LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Social Policy Scrutiny Committee

Inquiry into the Environment Protection Bill 2019

September 2019

Contents

Chair's Preface

This report details the Committee's findings regarding its examination of the Environment Protection Bill 2019. Repealing the *Environment Assessment Act 1982* and the Environmental Assessment Administrative Procedures 1984, the Bill establishes the *Environment Protection Act 2019.* Reforming the Territory's environmental impact assessment and approval process, the Bill supports implementation of the Government's environmental regulatory reform commitments.

The Committee received 46 submissions to its inquiry, including 21 proforma submissions. Although the majority of submissions supported reform of the NT's environmental management framework, clarification was sought regarding the intended operation of various provisions within the Bill. Submitters also put forward a number of suggestions as to how the Bill might be improved. Most of the issues raised by submitters were satisfactorily clarified in the comprehensive advice received from the Department of Environment and Natural Resources.

While the Committee has recommended that the Assembly pass this significant piece of legislation, it has proposed a number of amendments as set out in recommendations 2 to 14. For the most part, these amendments seek to ensure that the provisions in the Bill promote transparency and accountability in the environmental impact assessment and approval process; have sufficient regard to the institution of Parliament; and are unambiguous and drafted in a sufficiently clear and precise way.

On behalf of the Committee, I would like to thank all those who made submissions or appeared before the Committee. Their detailed advice and commentary was of great assistance to the Committee in its examination of the Bill. The Committee also thanks the Department of Environment and Natural Resources for their advice. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.

Ms Ngaree Ah Kit MLA

Chair

Committee Members

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	Party:	Territory Labor
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
	Standing:	Standing Orders and Members' Interests, House
	Sessional:	Social Policy Scrutiny
	Chair:	Social Policy Scrutiny
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	Deputy Chair:	Social Policy Scrutiny
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	Parliamentary Position:	Deputy Leader of the Opposition, Opposition Whip
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	Sessional:	Social Policy Scrutiny, Economic Policy Scrutiny
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	**Mrs Kate Worden MLA** Member for Sanderson	
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On 17 June 2019 Member for Katherine, Ms Sandra Nelson MLA, was discharged from the Committee and replaced by Member for Sanderson, Mrs Kate Worden MLA.		

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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at public hearings.

Acronyms and Abbreviations

ALEC	Arid Lands Environment Centre
AMEC	Association of Mining and Exploration Companies Inc.
ALFA	Arnhem Land Fire Abatement
CAD	Climate Action Darwin
COAG	Council of Australian Governments
DENR	Department of Environment and Natural Resources
EA	Environmental Approval
EIA	Environmental Impact Assessment
ECNT	Environment Centre NT
EDONT	Environmental Defenders Office NT Inc.
ICIN	Indigenous Carbon Industry Network
MCA NT	Minerals Council of Australia NT Division
NARU	North Australia Research Unit
NCLC	Northern and Central Land Councils
NTCA	Northern Territory Cattlemen's Association Inc.
NTCAT	Northern Territory Administrative Tribunal
NTCOSS	Northern Territory Council of Social Service
NT EPA	Northern Territory Environment Protection Authority
PNT	Protect NT Inc.
PRIS	Preliminary Regulation Impact Statement
RIC	Regulation Impact Committee
RIS	Regulatory Impact Statement
RIU	Regulation Impact Unit
WK	Ward Keller

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

(1) Standing Order 178 is suspended.

(2) The Assembly appoints the following scrutiny committees:

(a) The Social Policy Scrutiny Committee

(b) The Economic Policy Scrutiny Committee

(3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.

(4) The functions of the scrutiny committees shall be to inquire and report on:

(a) any matter within its subject area referred to it:

(i) by the Assembly;

(ii) by a Minister; or

(iii) on its own motion.

(b) any bill referred to it by the Assembly;

(c) in relation to any bill referred by the Assembly:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:

(A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(B) is consistent with principles of natural justice; and

(C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(D) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and

(F) provides appropriate protection against self-incrimination; and

(G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(H) does not confer immunity from proceeding or prosecution without adequate justification; and

(I) provides for the compulsory acquisition of property only with fair compensation; and

(J) has sufficient regard to Aboriginal tradition; and

(K) is unambiguous and drafted in a sufficiently clear and precise way.

(iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:

(A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(C) authorises the amendment of an Act only by another Act.

(5) The Committee will elect a Government Member as Chair.

(6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Environment Protection Bill 2019 with the proposed amendments set out in recommendations 2 to 15.

Recommendation 2

The Committee recommends that clause 42(b) be amended to include the impacts of a changing climate as a matter to be taken into account when assessing, planning and carrying out actions that may have a significant impact on the environment.

Recommendation 3

The Committee recommends that clauses 26(1) and (2) be amended by replacing the word should with the word must.

Recommendation 4

The Committee recommends that clauses 28(5) and 30(4) be amended to require that the Minister must publish the statement of reasons for making a declaration as soon as practicable after making the declaration.

Recommendation 5

The Committee recommends that clause 33 be amended to provide that:

1. The Minister may, by *Gazette* notice, amend or revoke an environmental objective or a referral trigger.
2. The Minister must publish the statement of reasons for amending or revoking an environmental objective or a referral trigger as soon as practicable after making the amendment or revocation.

Recommendation 6

The Committee recommends that clauses 36, 38 and 39 be amended as follows:

1. Replace all instances of the word Administrator with the word Minister.
2. Include a requirement that the Minister must table declarations of protected environmental areas and prohibited actions and any subsequent revocation of declarations, including associated statements of reasons, in the Legislative Assembly following notification in the *Gazette.*
3. Include a requirement that the Minister must publish the statement of reasons for making a declaration of protected environmental areas and prohibited actions and any subsequent revocation of declarations, at the time of gazettal.

Recommendation 7

The Committee recommends that clause 62(a)(i) be amended to include matters relating to culture and heritage, including Aboriginal sacred sites.

Recommendation 8

The Committee recommends that Part 5, Division 9 be amended to require that, in addition to the proposed consultation requirements in clause 107, before amending an environmental approval at the request of the approval holder, the Minister must consider the assessment report and objects of the Act and must be satisfied that the proposed amendment will not prevent the significant impacts of the action from being appropriately avoided or mitigated or managed.

Recommendation 9

The Committee recommends that clause 109(c) be amended to provide that:

If the Minister, as a result of the monitoring of compliance with or enforcement of this Act or the approval or otherwise, believes on reasonable grounds that:

Recommendation 10

The Committee recommends that, similar to section 458 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), clause 142 be amended to provide that:

The CEO may direct an approval holder to cause an environmental audit to be carried out by a qualified person if the CEO believes or suspects on reasonable grounds:

(a) that an approval holder has contravened, or is likely to contravene, a condition of an environmental approval; or

(b) that the action authorised by the environmental approval has, has had or is likely to have an environmental impact significantly greater than was indicated in the information available to the Minister when the environmental approval was granted.

Recommendation 11

The Committee recommends that clause 159 be amended to provide that the CEO must not appoint a person to be an environmental officer unless satisfied that the person has the skills, qualifications, training and experience to properly perform the functions of an environmental officer.

Recommendation 12

The Committee recommends that clause 170 be amended to provide that search warrants may only be issued by a judicial officer.

Recommendation 13

The Committee recommends that clauses 187(4) and 204(4) be amended to include an obligation to take all reasonable measures to provide notices to an occupier.

Recommendation 14

The Committee recommends that clause 288 be amended to require that the Minister must be satisfied that granting an exemption will not undermine the objects of the Act.

1 Introduction

Introduction of the Bill

1.1 The Environment Protection Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Minister for Environment and Natural Resources, the Hon Eva Lawler MLA, on 16 May 2019 The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 6 August 2019.[1] On 20 June 2019 the Assembly agreed to extend the report date to 17 September 2019.[2]

Conduct of the Inquiry

1.2 On 17 May 2019 the Committee called for submissions by 14 June 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 The Bill, associated *Explanatory Statement,* and *Statement of Compatibility with Human Rights* was also forwarded to Sally Gearin for review of fundamental legislative principles under Sessional Order 13(4)(c).

1.4 As noted in Appendix 2, the Committee received 46 submissions to its inquiry, including 21 proforma submissions. The Committee held a public briefing with the Department of Environment and Natural Resources on 20 May 2019 and public hearings with 21 witnesses appearing in Darwin on 29 July 2019.

Outcome of Committee's Consideration

1.5 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

(i) whether the Assembly should pass the bill;

(ii) whether the Assembly should amend the bill;

(iii) whether the bill has sufficient regard to the rights and liberties of individuals; and

(iv) whether the bill has sufficient regard to the institution of Parliament.

1.6 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2 to 15.

[1] Daily Hansard, *Day 6 – Thursday 16 May 2019,* http://www.territorystories.nt.gov.au/jspui/handle/10070/307368, p.8
[2] Daily Hansard, *Day 1 –Thursday 20 June 2019*, http://www.territorystories.nt.gov.au/jspui/handle/10070/308154, p.12

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Environment Protection Bill 2019 with the proposed amendments set out in recommendations 2 to 15.

Report Structure

1.7 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.

1.8 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 Recognising the need to reform and modernise the Territory's environmental management and protection framework, in 2016 the Government commenced a comprehensive environmental regulatory reform program. In presenting the Bill, the Minister for Environment and Natural Resources, the Hon Eva Lawler MLA, noted that:

> The Territory's existing environmental impact assessment system was introduced in 1984 and has not been substantially amended since that time. It is outdated, ambiguous, inefficient and ineffective to deliver the environmental protections that are, and should be, expected in 2019.[3]

2.2 Informed by a number of reviews of the Territory's environmental impact assessment and approvals system conducted in recent years,[4] and the Australian Productivity Commission's 2013 study *Major Project Development Assessment Processes*[5], the Environment Protection Bill 2019 is the first stage of the environmental reform program and seeks to introduce:

> improvements to the environmental impact assessment and approval system for the Northern Territory comparable to other Australian jurisdictions and international best practice.[6]

Purpose of the Bill

2.3 As highlighted in the Explanatory Statement, in establishing the *Environment Protection Act 2019,* the purpose of the Bill is to:

> support implementation of Government's environmental regulatory reform commitments by reforming the Territory's environmental impact assessment and approval process.[7]

2.4 In doing so, the Statement of Compatibility with Human Rights notes that the Bill:

- repeals the *Environmental Assessment Act 1982* and Environmental Assessment Administrative Procedures 1984
- introduces a new environmental approval issued at the completion of the impact assessment process, and
- provides a range of modern regulatory tools including environment protection notices, offences and penalties to ensure that the impact assessment process and approvals are complied with and able to be enforced.[8]

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[3] Daily Hansard, *Day 6 – Thursday 16 May 2019,* http://www.territorystories.nt.gov.au/jspui/handle/10070/307368, p.5

[4] see for example, Hawke, A., *Review of the Northern Territory Environmental Assessment and Approval Process,* NT Government, Darwin, May 2015; Northern Territory Environment Protection Authority, *Roadmap for a Modern Environmental Regulatory Framework for the Northern Territory,* Northern Territory Environment Protection Authority, Darwin, 2017

[5] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013

[6] Department of Environment and Natural Resources, "Environment Protection Bill 2019", https://denr.nt.gov.au/environment-information/environmental-policy-reform/environment-protection-bill-2019

[7] Explanatory Statement, *Environment Protection Bill 2019 (Serial 94),* https://parliament.nt.gov.au/committees/spsc/94-2019, p.1

[8] Statement of Compatibility with Human Rights, *Environment Protection Bill 2019 (Serial 94),* https://parliament.nt.gov.au/committees/spsc/94-2019, p.1

3 Examination of the Bill

Introduction

3.1 Although the majority of submissions supported reform of the NT's environmental management framework, clarification was sought regarding the intended operation of various provisions within the Bill. Submitters also put forward a number of suggestions as to how the Bill might be improved. The following discussion considers the main issues raised in the evidence received along with the advice provided by the Department of Environment and Natural Resources (the Department).

Part 1, Division 1: Preliminary Matters

3.2 Clause 3 provides that the objects of the Bill are:

(a) to protect the environment of the Territory; and

(b) to promote ecologically sustainable development so that the wellbeing of the people of the Territory is maintained or improved without adverse impact on the environment of the Territory; and

(c) to recognise the role of environmental impact assessment and environmental approval in promoting the protection and management of the environment of the Territory; and

(d) to provide for broad community involvement during the process of environmental impact assessment and approval; and

(e) to recognise the role that Aboriginal people have as stewards of their country as conferred under their traditions and recognised in law, and the importance of participation by Aboriginal people and communities in environmental decision-making processes.

