate the submission of stand-alone closure plans as part of the mining lease approval process.

[1] https://www.treasury.qld.gov.au/growing-queensland/improving-rehabilitation-financial-assurance-outcomes-resources-sector/financial-assurance-framework-reform/
[2] http://www.mcarthurrivermine.com.au/en/EIS/eisdocuments/Chapter-10-MNES.pdf

Develop national "chain of responsibility" legislation

In addition, in order to improve the outcomes at the state and territory levels, the Commonwealth should work with the states and territories to develop model "chain of responsibility" legislation based on Queensland's *Environmental Protection (Chain of Responsibility) Act 2016.*

On 27 April 2016, the Queensland Government introduced the *Environmental Protection (Chain of Responsibility) Amendment Act* 2016 (Qld) which amended the *Environmental Protection Act* 1994 (Qld) .

The new act gives the QLD Department of Environment and Heritage Protection greater powers to enforce compliance with environmental obligations to ensure that companies and their related parties bear the cost of managing and rehabilitating sites.

Broadly speaking Lock the Gate is very supportive of the objectives of the amendments which are to:

- Facilitate enhanced environmental protection for sites operated by companies in financial difficulty, and
- To avoid the State bearing the costs for managing and rehabilitating sites in financial difficulty.

The new powers allow the Government to issue an environmental protection order (EPO) to 'related persons' of companies. An EPO is designed to protect the environment by encouraging or, where deemed necessary, legally forcing a person or organisation to undertake or stop an activity.

The responsible department may decide that a person has a relevant connection with a company if it is satisfied that the person:

- is capable of significantly benefitting financially, or has significantly benefited financially, from the carrying out of a relevant activity by the company or
- the person is, or has been at any time during the previous two years, in a position to influence the company's conduct in relation to its compliance with obligations under the Act.[3]

In summary the Queensland legislation facilitates greater environmental protection for sites in financial difficulty and assisting in avoiding costs being incurred by the State for the environmental management and clean-up of such sites.

The Act also enables early intervention in the event of corporate financial distress. The act defines a 'high risk company' consistent with the Corporations Act 2001 (Cth), as well as companies which are related entities to such companies (Clause 7). This definition is designed to capture where the operator of an "environmentally relevant activity" is in administration and therefore at risk of failing to comply with its environmental and rehabilitation obligations. This amendment blocks attempts to avoid responsibility for clean-up and rehabilitation by transferring operation of the relevant activity from an externally administered company to another member of its corporate group or other associated entity.

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3 http://www.dibbsbarker.com/publication/Queensland_s__Chain_of_Responsibility__guideline_has_taken_effect.aspx

We believe the Commonwealth has the constitutional power under the corporations head of power to develop and enact such legislation to cover those jurisdictions who do not have complimentary legislation in place.

EPBC conditioning for mines impacting on Matters of National Environmental Significance (MNES) and the McArthur River Mine

The Commonwealth needs to review the stringency of conditioning provisions under the Act to ensure that approved mines have the lowest possible impact on MNES. In regards to mine rehabilitation related conditions must be developed and applied to these projects through the EPBC Act. These include;

- The proponent must submit a full life of mine and closure plan at the approvals stage which includes rehabilitation strategies designed to specifically protect at risk MNES,
- The proponent must submit a progressive rehabilitation plan including rehabilitation targets designed to enhance the protection of the at risk MNES during the mine's operational life
- The Commonwealth should require an independent assessment of the closure cost estimate based on the closure plan that informs the relevant jurisdictions level of FA with specific reference to protecting the MNES,
- The final landform and land use must reflect the lowest possible residual impact on the at risk MNES and mandate that voids are backfilled and out of pit waste rock dumps and tailings storage facilities are eliminated where these landforms have a demonstrable residual impact on MNES.

The situation at MRM and the proposed extension and the Overburden Management Project, currently subject to an EIS, all have profound implications for all nine MNES as outlined in Chapter 10 of the EIS.

We would submit that the MRM Overburden Management Project is a test case for the effectiveness of the EPBC Act.

The proposed Overburden Management Project currently before the Commonwealth will expose a variety of MNES to a high degree of risk in perpetuity. The proposed expanded North Overburden Emplacement Facility cannot encapsulate and isolate the potentially acid forming material in perpetuity. All engineered structures will fail over time particularly in challenging climate regimes experienced in the south-western Gulf of Carpentaria. Equally the proposition that re-routing the McArthur River through the pit void that will contain acidic and toxic mine tailing is the best possible environmental outcome lacks any credibility. The proposed Overburden Management Project has as it basis maximizing shareholder returns, not the protection of MNES or the health and safety of downstream communities.

Unfortunately due to the proponent's mismanagement of the mine's acid forming mine waste, poor mine design and poor oversight by the NT Regulator, the most prudent and effective means of minimizing the risk to MNES is to close the mine, ensure that the MRM void is backfilled with all potentially acid forming mine waste and the tailings and that the rehabilitated void is capped using world's best practice cover design and acid and metalliferous drainage management techniques.

In support of this view we submit a detailed case study of the backfill option, The McArthur River Mine: The Environmental Case for Complete Pit Backfill[4] . On this basis the Commonwealth should not approve the Overburden Management Project under the EPBC Act.

[4] The McArthur River Mine: The Environmental Case for Complete Pit Backfill, Minerals Policy Institute, G. Mudd, C Roche, L Mellor, 2017