3.3 With regards to clause 3(b), the Association of Mining and Exploration Companies Inc. (AMEC) suggested that the term 'wellbeing', which is not used elsewhere in the Bill, is "a highly ambiguous and subjective term.'[9] Given that the definition of environment includes economic, cultural and social aspects, AMEC considered that the Bill should:

> correspondingly balance all parts of its definition of environment within the objects. AMEC recommends that the Government amend clause 3(b) to insert 'social, economic and cultural' as adjectives to greater define the term 'wellbeing'. This will reduce ambiguity and elevate the consideration of these important aspects.[10]

3.4 The Department subsequently advised the Committee that:

> Wellbeing is used in its ordinary context. It is about ensuring that the health, happiness and prosperity of Territorians is supported through the ecologically sustainable development of the Territory. The term wellbeing is inclusive of more than social, economic and cultural elements – it is the outcome being sought from

[9] Association of Mining and Exploration Companies Inc. (AMEC), Submission 23, p.7
[10] AMEC, Submission 23, p.7

> applying a model of sustainability. It recognises that Territorians are entitled to a healthy and productive life in harmony with nature. 'Social, economic and cultural' aspects contribute to 'wellbeing' but are not words that represent the entire intent of what is meant by its inclusion in clause 3(b).
>
> The proposed wording does not capture the inclusivity of the term 'wellbeing'. It suggests that these elements are separate and the achievement of each be considered in light of the potential for impact on the natural environment. The risk of separating the elements as suggested by AMEC is that they can be placed in competition with each other. Aiming to achieve wellbeing ensures that every element of what contributes to wellbeing is considered equally.[11]

3.5 The Environmental Defenders Office NT Inc. (EDONT) raised concerns that limitations have been placed on the legislative framework by reference to 'the environment of the Territory' in paragraphs (a), (b) and (c) of the objects:

> While of course the legislation will regulate *actions* that take place in the Territory, the Bill should not be limited to considering the impacts that occur only within the boundaries of the Territory. It is unusual to specifically limit the objects of environmental legislation to be jurisdictionally focussed. This drafting could potentially undermine the appropriate scope of EIA [Environmental Impact Assessment] under the Bill. It ignores the interdependent and transboundary nature of many ecological and environmental processes and issues, including pollution and greenhouse gas emissions, water and ecology.
>
> Further, the Bill actually anticipates that there may be cooperative agreements between jurisdictions (Bill cl 45) for carrying out EIA. It would be perverse for the Bill to direct the Northern Territory EIA process to only consider impacts on the Northern Territory's environment arising from a project on the border of South Australia or Western Australia, particularly when that project is assessed under a cooperative agreement with the other state.[12]

3.6 However, it is noted that equivalent legislation in all other jurisdictions, with the exception of South Australia, is State focussed.[13] As provided for in clause 45, it is further noted that the purpose of a cooperative agreement is to establish a single environmental impact process for the action. Where such an agreement is reached, clause 46 of the Bill provides that a proponent of an action that has had an EIA in accordance with a cooperative agreement is not required to undergo a further assessment of the same action under the *Environment Protection Act*.

3.7 Noting that paragraphs (d) and (e) were new additions from the exposure draft of the Bill, Ward Keller (WK) expressed the view that:

> Broad community involvement in the environmental impact assessment process is important and is reflected in sections 18(2) and 43(a)-(d). Environmental approval is part of the environmental impact assessment process, and should not be called out separately.[14]
>
> While Aboriginal people are clearly stakeholders with an important role to play in the environmental impact assessment process, the objective [3(e)] appears to elevate Aboriginal interests above all others in that process, independent of other

[11] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.2-3
[12] Environmental Defenders Office NT Inc. (EDONT), Submission 1, p.6
[13] *Environment Protection Act 1970* (Vic), s 1a; *Environment Protection Act 1994* (Qld), s.3; *Environmental Protection Act 1986* (WA), s.4A; *Environmental Management and Pollution Control Act* 1994 (Tas), Schedule 1, Part 2, s3; *Environmental Planning and Assessment Act 1979* (NSW), s1.3; *Biodiversity Conservation Act 2016* (NSW), s1.3
[14] Ward Keller (WK), Submission 14, p.14

> considerations. Is this the intent of the objective? Does similar language appear in other legislation from which the Bill's drafters have drawn ideas and concepts? If not, then perhaps incorporating the phrase 'including Aboriginal people and communities" into Objective 3(d) may be more appropriate, though as a rule we see no basis for making broad assertions about particular people or groups and believe all Territorians should be treated equally with an ability to have their say based upon their circumstances and views.[15]

3.8 As noted in the Department's *Response to submissions on draft environment protection legislation for the Northern Territory*:

> In general the objects specified in the Bill were supported however some submissions suggested these should be expanded, particularly to include recognition of the role of the First Nations and Indigenous people in the conservation and ecologically sustainable use of natural and cultural resources, and in decision-making process around them. … It was also suggested that the objects could include the importance of public participation in environmental decision-making …[16]

Committee's Comments

3.9 The Committee acknowledges the Department's response regarding the term 'wellbeing', and notes that section 1B of the *Environment Protection Act 1979* (Vic) also makes reference to the importance of ecologically sustainable development when it comes to improving 'community well-being'.

3.10 As indicated above, the Committee does not consider that reference to the 'environment of the Territory' in paragraphs (a), (b) and (c) places a limitation on the legislative framework and notes that the drafting of the Bill is consistent with equivalent legislation in other jurisdictions.[17]

3.11 As pointed out by the Department, subclauses 3(d) and (e) were included as a result of the consultation on the exposure draft of the Bill. Providing for and promoting broad community consultation is also included as an object in equivalent legislation in New South Wales, South Australia, Queensland, Victoria and the Commonwealth.[18] Given that large areas of the Northern Territory is Aboriginal land, inclusion of a specific object which acknowledges the role of Aboriginal people as stewards of their country is considered appropriate. The Committee also notes that proposed subclause 3(e) is consistent with the objects of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which include under section 3(1):

> (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and

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[15] WK, Submission 14, pp.14-15

[16] Department of Environment and Natural Resources, *Response to submissions on draft environment protection legislation for the Northern Territory, February 2019,* https://denr.nt.gov.au/__data/assets/pdf_file/0006/669750/response-public-submissions.pdf, p.4

[17] *Environment Protection Act 1970* (Vic), s 1a; *Environment Protection Act 1994* (Qld), s.3; *Environmental Protection Act 1986* (WA), s.4A; *Environmental Management and Pollution Control Act* 1994 (Tas), Schedule 1, Part 2, s3; *Environmental Planning and Assessment Act 1979* (NSW), s1.3; *Biodiversity Conservation Act 2016* (NSW), s1.3

[18] *Environmental Planning and Assessment Act 1979* (NSW), s1.3(j); *Protection of the Environment Operations Act 1997* (NSW), s3(b); *Environment Protection Act 1993* (SA), s10(1)(v)(ix); *Environmental Protection Act 1994* (Qld), s4(4); *Environment Protection Act 1970* (VIC), s.1L; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s3(1)(d)

> (g) to promote the use of indigenous people's knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.[19]

Consideration of Climate Change and Greenhouse Gas Emissions

3.12 In the absence of climate change legislation such as that in the ACT, South Australia and Victoria,[20] the majority of submissions received expressed particular concern that the Bill is silent on the issue of climate change and greenhouse gas emissions. In addition to calling for the objects of the Bill to be amended accordingly, submitters expressed the view that climate change and greenhouse gas emissions should also be a mandatory consideration in decision-making provisions throughout the Bill.[21]

3.13 For example, EDONT noted that it was:

> highly concerned that the Bill, which will be the cornerstone of environmental law for the Northern Territory, fails to mention climate change. Given the level of threat posed by climate change (as spelt out by the Intergovernmental Panel on Climate Change), this is highly concerning. Noting that legislation can have an approximate 'life span' of 20 years, it is crucial that the Northern Territory ensures that its core legal framework for environmental protection is modern and forward looking and can respond appropriately to the challenges of the future.
>
> Other jurisdictions are moving to include references to climate change, particularly in objects clauses, in recognition of the need to establish clear obligations on decision-makers to consider greenhouse gas emissions, and plan for climate change impacts when assessing and approving the environmental impacts of development.
>
> Clear, mandatory and enforceable requirements in legislation are required to ensure there is explicit accountability around the requirements for decision-makers to fully integrate climate change into their decision-making. … Given the above, we submit that the Bill must contain a specific object relating to climate change and must integrate climate change into key operational provisions across the Bill. This will ensure the EIA [Environmental Impact Assessment] system is effective to support development that reduces greenhouse gas emissions and is focused on effectively adapting to climate change impacts.[22]

EDONT subsequently recommended that the objects of the Bill be amended to include:

> (f) to support decision-making that accounts for climate change, in particular recognising the need to reduce greenhouse gas emissions and to plan effectively for climate change impacts.[23]

3.14 The Environment Centre NT (ECNT) expressed similar sentiments:

> As outlined in the NT Government's Discussion Paper on Mitigation and Adaption Opportunities in the Northern Territory, economic development generally increases greenhouse gas emissions, contributing to climate change. Climate

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[19] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s3(1)(f) & (g)

[20] *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT)*; Climate Change and Greenhouse Emissions Reduction Act 2007* (SA)*; Climate Change Act 2017* (Vic)

[21] see for example, EDONT., Submission 1; Indigenous Carbon Industry Network (ICIN), Submission 12; Environment Centre NT (ECNT), Submission 13; Kirsty Howey – North Australia Research Unit, Submission 16; Arid Lands Environment Centre (ALEC), Submission 24

[22] EDONT, Submission 1, pp.3-4; see also *Planning Act 2016* (QLD), s3; *Biodiversity and Conservation Act 2016* (NSW), s1.3

[23] EDONT, Submission 1, Attachment A, p.16

> change will also adversely affect the Northern Territory in a number of ways, necessitating adaption. If the Northern Territory is to contribute to climate change mitigation and adapt to the effects of climate change, it is imperative that climate change mitigation and adaption are emphasised whenever development proposals are going through the Northern Territory's environmental protection regime.
>
> Given that this Environment Protection Bill will likely be in place for twenty years (if passed), this is a once-in-a-generation opportunity to ensure that climate change is at the heart of the environmental protection regime. Inclusion of climate considerations is essential to implement the ESD [Ecologically Sustainable Development] principle of intergenerational equity: the interests of future generations in a safe climate should be considered when making a decision on a project with climate change implications.[24]

3.15 While the *Climate Change: Mitigation and Adaption Opportunities in the Northern Territory Discussion Paper* indicates that the Bill is one of the actions the Government is taking to mitigate risks and adapt to the changing environment,[25] the Indigenous Carbon Industry Network (ICIN) expressed the view that:

> By avoiding any reference to greenhouse gas emissions or a specific carbon offset policy, not only does the Bill fail to recognise an emerging environmentally sustainable industry which generates jobs and income for very remote Indigenous communities, it ignores the Northern Territory's global responsibility to reduce its greenhouse gas emissions and reduces the power of decision-makers to determine that the greenhouse gas emissions of a particular future development should be avoided or reduced. …
>
> In the good faith that it will support clearer policy setting for managing the NT's climate impact, ICIN has fully participated in informing the drafting of the NT's Climate Change Strategy. However, it remains to be seen what tools the NT Government will have to implement any future Climate Change Strategy if it misses this rare opportunity to provide a regulatory framework for the assessment and offset of the greenhouse gas emissions of a proposed development.[26]

Further, ICIN called on the Committee to recommend that the Bill be amended to:

> ensure that reducing the Territory's greenhouse gas emissions, and increasing action to draw down atmospheric greenhouse gases, is an Object of the Bill, and a mandatory consideration for every decision-maker and authority throughout the Bill, including s73.[27]

3.16 While noting that consideration of climate change impacts is a component of ESD, Kirsty Howe (North Australia Research Unit) nevertheless suggested that "there should be stand-alone provisions requiring consideration of climate change impacts in environmental assessments."[28] Acknowledging the importance of specifically referencing these matters, the Committee notes that the *Climate Change Act 2017* (Vic) requires that the potential impacts of climate change and the potential contribution to the State's greenhouse gas emissions are taken into account by decision-makers and any policy, program or process developed or implemented by

[24] Environment Centre NT (ECNT), Submission 13, p.3
[25] Northern Territory Government, *Climate Change: Mitigation and Adaption Opportunities in the Northern Territory Discussion Paper,* Northern Territory Government, Darwin, 2018, p.5
[26] Indigenous Carbon Industry Network (ICIN), Submission 12, p.2
[27] ICIN, Submission 12, p.2
[28] Kirsty Howe (North Australia Research Unit), Submission 16, p.5

the Government, including decisions made under the *Environment Protection Act 1970* (Vic).[29]

3.17 In response to these concerns, the Department advised the Committee as follows:

> Objects clauses are intended to give a general understanding of the purpose of legislation. They provide general principles or aims that help with legislative interpretation. The objects clause reflects the intent of the Bill to, at a high level, protect the environment, promote ecologically sustainable development (ESD) and ensure the community has the opportunity to be involved in decision-making that may affect them.
>
> Climate change and greenhouse gases, is one of a number of matters that should be considered when delivering environmental protection and ESD outcomes. These environmental threats are addressed under the Bill in the same way as other threats (e.g. impacts to biodiversity or coastal processes) by ensuring that significant impacts of projects are appropriately assessed, and if approved, are subject to appropriate conditions. ….
>
> The current drafting of the Bill provides greater flexibility for the Northern Territory Environment Protection Authority (NT EPA) in its implementation of the environmental impact assessment process, allowing it to respond to the specifics of a proposed action and its location. This allows the NT EPA to tailor how the environmental impact assessment is to be conducted for a proposed action, including information it needs to determine likely impact. Prescribing, through the Bill, all the impacts that need to be considered (including climate change and greenhouse gas emissions) in the environmental impact assessment process would come at the risk of precluding environmental impacts that may arise in the future as well as increased administrative burden for proponents and decision-makers. It would also potentially require the NT EPA and Minister to consider climate change and greenhouse gas impacts in relation to all developments, irrespective of whether or not such matters are of significant impact. This would undermine the focus of the Bill on the assessment and approval of significant environmental impacts.
>
> The Bill provides for the NT EPA to consider any applicable environmental objectives (cl 57(3)) developed under clause 28 of the Bill. It is through these clauses that objectives for managing climate change and other contemporary environmental issues are able to be identified for consideration in decision-making. Climate change is inherent in several of the ESD principles and decision-makers are required to consider these principles when making a decision.
>
> The Department suggests that clause 42(b) of the Bill may be amended to reference "the impacts of a changing climate" as a matter to be taken into account in conducting the impact assessment process. A broad reference to a changing climate will provide greater flexibility when considering potential impacts and is more appropriate than a specific reference to greenhouse gas emissions. The Bill is about ensuring ecologically sustainable development – it is not a forum for ensuring that Government and proponents adopt tools to adapt to a changing climate. A reference to 'planning for climate change impacts' would take the Bill beyond its intended scope and purpose.[30]

Committee's Comments

3.18 The Committee is satisfied with the Department's response regarding inclusion of climate change and greenhouse gas emissions within the objects of the Bill.

[29] *Climate Change Act 2017* (Vic), ss17 and 20

[30] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.1-2

Furthermore, as noted by Ms Joanne Townsend (Chief Executive Officer: Department of Environment and Natural Resources), the purpose of clause 28 'Environmental objectives' is to provide:

> the mechanism to declare significant matters that must be considered in the impact assessment process. It is through this clause that climate change is proposed to be identified as an objective to guide decision-making under the Bill, although I note in answer to written questions from the committee we have also recognised that impacts from a changing climate could also be given greater recognition by incorporating it into the purpose of environmental impact assessment at clause 42.[31]

3.19 Clause 42(b) provides that all actions that may have a significant impact on the environment are assessed, planned and carried out taking into account:

(i) the principles of ecologically sustainable development; and

(ii) the environmental decision-making hierarchy; and

(iii) the waste management hierarchy; and

(iv) ecosystem-based management

Taking into consideration the views of submitters and the Department's advice, the Committee agrees that this clause should be amended to include the impacts of a changing climate as a matter to be taken into account when assessing planning and carrying out actions that may have a significant impact on the environment.

Recommendation 2

The Committee recommends that clause 42(b) be amended to include the impacts of a changing climate as a matter to be taken into account when assessing, planning and carrying out actions that may have a significant impact on the environment.

Part 1, Division 2: Important Concepts

3.20 As outlined below, a number of submitters made suggestions as to ways in which the drafting of several key concepts in this division might be improved.

Meaning of environment

3.21 Clause 6 provides that the term 'environment' means 'all aspects of the surroundings of humans including physical, biological, economic, cultural and social aspects.' Concerns were raised by a number of submitters that, as drafted, the definition was too broad. For example, EDONT noted that:

> We are concerned that the definition of 'environment' (Bill cl 6) has been drafted too broadly, particularly by the inclusion of 'economy'. While EIA processes necessarily involve consideration of a range of social and economic aspects in how they relate to environmental concerns, in our view the proposed definition is so broad as to expand the scope of EIA, and potentially create difficulties in the administration of the legislation consistent with its intended purpose (i.e. the

[31] Committee Transcript, Public Hearing, 29 July 2019, p.67

protection of the environment). We suggest a more appropriate avenue would be to adopt a definition similar to that contained in the Commonwealth legislation.[32]

3.22 AMEC also raised concerns regarding the breadth of the definition, noting that:

> The definition of Environment underpins this legislation. Industry considers that this definition of environment is too broad and should focus only on the natural environment. The current definition is inclusive of physical, biological, economic, social and cultural aspects.
>
> The definition does articulate a clear boundary of what is considered. It does not provide certainty, as almost any matter can be considered under the current definition of environment. These matters are not then considered in the decision-making principles articulated in Part 2.
>
> It also gives the impression that the EPA has seriously considered the economic and social benefits of a proposal, when it does not have sufficient expertise to do so.[33]

3.23 Noting that the Bill retains the definition of environment from the existing *Environmental Assessment Act 1982* (NT), ECNT suggested that the definition is:

> idiosyncratic and, in our view, runs the risk of broadening the definition of environment and prioritising economic considerations. We recommend utilising a similar definition to the one contained in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) in s528:
>
> environment includes:
>
> *(a) ecosystems and their constituent parts, including people and communities; and*
>
> *(b) natural and physical resources; and*
>
> *(c) the qualities and characteristics of locations, places and areas; and*
>
> *(d) heritage values of places; and*
>
> *(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c), or (d).*[34]

3.24 In response to these comments and suggestions, the Department advised the Committee that:

> Extensive consideration was given to the definition of environment. The definition in the Bill is consistent with the current definition in the *Environmental Assessment Act 1982* and ensures that projects can be considered holistically rather than just focussing on the biophysical aspects.
>
> Consideration was given to amending the definition to reflect some more modern approaches, such as by including specific reference to health in the definition. The existing definition has served the Territory and is well understood within the context of environmental impact assessment. There is no evidence from the Northern Territory experience that this definition has created difficulty in the administration of the legislation.
>
> The NT EPA and other decision-makers are required to weigh all factors in decision-making. This is the core of decision-making for ESD. It is also a requirement of the Bill (as identified in its objects). Appropriate agencies will provide information to the NT EPA on these matters. …

[32] EDONT, Submission 1, p.6
[33] AMEC. Submission 23, p.8
[34] ECNT, Submission 13, p.4

> The NT EPA prepares an assessment report at the completion of the assessment process. The report addresses whether objectives for protecting the biophysical environment, and social and cultural matters are likely to be achieved. The NT EPA's assessment considers each of these matters in an integrated way, but not necessarily equally. For example a biophysical objective for managing a site may conflict with cultural objectives associated with the site. The NT EPA is required to use its expertise and judgement to reach a position on this conflict and what it believes is an acceptable outcome in the specific context.
>
> The NT EPA also ensures that its report identifies the potential economic benefits (or costs) associated with the proposed project in order to ensure that this is considered in the decision-making process. For each decision, the NT EPA is required to prepare and publish its reasons for the decision.
>
> The *Northern Territory Environment Protection Authority Act 2012* contains skills and qualification requirements for members of the NT EPA. The breadth of these requirements reflects the breadth of the NT EPA's responsibilities in considering social, cultural and economic matters as well as the biophysical environment.
>
> Clause 17(2) requires all decision-makers to consider the principles of ESD in decision-making. The Minister is also required to consider the assessment report provided by the NT EPA which is based on an assessment on the impacts of the environment and consideration of ESD – refer clauses 73 and 76. The Minister is required to prepare and publish reasons for each decision made under the Act which will provide further information on how these matters have been taken into account.[35]

3.25 Noting that the definition of environment has been a "persistent issue throughout the development of the Bill"[36], Ms Joanne Townsend (Chief Executive Officer, Department of Environment and Natural Resources) further noted that:

> The incorporation of matters other than biophysical is important for the environmental impact assessment process because it supports a holistic consideration of a proposed action allowing decision-makers to understand the likely benefits and impact if an action proceeds. To only examine an action in its significant impact on the biophysical environment would give an incomplete and inaccurate picture of what the action actually means for the Territory. …
>
> In her consideration of the NT EPA's advice, the Minister is able to consult with other relevant Ministers – which was an amendment which was made to the Bill since consultation – further supporting a holistic review of the proposed action. The breadth of the definition of 'environment' ensures the Minister for Environment and Natural Resource must consider the economic and social implications of a development.
>
> A refusal under the Environment Protection Bill will only occur where a proponent has failed to demonstrate the worth of its project in economic and social contribution to the Territory, compared to the cost of significant residual risks to the natural environment.
>
> Contrary to some of the views presented to the Committee, amending the current definition to require consideration of only the biophysical impacts is more likely to result in projects not being approved, not the other way around. This is because risks to the environment will not be able to be considered in the context of the project's economic or social benefits and outcomes.[37]

[35] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.3-4
[36] Committee Transcript, Public Hearing, 29 July 2019, p.65
[37] Committee Transcript, Public Hearing, 29 July 2019, pp.65-6

Committee's Comments

3.26 The Committee is satisfied with the Department's response and clarification of the issues raised by submitters. The Committee also notes that definitions of environment vary quite considerably across jurisdictions. For example, while the definition of environment in Queensland, the ACT and the Commonwealth include social, cultural and economic factors, this is not the case elsewhere.[38]

3.27 The Committee also notes that the definition as proposed in the Bill is no broader than equivalent provisions in other jurisdictions. For example, section 3(1) of the *Environment Protection Act 1993* (SA) provides that environment means 'land, air, water, organisms and ecosystems, and includes human-made or modified structures or areas; and the amenity values of an area'. Under section 4 of the *Environment Protection Act 1970* (Vic), the meaning of environment encompasses the 'physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours, tastes, the biological factors of animals and plants and the social factor of aesthetics'.[39]

Meaning of material environmental harm, significant environmental harm and significant impact.

3.28 Given their importance in the environmental impact assessment and approval process, concern was raised by a number of submitters regarding the drafting of the meanings of material environmental harm, significant environmental harm and significant impact.

3.29 In contrast to equivalent provisions in Queensland, the ACT and Western Australia,[40] the meaning of material environmental harm in clause 8 does not provide a threshold amount as provided for in the meaning of significant environmental harm at clause 9(b). AMEC noted that lack of clarity regarding thresholds was a concern to industry.[41] Conversely, EDONT questioned the inclusion of a monetary threshold in clause 9(b) noting that:

> It is an artificial approach that does not translate appropriately in a useful way, when applying a threshold test of 'significance' – prior to any action being undertaken. For example, how can the level of impact on the disturbance of critical habitat that puts a bird at risk of extinction, be translated into a monetary figure intended to estimate the cost to 'remediate'? We consider clause 9(b) should be deleted.[42]

3.30 However, the Department subsequently advised the Committee that:

> The definition of significant environmental harm includes capacity to specify an explicit threshold amount consistent with other jurisdictions and the *Waste Management and Pollution Control Act 1998.* Given the approach to the definition of material harm, which is harm that is not trivial or negligible, and less serious

[38] *Environmental Protection Act 1994* (Qld), s8; *Environment Protection Act 1997* (ACT), Dictionary; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s528
[39] *Environment Protection Act 1993* (SA), s3; *Environment Protection Act 1970* (Vic), s4
[40] *Environmental Protection Act 1994* (Qld), s16; *Environment Protection Act 1997* (ACT), Dictionary; *Environmental Protection Act 1986* (WA), s4
[41] AMEC, Submission 23, p.7
[42] EDONT, Submission 1, p.7

> than significant environmental harm, it is not necessary to establish a specific threshold for that type of harm. Any threshold would simply be identified as "would, or is likely to cost less to remediate than the monetary amount prescribed by regulation." The monetary amount would equate to the amount prescribed for significant environmental harm.[43]

3.31 A number of submitters, including EDONT, ALEC (Arid Lands Environment Centre) and ECNT, also raised concerns with use of the word 'major' in relation to the meaning of 'significant environmental harm' and 'significant impact' in clauses 9 and 11.[44] For example, EDONT noted that:

> We are highly concerned with how 'significant impact' is defined (Bill cl 9, 11) – that is, that an impact must be of 'major consequence'. The definition of significant impact is key to how the legislation will operate, by guiding what actions will require EIA and approval. The language must be set to ensure that the threshold of impact is not unreasonably high, such that significant environmental impacts are determined to not be captured by the legislation.
>
> This definition is also inconsistent with the language used by the Commonwealth under the *Environment Protection Biodiversity Conservation Act 1999* (EPBC Act) for interpreting the test of 'significant impact' under Commonwealth EIA:
>
> > *A 'significant impact' is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value and quality of the environment which is impacted and upon the intensity, duration, magnitude and geographic extent of the impacts.*
>
> If the Bill is intended to be accredited for assessment under the EPBC Act (which we understand to be the Department's intent, and that this has been a substantial influence on the Bill's drafting), we strongly recommend that the Bill be consistent with those of the Commonwealth. We therefore suggest the word 'major' must be deleted from clauses 9 and 11.[45]

3.32 In response to these concerns and suggestions, the Department advised that:

> Consideration was given to approaches taken across various jurisdictions in developing concepts and definitions. The proposed definition is substantially aligned with the approach taken in the referenced guidelines [*Matters of National Environmental Significance – Significant Impact Guidelines*], with the primary difference being that the approach in the Bill uses the term "major consequence' which is of a higher bar than "important, notable or of consequence." Additionally, to further assist in the administration of the legislation, similar guidance material covering a range of matters referenced in the Bill will be developed for the Territory's specific circumstances once the Act is in place.[46]

Committee's Comments

3.33 The Committee is satisfied with the Department's clarification regarding the drafting of the meanings of material environmental harm, significant environmental harm and significant impact. In relation to the inclusion of a monetary threshold in clause 9(b),

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[43] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.5
[44] EDONT, Submission 1, p.7; ECNT, Submission 13, p.4; ALEC Submission 24, p.3
[45] EDONT, Submission 1, p.7
[46] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.6

the Committee notes that this is consistent with equivalent legislation in Queensland, the ACT and Western Australia.[47]

3.34 While it is acknowledged that the meanings of significant environmental harm and significant impact set a higher bar than that provided for in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the Committee notes that the approach taken in the Bill is not inconsistent with other jurisdictions. For example, equivalent provisions in Queensland and Western Australia refer to harm that is 'irreversible, of a high impact or widespread', whereas the ACT simply refers to harm that is 'very significant'.[48]

Part 2: Division 1: Principles of Ecologically Sustainable Development

3.35 Pursuant to clause 17(2), decision-makers must consider and apply the principles of ecological sustainability (ESD) set out in clauses 18-24 when making a decision under the Act. However, clause 17(3) then provides that in making a decision and stating the reasons for that decision, 'a decision-maker is not required to specify how the decision-maker has considered or applied these principles.' Concern was raised by EDONT, AMEC, the Northern and Central Land Councils (NCLC), ALEC, and Protect NT Inc. (PNT) that this provision undermines transparency and accountability, defeats the purpose of the 'must' principle in clause 17(2), and is internally inconsistent.[49]

3.36 The Committee sought clarification from the Department as to the intended operation of this clause and was advised that:

> It was determined not to require decision-makers to articulate how they have applied each of the principles of ESD in their decision-making on the basis that ESD decision-making is a holistic process. Not all principles are relevant to all decisions.
>
> Transparency and accountability is not undermined because the NT EPA will be required to provide and publish reasons for its decision, however requiring decision-makers to articulate reasons against specified criteria does not account for the interdependence of the principles or how the principles in their entirety have informed decision-making. It will become an onerous process that has the adverse effect of becoming an administrative checklist rather than providing a clear articulation of why a particular decision was made. It potentially establishes grounds for judicial review that can be exploited in order to delay projects without providing tangible environmental benefit.
>
> The approach taken by the Bill is to facilitate the development of holistic statements of reasons that are focussed towards an explanation of the decision and how it was reached addressing the relevant matters, over a checklist approach.[50]

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[47] *Environmental Protection Act 1994* (QLD), ss16 & 17; *Environment Protection Act 1997* (ACT), Dictionary; *Environmental Protection Act 1986* (WA), s4

[48] *Environmental Protection Act 1994* (QLD), ss16 & 17; *Environmental Protection Act 1986* (WA), s4; *Environment Protection Act 1997 (ACT), Dictionary*

[49] EDONT, Submission 1, p. 7; AMEC, Submission 23, p.8; Northern and Central Land Councils (NCLC), Submission 25, p.11; ALEC, Submission 24, p. 5; and Protect NT Inc. (PNT), Submission 19, p.1

[50] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.6

Committee's Comments

3.37 The Committee is satisfied with the Department's response, and notes that the approach taken in the Bill is similar to that currently provided for under section 25AA(1) of the *Northern Territory Environment Protection Authority Act 2012* (NT).

Decision-making Principle

3.38 The Minerals Council of Australia NT Division (MCA NT) suggested that to be consistent with the definition of 'environment', clause 18(1) should be amended to include economic and social considerations as currently provided for in section 25AA(2)(c) of the *Northern Territory Environment Protection Authority Act 2012* and section 3A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[51] However, as the Department pointed out:

> Economic and social considerations are inherent within the definition of environment. Including a separate reference to economic and social considerations within this principle introduces ambiguity in the interpretation of the principle.[52]

Committee's Comments

3.39 The Committee is satisfied with the Department's response and also notes that clause 18 includes a note which specifically references the definition of 'environment' in clause 6 of the Bill.

Precautionary Principle

3.40 MCA NT noted that, as drafted, the 'Precautionary Principle' set out in clause 19 omits the term 'cost effective' in relation to measures to prevent environmental degradation as provided for in Principle 15 of the *Rio Declaration on Environment and Development*.[53] AMEC also expressed the view that:

> Industry considers that this principle is weighed against any activity where the Government is uncertain of the outcome and provides an outlet to excuse not making a decision. It raises questions over what is determined to be sufficient certainty.[54]

3.41 In addition to considering the provisions of the Rio Declaration, the Department advised the Committee that:

> Consideration was given to approaches taken across various jurisdictions in the articulation of the *ESD* principles, including the *Intergovernmental Agreement on the Environment* (1992*)* and the *National Strategy for Ecologically Sustainable Development* (1992). Australian jurisdictions do not include 'cost-effective' in the

[51] AMEC, Submission 23, p. ; Minerals Council of Australia NT Division (MCA NT), Submission 22, p.5
[52] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.7
[53] MCA NT, Submission 22, p.5; AMEC, Submission 23, p. 9; United Nations General Assembly, *Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex I: Rio Declaration on Environment and Development (1992),* https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm, p.3
[54] AMEC, Submission 23, p.9

> articulation of the principle. The principle used is consistent with the *Environment Protection and Biodiversity Conservation Act 1999,* section 3A(b).[55]

Committee's Comments

3.42 The Committee is satisfied with the Department's response.

Principle of Intergenerational and Intragenerational Equity

3.43 MCA NT also raised concerns that the Principle of intergenerational and intragenerational equity at clause 21 fails to incorporate Principle 3 of the *Rio Declaration on Environment and Development*, which provides that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'[56]

3.44 Here again, the Department advised that in drafting the principle consideration was given to approaches taken elsewhere in Australia and noted that the principle used is consistent with section 3A(c) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[57]

Committee's Comments

3.45 The Committee is satisfied with the Department's response.

Principle of Conservation and Biological Diversity

3.46 EDONT and NCLC raised concern that, as drafted, the Bill effectively diminishes the importance of the 'Principle of conservation and biological diversity' in clause 23 by omitting the phrase 'and should be a fundamental consideration in decision-making'.[58] While acknowledging that the principle does not align with that currently provided for under section 25AA(2)(b) of the *Northern Territory Environment Protection Authority Act 2012,* or section 3A(d) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the Department advised that:

> The Bill requires decision-makers to consider all the principles of ESD. It is for decision-makers to determine the appropriate weighting to be given to various principles within the context of the decision that is being made.
>
> Redrafting of the principle to align with the EPBC Act [*Environment Protection and Biodiversity Conservation Act 1999* (Cth)] has the potential to create ambiguity in the interpretation of the Act and the application of the Principles by imposing an additional weighting on a single ESD Principle.[59]

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[55] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.7

[56] MCA NT, Submission 22, p.5; *United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), Annex I: Rio Declaration on Environment and Development (1992),* https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm, p.2

[57] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.7

[58] EDONT, Submission 1, pp.7-8; NCLC, Submission 25, p.16

[59] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.8

Committee's Comments

3.47 The Committee is satisfied with the Department's response.

Principle of Economic Competitiveness

3.48 AMEC suggested that, similar to clause 21 of the exposure draft, the Bill should incorporate a clearly articulated principle of economic competitiveness which:

> stipulates that the NT EPA must enumerate the estimated costs, jobs, potential royalties, taxes and comparative advantage such a development will create in the Territory.[60]

3.49 The Department advised the Committee that clause 21 was removed as a consequence of the consultation process, with a number of submitters highlighting that the proposed 'Principle of economic competitiveness' was not consistent with the *Rio Declaration on Environment and Development:*

> Clause 21 of the exposure draft reflected wording of the National Strategy for ESD, however it is not incorporated as a principle within the EPBC Act or across other jurisdictions. Submissions on the draft Bill, including those from industry and the NT EPA, reflected concerns about how the draft Principle could be enacted and demonstrated. The current wording of clause 24 reflects the principle of improved valuation, pricing and incentive mechanisms contained in the *Intergovernmental Agreement on the Environment* and is consistent with other jurisdictions.[61]

Committee's Comments

3.50 The Committee is satisfied with the Department's response.

Part 2, Division 2: Management Hierarchies

3.51 Clause 26 'Environmental decision-making hierarchy' sets out the approach to be taken by decision-makers, proponents and approval holders in relation to actions that affect the environment. In doing so it supports decision-making that:

> not only seeks to minimise adverse impact on the environment, but also to identify and put in place measures that enhance or restore environmental quality where possible. The clause establishes an approach to environmental protection that recognises that the upfront design of a proposed action is the best approach to minimising adverse impacts on the environment.[62]

3.52 While supporting the environmental decision-making hierarchy, EDONT expressed the view that they considered it:

> essential that this be a mandatory standard that must be applied by proponents in designing actions, and by decision-makers in assessing and determining applications for environmental approvals. The approach set by the hierarchy (avoid, mitigate and then offset impacts of development) is at the heart of the EIA process. Its mandatory application (applied consistently to all proponents and for

[60] AMEC, Submission 23, p.8
[61] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.8
[62] Explanatory Statement, *Environment Protection Bill 2019 (Serial 94),* https://parliament.nt.gov.au/committees/spsc/94-2019, p.5

> all decisions made under the legislation) is essential to ensure a robust framework that is based on international best practice principles.
>
> We therefore submit that the word 'should' be replaced with 'must' in clause 26. This would also be consistent with the requirement under clause 73 that the Minister be satisfied that the significant impacts of the action have been appropriately avoided, mitigated or offset.[63]

3.53 The Committee sought the Department's advice as to how it would impact on the operation of the legislation if clauses 26(1) and (2) were amended accordingly and was subsequently advised that "there would be little to no impact on the operation of the legislation if this amendment was adopted."[64]

3.54 As issues relating to waste management and pollution are to be included in the second stage of the environmental regulatory reform program[65], WK questioned the inclusion of clause 27 'Waste management hierarchy':

> In its 13 March 2019 response to Ward Keller's submission on the exposure draft, DENR [Department of Environment and Natural Resources] noted that a number of peripheral matters raised in the exposure draft of the legislation are more relevant to the broader environmental protection functions proposed in the second stage of environmental reform, replacing similar existing provisions in the (to be replaced) *Waste Management and Pollution Control Act 1998.* The response then indicated that these matters would be removed from the legislation now to be considered further at a later date, with appropriate further public consultation. In that vein, section 27 should be removed at this time for consideration at a later date.[66]

3.55 In response to the Committee's query regarding how this provision interacts with existing provisions under the *Waste Management and Pollution Control Act 1998* (NT), the Department advised that:

> Waste management considerations are relevant at all stages of the development process. It is appropriate for the hierarchy to be applied at the project development phase and when subject to environmental impact assessment. The provision is separate to the *WMPC Act* [*Waste Management and Pollution Control Act 1998*] but supports the objectives of that Act, including objectives relating to reuse and recycling.[67]

Committee's Comments

3.56 The Committee agrees with EDONT that application of the 'Environmental decision-making hierarchy' by decision-makers, proponents and approval holders should be mandatory. Given the Department's subsequent advice that this would not unduly impact on the operation of the legislation, the Committee is of the view that clauses 26(1) and (2) should be amended accordingly.

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[63] EDONT, Submission 1, p.8
[64] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.8
[65] Department of Environment and Natural Resources, *The Environmental Regulatory Reform Program,* Northern Territory Government, Darwin, 23 April 2019, p.1
[66] WK, Submission 14, p.15
[67] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.9

3.57 With regards to the inclusion of the 'Waste management hierarchy' at clause 27, the Committee is satisfied with the Department's response. As noted in the Explanatory Statement:

> This clause largely speaks to a proponent and places a focus on a proposed action being designed, implemented and managed to minimise waste creation and a pollution discharge to the environment. Avoiding production of waste is to be the priority for a proponent. The least preferred approach to be accepted by decision-makers is the reliance on waste disposal undertaken in an environmentally sound manner. This clause therefore seeks to address the real threat of waste disposal and discharge to the Northern Territory's environment.[68]

Recommendation 3

The Committee recommends that clauses 26(1) and (2) be amended by replacing the word should with the word must.

Part 3: Environment Protection Declarations

3.58 Part 3, Division 1 provides for the declaration, amendment and revocation of environmental objectives and referral triggers. Division 2 provides for the declaration and revocation of declarations of temporary and permanent protected environmental areas and prohibited actions. As detailed below, a range of concerns were raised by a number of submitters regarding the absence of consultation provisions, and the intended operation of a number of clauses within these divisions.

Declaration of Environmental Objectives and Referral Triggers

3.59 Clause 28 provides that 'the Minister may, by *Gazette* notice, declare environmental objectives for this Act.' As noted by the Department:

> The inclusion of clause 28 enables the identification and communication of matters that must be considered in the environmental impact assessment process, providing the potential for greater specificity of what is considered a significant environmental matter than is provided by the Bill (such as a climate change objective).
>
> Environmental objectives will assist proponents in gauging significant impact and a decision on whether or not to refer their project to the NT EPA. The NT EPA would also be required to use environmental objectives when determining the significance of impact of a proposed action.
>
> A similar approach is currently being applied by the NT EPA who has published the *NT EPA Environmental Factors and Objectives.* These objectives identify those matters to be considered when determining whether an action may have a potentially significant impact on the environment.[69]

Until such time as the Minister establishes environmental objectives, the Committee understands that the NT EPA will continue to apply its environmental factors and objectives in the environmental impact assessment process.[70]

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[68] Explanatory Statement, *Environment Protection Bill 2019 (Serial 94),* https://parliament.nt.gov.au/committees/spsc/94-2019, p.5

[69] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.9

[70] Department of Environment and Natural Resources, *Frequently asked questions*, Northern Territory Government, Darwin, 23 April 2019, p.5; see also Northern Territory Environment Protection Authority, *NT*

3.60 Clause 30 provides that the Minister may, by *Gazette* notice, also declare activity-based or location-based referral triggers. In declaring a referral trigger, the Minister may also 'specify circumstances in which, and the thresholds above which, actions are to be subject to the trigger.' As provided for under clause 29, a referral trigger requires a proponent of an action to refer the action to the NT EPA for assessment in accordance with the regulations because it has the potential for significant impact on the environment by virtue of the type of activity or its proposed location.

3.61 As further explained in the Department's fact sheet on *Referral pathways for impact assessment:*

> A **location-based** referral trigger is where an area has been formally identified as being of exceptional environmental significance. This may be due to a feature of the natural or cultural environment such as the last known habitat of a critically endangered species.
>
> An **activity-based** referral trigger identifies specific actions that may pose an extraordinary potential for significant impact. Such an activity would likely be described in terms of the threshold of activity that would require the proposed action to be referred. Threshold values may reflect scale and/or expected output and/or expected waste products. For example, an activity trigger might be the construction of a new water storage dam that is located on a continuously flowing river, or which exceeds a specified height, or which captures a certain percentage of the catchment. Only proposed actions that meet the thresholds for the identified activity would need to be referred.[71]

3.62 As provided for in clauses 28 and 30, declarations of environmental objectives and referral triggers must be prepared in accordance with the regulations and the Minister is required to publish a statement of reasons for making declarations. While noting that the Department's fact sheets indicate that the Minister will consult with the NT EPA and the public prior to the gazettal of environmental objectives and referral triggers, MCA NT questioned why there is no requirement for the Minister to consult with industry or the broader community:

> The need for *bona fide* consultation with industry and the broader community in declaration of environmental objectives and referral triggers by the Minister was raised in the MCA NT's 2018 submission (Recommendation 7) but not implemented in the development of the 2019 Bill.
>
> In relation to declaration of environmental objectives, section 28 merely states that declaring environmental objectives (aimed at targeting and streamlining EIA) will require the Minister to abide by a process set out in the future Regulations. Neither the Bill nor the explanatory statement includes a commitment that adequate consultation will be required in this process to be outlined in the Regulations. The only references to this commitment are in Fact Sheets, released in conjunction with release of the 2019 Bill, which have no legal standing (e.g. Fact Sheet 25, *Frequently Asked Questions).*The same is true for declaration of referral triggers (section 30) …
>
> The MCA NT therefore recommends that Sections 28 and 30 (Ministerial declaration of environmental objectives and referral triggers) of the Bill be

EPA Environmental Factors and Objectives, Northern Territory Environment Protection Authority, Darwin, February 2018, pp.7-9

[71] Department of Environment and Natural Resources, *Referral pathways for impact assessment,* Northern Territory Government, Darwin, 23 April 2019, p.2

> amended to explicitly state that the processes to make these declarations will involve bona fide public consultation.
>
> The MCA NT notes that unlike the declarations above, the explanatory statement for Section 36 (relating to declaration of permanent protected environmental areas) does reference public consultation. The Regulations will specify processes for making permanent declarations of protected environmental areas, which will include requirements for public consultation. The MCA NT recommends that this wording be incorporated into an amended version of the 2019 Bill.[72]

3.63 In response to MCA NT's concerns, the Department advised as follows:

> The identification of specific public consultation requirements are a procedural matter which are more appropriately contained in Regulations. The Regulations will specify public consultation processes for these declarations.
>
> There was internal inconsistency within the consultation draft Bill and Regulations. Under the draft Bill some policy development activities specified consultation requirements of a procedural nature, while other matters of a procedural nature occurred in the draft Regulations. To ensure internal consistency within the legislation, all matters of a more procedural nature have been moved to the Regulations.[73]

3.64 The Committee also sought clarification from the Department as to why there is no requirement for the Minister to table declarations of environmental objectives and referral triggers, and associated statements of reasons, in the Parliament. While the Bill requires the Minister to publish a statement of reasons for making these declarations, it was further noted that the Bill does not specify any timeframe within which this must occur. The Department subsequently explained that:

> The environmental objectives and referral triggers are policy instruments which give the community, proponents and NT EPA guidance about when a proposed project is to be referred to the NT EPA. The objectives also provide guidance to the NT EPA in its assessment of significant impacts. The documents do not establish rights or obligations and are not determinative in themselves.
>
> It is therefore unnecessary for the Minister to table such policy instruments in the Legislative Assembly and this would introduce an additional administrative burden on the Department and Assembly. The environmental objectives and referral triggers will be subject to public consultation during their development (as will be established in Regulations) and will be publicly available once established.
>
> It is anticipated that the Minister would publish the statement of reasons in conjunction with the declaration. For certainty, the Bill could be amended to require the statement to be published 'as soon as practicable' after making the declaration.[74]

3.65 As noted previously, until such time as the Minister makes a declaration on environmental objectives, the existing factors and objectives established by the NT EPA will continue to be used in the environmental impact assessment process. While industry are already familiar with these environmental objectives, NTCA (Northern Territory Cattlemen's Association Inc.) and MCA NT noted that the absence of any information as to what the referral triggers may be was of particular concern to

[72] MCA, Submission 22, pp.4-5
[73] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.9-10
[74] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.10

industry given that they will determine whether or not a project will be subject to assessment by the NT EPA.[75]

3.66 However, as explained in the Department's fact sheet on *Referral pathways for impact assessment*, and reiterated by Departmental representatives during the public hearing:

> While the Minister has the power to declare location or activity triggers, there is no requirement to do so. It's expected that referral triggers will only be declared in exceptional circumstances. This would be when there is a genuine and defensible need for potential developments of a certain activity type or in a certain location, to be referred to the NT EPA because of their potential for significant environmental risk. The NT EPA would then consider the proposed project's potential for significant impact to determine is an assessment is actually required.[76]

Committee's Comments

3.67 The Committee is satisfied with the Department's responses regarding consultation on the development of environmental objectives and referral triggers and the intended operation of these mechanisms. However, to ensure that information regarding declared environmental objectives and referral triggers is published in a timely manner, as suggested by the Department, the Committee considers that the Bill should be amended to provide that the Minister must ensure that statements of reasons for such declarations are published as soon as practicable following gazettal.

3.68 While clause 33 provides that the Minister may amend or revoke an environmental objective or referral trigger, the Committee notes that there is no requirement for amendments or revocations to be notified in the *Gazette* or for the Minister to publish a statement of reasons for such. It is the Committee's view that, in the interests of transparency and accountability and to ensure consistency with clauses 28 and 30, the Bill should be amended to provide that amendments and revocations are subject to the same notification and publication provisions as declarations.

Recommendation 4

The Committee recommends that clauses 28(5) and 30(4) be amended to require that the Minister must publish the statement of reasons for making a declaration as soon as practicable after making the declaration.

Recommendation 5

The Committee recommends that clause 33 be amended to provide that:

1. **The Minister may, by *Gazette* notice, amend or revoke an environmental objective or a referral trigger.**

[75] Committee Transcript, Public Hearing, 29 July 2019, pp.28-9; 38-9; 41

[76] Department of Environment and Natural Resources, *Referral pathways for impact assessment,* Northern Territory Government, Darwin, 23 April 2019, p.2; see also Committee Transcript, Public Hearing, 29 July 2019, pp.83-5

2. **The Minister must publish the statement of reasons for amending or revoking an environmental objective or a referral trigger as soon as practicable after making the amendment or revocation.**

Protected Environmental Areas and Prohibited Actions

3.69 Part 3, Division 2 provides for the declaration, and revocation of declarations, of temporary and permanent protected environmental areas and prohibited actions; the regulation of actions in declared areas; and associated offence provisions. Clarification was sought from a number of submitters as to why the consultation requirements regarding declarations of protected environmental areas and prohibited actions that existed in the exposure draft have been removed from the Bill as introduced. WK expressed the view that:

> Open and transparent decision-making requires consultation. This is especially so for temporary declarations, which may not be subject to the same legislative scrutiny as permanent declarations.[77]

3.70 However, as pointed out by the Department:

> Declaration of a temporary protected environmental area is an urgent response to an immediate risk, making consultation inappropriate for this action. Such declarations are short term. Permanent protected environmental area declarations are subject to consultative processes as are declarations of prohibited actions.
>
> There was internal inconsistency within the consultation draft Bill and Regulations. Under the draft Bill some policy development activities specified consultation requirements of a procedural nature, while other matters of a procedural nature occurred in the draft Regulations. To ensure internal consistency within the legislation, all matters of a more procedural nature have been moved to the Regulations. The Regulations will specify public consultation processes for the permanent protected environmental area and prohibited action declarations.[78]

3.71 In relation to temporary declarations of protected environmental areas, clause 35(2) provides that such declarations have effect for the period specified in the *Gazette* notice and not exceeding 12 months. WK suggested that this was too long and suggested that:

> Ninety (90) days, with the possibility of one ninety day extension should be sufficient to address more permanently whatever the underlying issue is that prompted the declaration.[79]

3.72 The Department advised that, in determining the 12 month timeframe:

> consideration was given to similar declarations under existing Territory legislation, including interim development control order provisions under the *Planning Act 1999* (valid for 2 years); the proposed consultation requirements for making permanent declarations; and administrative matters associated with government procedures.

[77] WK, Submission 14, p.15
[78] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.11
[79] WK, Submission 14, p.15

> A reduction of the timeframe as proposed by Ward Keller would, in effect, make the provisions inoperable. The timeframes would be too limited to provide sufficient time to gather the evidence to provide an evidence-based view of whether a declaration can be lifted or is required over a longer period, particularly taking into consideration the requirement to collect evidence across the marked seasonal variation present in most areas of the Territory.[80]

3.73 AMEC queried the requirement for this division and suggested that it was duplicative and unnecessary given that:

> In the Territory, 67 sites are identified as Sites of Conservation Significance, 'the most important sites for biodiversity conservation that need further protecting'. There is also RAMSAR wetlands, national parks and reserves. Over 5 million hectares of the Territory are successfully protected under the existing legislative mechanisms in national parks, reserves and wetlands. … It is unclear why the government has chosen to create a new instrument of 'Protected Environmental Areas' through Division 2, Part 3. … Furthermore, the capacity to create conservation estate already exist in other legislation. The existing legislation appears to be achieving the desired outcome of creating conservation estate.[81]

3.74 Given AMEC's concern, the Committee sought clarification form the Department as to how this division interacts with provisions under the *Heritage Act 2011* (NT) and other relevant legislation in relation to declaring sites of conservation significance and protected environmental areas. The Department subsequently advised that:

> The *Heritage Act 2011* provides for the conservation of cultural and natural heritage by allowing the declaration of objects and places with heritage significance. This does not extend to areas of significance of the natural (or biophysical) environment.
>
> The *Territory Parks and Wildlife Conservation Act 1976* (TPWC Act) allows for the declaration of parks, reserves, wilderness zones and sanctuaries. Each of these types of declarations are associated with specific requirements for management and public access. The declaration of areas under the TPWC Act does not generally preclude development occurring within them, and does not serve the same purpose as the proposed protected environmental areas.
>
> Sites of conservation significance do not have a legislative foundation. The provisions of the Bill support the provisions of other Territory legislation in ensuring the appropriate protection of elements of the environment.[82]

3.75 In contrast to the exposure draft, clauses 36 'Permanent declaration of protected environmental area, 38 'Declaration of prohibited actions' and 39 'Revocation of declaration' of the Bill transfer the decision-making power from the Minister to the Administrator. However, as EDONT pointed out:

> It is completely inappropriate to assign executive decision-making power in this context to the Administrator, which is a public office that plays a procedural role in law making and is not accountable to Parliament or the community. These obligations must rest with the Minister, for accountability. Clauses 36, 38 and 39 must be amended accordingly.[83]

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[80] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.11-12
[81] AMEC. Submission 23, p.9
[82] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.12
[83] EDONT, Submission 1, p.8

3.76 The Department advised the Committee that the Bill was amended in response to concerns raised by some stakeholders that powers of this nature should not be held by the Minister, "elevation of these responsibilities to the Administrator was considered to provide evidence of a more complete, whole of Government consideration of the matter."[84] However, the Department also acknowledged that, consistent with declarations of this nature in the *Mineral Titles Act 2010* (NT) and the *Planning Act 1999* (NT), "the operation of the Bill would be improved if this power was placed with the Minister."[85]

3.77 Given the potential impact on development, the Committee sought clarification from the Department as to why the Bill does not include any requirement for declarations of protected environmental areas and prohibited actions, including associated statements of reasons, to be tabled in the Parliament. While noting that the Bill provides that the Minister must publish the statement of reasons for making declarations, the Committee also queried why the Bill does not include a timeframe within which this must occur.

3.78 The Department subsequently advised the Committee that:

> These declarations are gazetted which is consistent with requirements for similar instruments under other legislation; e.g. reserved land declarations under the *Minerals Titles Act.* It would be inconsistent to require the Minister to table such instruments when similar instruments under other legislation are not required to be tabled. … However, the Department acknowledges that tabling of these declarations would provide an additional level of oversight, scrutiny and accountability to the declaration process.
>
> It is anticipated that the Minister and Administrator would publish the statement of reasons in conjunction with the declaration. For certainty, the Bill could be amended to require the statement to be published 'as soon as practicable' after making the declaration.[86]

Committee's Comments

3.79 The Committee is satisfied with the Department's response regarding consultation on protected environmental areas and prohibited actions, the purpose of these provisions and considers that, as a maximum, the 12 month timeframe for temporary declarations is appropriate. The Committee also notes that further information regarding protected environmental area and prohibited action declarations is provided in the Department's fact sheet: *Protected environmental areas and prohibited actions.*[87]

3.80 However, with regards to the transfer of decision-making power from the Minister to the Administrator, the Committee notes that the provisions in the Bill are inconsistent with both the *Northern Territory (Self Government) Act 1978* (Cth) and the

[84] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.12-13
[85] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.13
[86] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.13
[87] Department of Environment and Natural Resources, *Protected environmental areas and prohibited actions,* Northern Territory Government, Darwin, 29 April 2019

Interpretation Act 1978 (NT). While section 32(3) of the *Northern Territory (Self Government) Act 1978* requires that the Administrator exercise powers in accordance with instructions from the Minister, section 34(1) of the *Interpretation Act 1978* prohibits a provision conferring a function on the Administrator being read as enabling the Administrator to perform that function except with the advice of the Executive Council. Noting the Department's comments that placing these responsibilities with the Minister would improve the operation of the Bill, the Committee has recommended that clauses 36, 38 and 39 be amended accordingly.

3.81 Given the Department's advice, the Committee has further recommended that clauses 36 and 38 be amended to provide that declarations of protected environmental areas and prohibited actions, including associated statements of reasons, are tabled in the Legislative Assembly following notification in the *Gazette.* In addition, the Committee has recommended that the Bill be amended to require that the Minister must publish the statement of reasons for making such declarations at the time of gazettal.

3.82 While clause 39 regarding revocations of temporary or permanent declarations of protected environmental areas and prohibited actions provides that revocations must be notified in the *Gazette,* the Bill does not include any requirement for gazettal notices to be accompanied by a statement of reasons, or for revocations to be tabled in the Assembly or published. As with declarations, the Committee is of the view that for transparency and accountability, and consistency with clauses 26 and 38, revocations should also be subject to scrutiny by Parliament. The Committee is, therefore, of the view that this clause should be amended to include a requirement for revocations, and associated statements of reasons, to be tabled in the Legislative Assembly and for statements of reasons to be published at the time of gazettal.

Recommendation 6

The Committee recommends that clauses 36, 38 and 39 be amended as follows:

1. **Replace all instances of the word Administrator with the word Minister.**
2. **Include a requirement that the Minister must table declarations of protected environmental areas and prohibited actions and any subsequent revocation of declarations, including associated statements of reasons, in the Legislative Assembly following notification in the *Gazette.***
3. **Include a requirement that the Minister must publish the statement of reasons for making a declaration of protected environmental areas and prohibited actions and any subsequent revocation of declarations, at the time of gazettal.**

Part 4: Environmental Impact Assessment Process

3.83 As detailed below, submitters raised concerns regarding provisions relating to the purpose of the environmental impact assessment process, the general duty of proponents, and referrals.

Purpose of Environmental Impact Assessment Process

3.84 Clause 42(a) provides that the purpose of an environmental impact process is to ensure that 'actions do not have an unacceptable impact on the environment, now or in the future'. Noting that the term 'unacceptable impact' is not defined and is potentially open to interpretation, the Committee sought clarification from the Department as to what guidance will be provided to decision-makers. The Department noted that:

> To avoid any potential ambiguity in interpretation, the assessment process will be defined further in the Regulations and any necessary administrative procedures and guidance material. This will include advice to proponents and the community about the interpretation of unacceptable.
>
> Unacceptable impact is a judgement that is made in consideration of the proposed action and matters identified during an assessment process. There are many factors that would contribute to an action having unacceptable impacts, such as locality or competition for natural resources, etc. It is not a matter that is suitable or open to specific definition.[88]

3.85 In relation to the requirement under clause 42(b) for all actions that may have a significant impact on the environment to be assessed, AMEC questioned whether this would extend to Government projects such as roads and infrastructure:

> There has been concern from some within industry that the Territory Government will not be expected to adhere to this legislation. The NT Government should be subject to its own environmental legislation, as Government projects also affect the environment.[89]

However, the Department pointed out that:

> Clause 14 identifies that the Act binds the Crown. There are no exclusions from the Act for Government projects. The Act applies to Government projects equally with any private proponent, and will depend on objective consideration of whether the proposal has the potential to have a significant impact on the environment.[90]

Committee's Comments

3.86 The Committee is satisfied with the Department's clarification regarding the term 'unacceptable impact' and the application of the legislation to Government projects.

General Duty of Proponents

3.87 Clause 43 details the general duties of proponents of an action under an environmental impact assessment process. Subclause (a) provides that proponents have a duty to provide communities that may be affected by a proposed action with information and opportunities for consultation regarding the proposed action and its potential impacts and benefits. EDONT suggested that this clause could be strengthened by extending it to include cumulative impacts. It was further suggested

[88] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.14
[89] AMEC, Submission 23, p.10
[90] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.15

that there should be a requirement for proponents to demonstrate their compliance with each of the duties.[91]

3.88 With regards to inclusion of the words 'cumulative impacts' in clause 43(a), the Department advised that while it had been considered it was also acknowledged that:

> single proponents are not necessarily in a position to identify the cumulative impact of their specific project in the context of other projects within an area or region. Nevertheless, a proponent may be specifically required to consider cumulative impacts during the environmental assessment process, if the NT WPA considers this to be necessary.[92]

3.89 Noting that the duties in clause 43 are of a policy nature, the Department further advised that:

> The impact assessment process requires consideration of information provided by a proponent and community views in relation to the proposed project. This provides the NT EPA with the capacity to assess the effectiveness of the proponent's actions in relation to meeting each of these duties. However, the duties are not of a nature that it is appropriate that they be the subject of formal compliance or enforcement action.
>
> The impact assessment process is designed to ensure that the NT EPA is provided with the information that it requires to assess and make recommendations to the Minister about the environmental impacts of specific projects. The Regulations will specify impact assessment processes and powers of the NT EPA to obtain information, for example by issuing further information requests when the information supplied is insufficient in some way, and engaging additional expertise to advise it in relation to specific matters (e.g. the design and likely effectiveness of a water storage system in preventing discharges of contaminated water).[93]

Committee's Comments

3.90 The Committee is satisfied with the Department's advice.

Referrals

3.91 Subject to clause 49 'Referral of strategic proposal', clause 48 provides that a proponent must refer a proposed action to the NT EPA for assessment where it has the potential to have a significant impact on the environment or meets a referral trigger. EDONT sought clarification as to why the Bill does not include a corresponding offence provision for failing to comply with this obligation, given that "an appropriate offence provision was originally included in the Exhibition Bill."[94]

3.92 The Department advised the Committee that:

> Consideration was given to including an offence of the nature proposed by EDONT. This was not pursued following discussions with the Department of the

[91] EDONT, Submission 1, pp.8-9
[92] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.14
[93] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.14-15
[94] EDONT, Submission 1, p.9

> Attorney-General and Justice which advised on all offence provisions and penalties.
>
> The development of referral information and referral of a project merely identifies a proponent's intent. It was not considered appropriate to impose penalty provisions associated with a proponent's intent to investigate and propose a project where that intent may never be followed through. An offence arises when the proponent commences work on the project without an approval.
>
> There are offences associated with failing to comply with a call-in notice that the NT EPA can issue if it considers that the proponent is taking actions that represent a proposal that should be considered for assessment and approval.[95]

3.93 In relation to 'strategic proposals', clause 49 provides that:

A proponent, instead of referring an action under section 48, may refer a strategic proposal to the NT EPA for assessment (a ***strategic assessment***) of a proposed action or group of proposed actions under the strategic proposal that individually or in combination with each other:

(a) has the potential to have a significant impact on the environment; or

(b) will meet a referral trigger.

3.94 In the absence of a definition of 'strategic assessment' the Committee sought clarification from the Department as to how this differs from a 'standard assessment' as provided for under clause 48. The Department subsequently advised that:

> A strategic assessment is simply an assessment of a strategic proposal. A strategic proposal may be the development of a large industrial estate catering for heavy industry, or a multi-user port facility, or a collection of extractive industries (for example). The assessment of a strategic proposal can be undertaken using any of the identified assessment processes.
>
> The primary difference between the assessment of an action (i.e. individual proposal) and a strategic proposal is the breadth of the assessment in terms of area and types of actions. Assessment and approval of a strategic proposal allows future proponents to work within the assessed area under pre-determined conditions (subject to the grant of the approval notice).
>
> Assessments of strategic proposals streamlines the assessment process compared to consideration of multiple individual actions, reduces administrative burden on individual proponents and the Department/NT EPA to conduct individual assessments, and provides better environmental outcomes through a more comprehensive assessment of the potential cumulative impacts associated with grouped developments.[96]

3.95 WK suggested that while the concept of a strategic proposal is better defined in the Bill than in the exposure draft, it should be extended to "specifically include location-based plans, irrespective of whether or not a specific action or actions have been formally proposed."[97] However, as the Department pointed out, the meaning of a

[95] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.16
[96] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.15
[97] WK, Submission 14, p.16

strategic proposal as provided for in clause 13 of the Bill "includes 'a plan'. This can include a location based plan."[98]

3.96 In was also suggested to the Committee that, in addition to proponents,

> Other persons should be able to refer matters for strategic assessment, such as adjacent or downstream landowners, environmental organisations, Aboriginal Land Councils, native title representative bodies, registered native title claimants, and pastoralists.[99]

Noting that third parties may raise concerns about proposals with the NT EPA at any time through administrative process, the Department also explained that:

> The NT EPA may issue a call-in notice where it receives information from third parties about proposals that it considers may require referral. Consideration was given to including a formal pathway for third parties to refer projects, as is the case in Western Australia. Consultation with Western Australian authorities identified that this creates a significant administrative burden for the Environment Protection Authority and supporting department, and transfers responsibility from proponents back to the agency.[100]

Committee's Comments

3.97 The Committee is satisfied with the Department's responses regarding referrals and notes that the approach taken by the Bill in relation to strategic proposals is consistent with the findings of the Productivity Commission's 2013 report *Major Project Development and Assessment Processes,* which recommended that State and Territory Governments should make more use of strategic planning and strategic assessment processes.[101]

Part 5: Environmental Approvals

3.98 As noted in clause 60, Part 5 of the Bill provides for the 'granting and amendment of environmental approvals, and the transfer, suspension and revocation of environmental approvals'. However, EDONT suggested that:

> there does not appear to be any direct link in the Bill that connects the requirement to conduct an EIA in Part 4 with a subsequent mandatory requirement for an environmental approval.[102]

EDONT subsequently recommended that an additional clause be inserted into the Bill to establish a clear requirement for an environmental approval and an associated offence provision where a proponent carries out any action or actions in the absence of an environmental approval.[103]

3.99 However, as pointed out by the Department:

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[98] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.16
[99] Kirsty Howey (North Australia Research Unit), Submission 16, p.5
[100] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.16
[101] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013, pp. 317-48
[102] EDONT, Submission 1, p.9 and Appendix A, p.3
[103] EDONT, Submission 1, p.9 and Appendix A, pp.3-4

> The link is provided in Division 2 of Part 5 of the Bill. This Division states that at the completion of the environmental impact assessment of an action, the NT EPA must provide the Minister with an assessment report in addition to other documents which the Minister is to use to inform the decision on whether to grant an environmental approval (or not). The Bill also contains various offences for undertaking a project to which the Act applies without authorisation. It is implicit in the requirements of the Act that a person hold an approval if the Project is assessed by the NT EPA as having the potential to have a significant impact on the environment.[104]

Committee's Comments

3.100 The Committee is satisfied with the Department's clarification.

Consultation Provisions

3.101 Despite the objects of the Bill, a number of submitters raised concerns that "while proponents seem to have many opportunities to put their views forward, the same cannot be said for concerned citizens."[105] In relation to the consultation provisions under Part 5 of the Bill, NCLC noted that:

> Public participation is recognised as one of the key purposes of the environmental impact assessment process (see sub-clause 42(d)). However, the revised Bill again fails to make provision for community consultation at key points in the process. These include:
>
> - amended environmental approval (sub-clause 70(1))
> - environmental approval granted if Minister rejects statement (sub-clause 80(2))
> - amendment of approval (sub-clause 107(2))
> - revocation at request of holder (sub-clause 114(5))
> - transfer of environmental approval (sub-clause 122(2))[106]
>
> This is at odds with the statement that "Decision-making processes should provide for community involvement in relation to decisions and actions that affect the community" (sub-clause 18(2)). In particular, failure to consult with Aboriginal Traditional Owners on whose land a project or action is occurring represents a failure to recognise their rights and interests.[107]

3.102 As drafted, clauses 70(1), 80(2), 107(2), 114(5) and 122(2) provide that the Minister must consult with the NT EPA and the proponent, and must make reasonable efforts to obtain the views of, and consider any written comments received from, any statutory decision-maker who the Minister considers may hold views in relation to the matter. Where the proposed decision relates to a potential health impact of an action the Minister is also required to make reasonable efforts to obtain the views of the Chief Health Officer. Similarly, where a potential impact of an action relates to a social or cultural matter that is within the responsibility of a Minister, the Environment Minister is required to make reasonable efforts to obtain the views of that Minister.

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[104] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.17
[105] ECNT, Submission 13, p.5
[106] NCLC, Submission 25, p.15
[107] NCLC, Submission 25, p.16

3.103 Given the above, the Committee sought clarification from the Department as to why the Bill does not include a requirement for the Minister to also seek the views of the affected community. Noting that the community's views will have been considered during the impact assessment process and in the development of the draft conditions of approval, the statement of unacceptable impact, and any subsequent amendments to conditions, the Department advised the Committee that:

> The potential benefit of further consultation was weighed against the potential for this to cause additional delays and costs to proponents, particularly in circumstances where it would be unlikely that the community's views had altered significantly.
>
> The consultation requirements that were included are with advisory and regulatory bodies that are experienced in the development of conditions and which are able to provide advice on the practicality and workability of conditions to manage the potential environmental impacts.[108]
>
> It was determined that requiring additional consultation for the amendment of conditions would place an unfair impost on the approval holder for little community benefit, particularly where the changes to conditions are likely to be of a fairly minor nature to improve their functionality or respond to minor changes in the proposed operations of an activity.
>
> In addition, the Act requires projects that have been significantly varied to be referred to the NT EPA. The NT EPA will consider significant variation referrals and determine whether or not further impact assessment is required. By requiring the Minister to consult with the NT EPA on proposed amendments of approvals, the Bill ensures that the NT EPA has the capacity to consider whether the requested amendments to approval demonstrate a significant variation to the project. This provides the NT EPA with an opportunity to seek a significant variation referral and to issue a call-in notice if required.
>
> The Minister is required to consider the NT EPA's written comments in relation to any amendment. The NT EPA would mindful of any community concerns raised during the assessment process in preparing its comments.[109]

Committee's Comments

3.104 While acknowledging submitters concerns, the Committee notes that the approach taken in the Bill is consistent with the findings and recommendations of the Productivity Commission's 2013 report *Major Project Development Assessment Processes,* While emphasising the importance of effective consultation with the community in the project application and assessment stages, it was noted that further consultation in the approval stage should only be required where there are gaps in the information that the decision maker needs.[110]

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[108] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.20

[109] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.24-5

[110] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013, p. 34; pp.106-129; p.406

Fit and Proper Person to Hold Environmental Approval

3.105 Clause 62 introduces a 'fit and proper' person test for environmental approval holders. WK questioned the inclusion of this clause given that:

> the concept of a fit and proper test is always in the context of a license or operational permit. An environmental approval is neither; further action would still be necessary for an applicant to undertake the activity that has been subject to environmental impact assessment. This is reinforced by section 93, providing that nan environmental approval is not personal property for purposes of the *Personal Property Security Act 2009* (Cth).[111]

3.106 In response, the Department advised the Committee that:

> It is a modern approach to the development of environmental legislation to include a fit and proper person test. The Bill includes an environmental approval which is in effect a permit to authorise and manage appropriate levels of environmental harm required to conduct development activities. It is considered appropriate therefore to include a fit and proper person test as part of the considerations of whether an approval should be granted.
>
> The *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *Environment Protection Act 1970* (Victoria) and *Protection of the Environment Operations Act 1997* (NSW) are all examples of Acts that contain fit and proper tests. Many jurisdictions also includes such tests in their mining and petroleum project approval legislation. The Petroleum (Environment) Regulations 2016 (NT) also contains this test and inclusion of this test was a recommendation from the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*.[112]

3.107 Clause 62(a) provides a number of factors the Minister 'may' have regard to when determining whether a person is 'fit and proper' to hold an environmental approval. EDONT expressed the view that this clause could be strengthened by requiring that the Minister 'must' rather than 'may' have regard to the matters listed in paragraphs (i) to (iv).[113] However, as noted by the Department:

> Replacing the word 'may' with 'must' substantially changes the operation of this clause and makes it an onerous responsibility for the Minister to conduct specific investigations into the past behaviour and practices of proponents, including directors and other associated entities.
>
> The current approach to this clause provides the Minister with the appropriate powers to refuse to grant an environmental approval without obliging the Minister to conduct extensive investigations into the past behaviours and practices of applicants across a broad range of issues.[114]

3.108 NCLC suggested that in addition to considering contraventions relating to environmental matters, work health and safety legislation or offences committed that involve an element of fraud or dishonesty, clause 62(a) should also provide that the Minister may have regard to whether there are reasonable grounds to believe that the person has contravened a law of the Territory or another jurisdiction that relate to Aboriginal sacred sites.[115] The Department agreed that "clause 62(a)(i) could be

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[111] WK, Submission 14, p.16
[112] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.18
[113] EDONT, Submission 1, p. 9
[114] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.17
[115] NCLC, Submission 25, p.11

extended to include matters relating to heritage and culture, including Aboriginal sacred sites."[116]

3.109 Pursuant to clause 62(b), the Minister must also 'have regard to the matters prescribed by regulation'. Clarification was sought as to why the Bill does not incorporate such matters in the primary legislation similar to that provided for in section 15A of the *Petroleum Act 1984* (NT).[117] The Department subsequently advised that:

> the Regulations will specify a number of additional matters that should be considered by the Minister. It was determined to include these matters in Regulations to provide additional flexibility in the identification of matters that should be considered.[118]

Committee's Comments

3.110 The Committee is satisfied with the Department's clarification regarding the inclusion of a 'fit and proper' person test in the legislation. The Committee is also satisfied with the Department's explanation regarding use of the word 'may' rather than 'must' in clause 62(a), and the incorporation of other matters the Minister must consider in the Regulations. The Committee notes that a similar approach is taken in the 'Fit and proper persons' provisions of the *Protection of the Environment Operations Act 1997* (NSW).[119]

3.111 In determining whether a person is 'fit and proper' to hold an environmental approval, the Committee agrees with NCLC's suggestion that the legislation should provide that the Minister also have regard to whether the person has contravened a law of the Territory or another jurisdiction that relates to heritage and culture including Aboriginal sacred sites. As suggested by the Department, the Committee has recommended that clause 62(a)(i) be amended accordingly.

Recommendation 7

The Committee recommends that clause 62(a)(i) be amended to include matters relating to culture and heritage, including Aboriginal sacred sites.

NT EPA to Provide Assessment Report and Other Documents to Minister

3.112 According to the Department's fact sheet on *Roles and responsibilities*, when the NT EPA completes its assessment it is required to provide the Minister with an assessment report which is to be:

[116] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.17
[117] EDONT, Submission 1, pp. 9-10
[118] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.18
[119] *Protection of the Environment Operations Act 1997* (NSW), s 83(2)

> accompanied by a draft environmental approval if the NT EPA considers the environmental impacts and risk are manageable, or a statement of unacceptable impact if it does not.[120]

3.113 However, whereas clause 65 provides that the NT EPA 'must' provide a draft environmental approval with the assessment report when it considers the environmental impacts and risks are manageable, clause 66 provides that the NT EPA 'may' provide a statement of unacceptable impact where it considers it does not. As such the Committee sought clarification from the Department as to the different use of 'may' and 'must in these clauses, and was advised that:

> Clause 65 obliges the NT EPA to provide an environmental approval with the assessment report where the NT EPA 's assessment identifies that the significant impacts of the project can be avoided, mitigated and managed, and if appropriate, offset. The clause is written in a mandatory manner to ensure the NT EPA prepares the draft approval.
>
> Clause 66 is discretionary and provides an alternative for the NT EPA to provide a statement of unacceptable impact rather than an approval. The clause is written in this manner as it is left to the discretion of the NT EPA to prepare such a statement or to provide more stringent conditions on the draft approval.[121]

Committee's Comments

3.114 The Committee is satisfied with the Department's clarification.

Decision of Minister on Environmental Approval and Statement of Unacceptable Impact

3.115 MCA NT, AMEC, NTCA and WK raised concern that the provisions under Part 5, Divisions 3 and 4 give the Minister power of veto over all proposed significant development projects where the NT EPA recommends that approval not be granted.[122] MCA NT expressed the view that:

> A far more robust and considered process would be to refer any project for which the NT EPA has recommend no approval be given, to the Administrator. Referring these projects to the Administrator would likely result in the NT EPA's advice being considered from a broader, 'whole-of-community' perspective (including social, cultural and economic) rather than just environmental, because the Administrator would be expected to refer these to Cabinet.
>
> The NT EPA's advice, would, for example, be assessed against the potential for the proposed development to provide substantial support to the government in achieving its objectives under the Economic Development Strategy, including sustainable economic development in regional and remote areas of the Northern Territory.
>
> In effect, the process above is what happens in Queensland when proposals are declared 'coordinated projects', and are subject to review and approval by the Coordinator General.[123]

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[120] Department of Environment and Natural Resources, *Roles and responsibilities,* Northern Territory Government, Darwin, 23 April 2019, p.3

[121] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.19

[122] MCA, Submission 22, pp.3-4; NTCA, AMEC, Submission 23, pp.10-11; NTCA, Submission 21, p.2;

[123] MCA, Submission 22, pp. 3-4; WK, Submission 14, p.8

3.116 AMEC suggested that consideration should be given to amending the Bill to include a dispute resolution mechanism for situations where disputes arise between development approvals and environmental approvals, similar to that provided for in section 48J of the *Environmental Protection Act 1986* (WA). As noted in AMEC's submission, this section provides that if the Minister and a responsible Minister cannot agree as to whether a project is incapable of being made environmentally acceptable; whether an environmental review has been undertaken in accordance with the legislation; or what conditions a project should be subject to, the matter is to be referred to Governor for consideration. In such cases, the Governor's decision is final and is not subject to appeal.[124]

3.117 However, as noted by the Department:

> Section 48J of the *Environmental Protection Act 1986* is an unusual provision that is not replicated in other jurisdictions. An equivalent of s.48J would be inconsistent with the role and actions of the Administrator under the *Interpretation Act 1978*.
>
> There are administrative process that can be utilised in order for Ministers to raise and discuss concerns about approval processes. In addition, the Bill contains a number of obligations for the Minister to consult with other statutory decision makers before making a decision.[125]

3.118 Furthermore, as highlighted by Ms Joanne Townsend (Chief Executive Officer: Department of Environment and Natural Resources) during the public hearing:

> In her consideration of the NT EPA's advice, the Minister is able to consult with other relevant Ministers – which was an amendment which was made to the Bill since consultation – further supporting a holistic review of the proposed action. The breadth of the definition of 'environment' ensures the Minister for Environment and Natural Resources must consider the economic and social implications of a development.
>
> A refusal under the Environment Protection Bill will only occur where a proponent has failed to demonstrate the worth of its project in economic and social contribution to the Territory, compared to the cost of significant residual risks to the natural environment. …
>
> Another comment I will make refers to what is being alluded to as the Bill giving excessive powers to the Environment Minister. I stress to the Committee that the environmental approval established by the Bill is not an unusual arrangement in statute and does not establish a so-called power of veto that will stifle development. As I have explained, the Minister will reach a decision on an approval through a holistic review of the proposal, including consultation with other relevant Ministers. Our Minister is a member of Cabinet. The view that the Minister will make decisions that are not supported by government is both naïve and untrue in practice.
>
> There are very compelling reasons for the responsibility for the environmental approval of a mine, for example, to sit with the Minister responsible for the environment rather than the Minister responsible for mining development. Confidence in decisions made in the interests of all Territorians and management of the perception of conflicts and bias are the obvious reasons. These issues were the key reason that the independent scientific inquiry [*Independent Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*]

[124] AMEC, Submission 23, pp.10-11
[125] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.19

> recommended the transfer of environmental matters from the Resources Minister to the Environment Minister in relation to petroleum activities. That is now in effect. A similar environmental approval is in place under the Commonwealth *Environment Protection and Biodiversity Conservation Act,* and has been functioning effectively for the past 19 years.[126]

Committee's Comments

3.119 The Committee is satisfied with the Department's clarification regarding the role of the Minister in granting environmental approvals. As highlighted previously, transferring this decision-making power to the Administrator or including a dispute resolution mechanism as provided for in the Western Australia legislation would be inconsistent with provisions relating to the role and functions of the Administrator under both the *Northern Territory (Self Government) Act 1978* (Cth) and the *Interpretation Act 1978* (NT).

3.120 In relation to MCA NT's suggestion, the Committee further notes that, as a senior public servant in the Department of State Development, Manufacturing, Infrastructure and Planning, the role and function of Queensland's Coordinator-General is not comparable to that of the Administrator. Moreover, as pointed out by MCA NT, the Coordinator-General is only responsible for assessing projects where a proponent has applied to have a project declared as a 'coordinated project' under the *State Development and Public Works Organisation Act 1971* (Qld) and the Coordinator-General subsequently determines to make a declaration.[127]

3.121 Moreover, the Committee understands that the environmental impact assessment process under the *Environmental Protection Act 1994* (Qld), which is not dissimilar to that proposed in the Bill and is not subject to review or evaluation by the Coordinator-General, is generally used for mining, petroleum and gas projects.[128]

3.122 The Committee also notes that the approach taken in the Bill is consistent with the findings and recommendations from the 2015 Hawke *Review of the Northern Territory Environmental Assessment and Approval Process*, and the 2017 NT EPA *Roadmap for a Modern Environmental Regulatory Framework for the Northern Territory*.[129]

Matters to be Considered by Minister in Deciding on Environmental Approval

3.123 In addition to the matters set out in Part 2 'Principles of environment protection and management', clause 73 sets out the matters the Minister must have regard to in deciding whether to grant or refuse an environmental approval for an action. NCLC

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[126] Committee Transcript, Public Hearing, 29 July 2019, p.66

[127] Department of State Development, Manufacturing, Infrastructure and Planning, *Coordinated Projects,* https://www.statedevelopment.qld.gov.au/coordinator-general/assessments-and-approvals/coordinated-projects.html

[128] Queensland Government, *Environmental impact statement process,* https://www.qld.gov.au/environment/pollution/management/eis-process/about-the-eis-process/types-of-eis

[129] Hawke, A., *Review of the Northern Territory Environmental Assessment and Approval Process,* NT Government, Darwin, May 2015, pp.11-15 ; Northern Territory Environment Protection Authority, *Roadmap for a Modern Environmental Regulatory Framework for the Northern Territory,* Northern Territory Environment Protection Authority, Darwin, 2017, pp.6-7

and ECNT suggested that clause 73(2)(a), which provides that the Minister must be satisfied that the community has been consulted on the potential environmental impacts and benefits of a proposed action, should be amended to include an additional requirement that:

> Prior to granting an environmental approval, the Minister must be satisfied that *'Aboriginal values and the rights and interests of Aboriginal communities in areas that may be impacted by the proposed action have been considered, and their free, prior and informed consent obtained.'*[130]
>
> This would recognise the unique position held by Aboriginal people as Traditional Owners and custodians of the land, and reflect the principles outlined in the *United Nations Declaration on the Rights of Indigenous Peoples*.[131]

3.124 In response, the Department noted that:

> The Northern Territory Government determined not to include reference to 'free, prior and informed consent' within the Bill. Government acknowledges the importance of consent by Aboriginal people to projects on their land, however this is addressed through existing legislation that covers title, land and access where matters of free, prior and informed consent are more appropriately addressed.[132]

3.125 AMEC raised concern that this clause also fails to specify that the Minister must have regard to the social or economic benefits of an action when determining whether or not to grant an environmental approval. However, as the Department pointed out:

> The Minister is not explicitly required to consider social, cultural and economic aspects because these matters from part of the definition of 'environment'. The Minister is required to consider the object of the Act and the assessment report which will contain an assessment of those matters. The Minister also has the capacity to consider other matters that are considered relevant.[133]

Committee's Comments

3.126 The Committee is satisfied with the Department's advice. In relation to NCLC's comments, the Committee notes that clause 73(1)(a) requires that the Minister must have regard to the objects of the Bill which includes recognition of 'the role that Aboriginal people have as stewards of their country as conferred under their traditions and recognised in law, and the importance of participation by Aboriginal people and communities in environmental decision-making processes.'

3.127 As mentioned above, the matters the Minister must have regard to under clause 73(1) are in addition to those set out in Part 2, clauses 17-27 of the Bill. In relation to AMEC's comments, the Committee notes that the 'Decision-making principle' in clause 18 specifically references the definition of environment which incorporates physical, biological, economic, cultural and social aspects.

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[130] NCLC, Submission 25, p.9; see also ECNT, Submission 13, p.5
[131] NCLC, Submission 25, p.9; see also ECNT, Submission 13, p.5
[132] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.19
[133] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.20-21

Time for Decision on Environmental Approval and Statement of Unacceptable Impact

3.128 Clauses 74 and 77 provide that the Minister must make a decision to grant or refuse an environmental approval, or accept or not accept a statement of unacceptable impact within 30 business days following receipt of the assessment report and draft environmental approval from the NT EPA. If the Minister fails to make a decision within the required time, the Minister is taken to have accepted the NT EPA's recommendations for the action.

3.129 Grusha Leeman expressed concern regarding the prescriptive nature of the timeframe in these clauses and the potential for unintended consequences of default provisions if actions are not undertaken in the required time.[134] With regards to clause 74, EDONT also questioned why the Ministerial discretion to extend the decision-making timeframe beyond the 30 business days as provided for in the exposure draft had been removed from the Bill, noting that:

> We consider the Minister must retain discretion to extend the decision-making timeframe, particularly for major projects that have a high impact and for which there is considerable complex information, and thus where careful decision-making is required.[135]

3.130 The Department advised the Committee that:

> The NT EPA is providing expert advice to the Minister regarding whether or not the project should be approved and conditions contained in that advice. Providing the Minister with the discretion to extend this timeframe was identified by some stakeholders during the consultation process as introducing additional uncertainty into the approval process.
>
> The risks of unintended and damaging environmental consequences associated with inclusion of a default provision were weighed against the benefits of providing a clear conclusion to the approval process. The risks were considered low when considering the role of the NT EPA in providing expert advice.[136]

3.131 While welcoming the prescribed timeframes for approvals as set out in clauses 74 and 77, Mr Neil van Drunen (Manager South Australia, Northern Territory and Policy, AMEC) raised concerns that there are a number of instances where timeframes are not defined in the Bill.[137] For example, clauses 70(1), 71(2), 80(3), 99(4), 100(2), 108(3) 120(2) and 122(3) incorporate 'stop the clock' mechanisms. That is, the required timeframes within which the Minister is to make a decision ceases to run during any period that the Minister carries out a consultation or is awaiting further information to be supplied.

3.132 As Mr Brian Fowler (General Manager Northern Territory and Sustainability, Arafura Resources Ltd) pointed out to the Committee, the cost to proponents associated with delays in decision-making processes can be quite significant:

> I do not think there is a proper understanding of what it costs a proponent to sit there and wait, spinning their wheels … In Arafura's case our sitting around time

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[134] Grusha Leeman, Submission 20, pp.2-3
[135] EDONT, Submission 1, p.10
[136] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.21
[137] Committee Transcript, Public Hearing, 29 July 2019, p.22

> is somewhere between $350,000 and $400,000 a month … Every month that the project could be going forward, that is what it is costing our organisation to stand still. It is what we call our 'burn rate'. If you can get all your approvals lined up, everything is in place, arguably you can press the button and start. For every month you are delayed, it is another $300,000 or $400,000 it is costing you.[138]

3.133 To increase certainty for industry, Mr van Drunen advised the Committee that it was AMEC's view that 'stop the clock' mechanisms should be replaced by whole of government time lines:

> This nationally fits into a national policy that AMEC promotes across every jurisdiction which is called whole of government time lines. This sets one timeframe across the whole top of how long something should take. That is important if you are a mineral exploration company that is small and you have a limited amount of cash. You have to work out how you are going to budget for these things.[139]

3.134 Acknowledging the costs to industry of unnecessary delays in the assessment process, the Department pointed out that the Regulations will incorporate prescribed timeframes within which assessment processes are to be completed. As Mr Paul Purdon (Executive Director Environment Protection, Department of Environment and Natural Resources) noted, this represents a significant change from the existing system:

> In relation to stopping the clock, that is a decision that the EPA can make at the moment under the current Act. Where the EPA can do that is when it is preparing an assessment report and it realises it does not have enough time to complete that assessment report. If it does not have enough time to complete the report it is able to consult with a proponent and extend that timeframe it has to complete that report. The EPA has done that a number of times in the last three years or so, and that will be font-of-mind for some people who have spoken before you today.
>
> The EPA can also stop the clock when it decides it needs further information to inform its assessment, which then allows for a process of providing guidance back to the proponent about what further information is required to assist the EPA to complete their assessment report.
>
> Those stop-the-clock processes are beneficial on one hand, in that they allow the EPA to get information it thinks it needs to complete its assessment. But obviously, stopping the clock adds time and as we have heard from industry, will add money to their overall cause. They are not very enamoured with those stop-the-clock provisions.[140]

3.135 As detailed in the Department's fact sheet *Proposed Environmental Impact Assessment Timeframes,* overall timeframes excluding the times required for proponents to prepare relevant documentation, ranges from a maximum of 110 business days for a Tier 1 Assessment on referral information, to 170 business days for a Tier 2 Assessment by Supplementary Environmental Report, and 295 business days for a Tier 3 Assessment by Environmental Impact Statement. The only leeway

[138] Committee Transcript, Public Hearing, 29 July 2019, pp.43-4
[139] Committee Transcript, Public Hearing, 29 July 2019, p.22
[140] Committee Transcript, Public Hearing, 29 July 2019, pp.70-1

the NT EPA has to vary timeframes relates to the set periods for public comment which the NT EPA may only extend with the proponent's approval.[141]

3.136 In relation to the introduction of statutory timeframes, Ms Nicole Conroy (Technical Director Environment and Team Leader Impact Assessment and Permitting, GHD) noted that:

> If the government sticks to the time lines, then I agree they will be very efficient in responding. In the current process there are delays because there are not time lines and the new Act does address that. In the current process there are also delays because the information provided to the proponent is not clear and consistent. It is not a straight forward process to develop an environmental assessment. … We need a clearer more consistent process …[142]

3.137 However, as acknowledged by MCA NT:

> The three-tiered EIA framework (assessment on referral documentation; by supplementary environmental report; or environmental impact statement, EIS) provides levels of EIA commensurate with environmental risk, which should maximise efficiency, timeliness and cost-effectiveness of EIA and approvals processes.[143]

Committee's Comments

3.138 While noting the concerns raised regarding provisions for deemed decisions and the potential costs to proponents of delays in the assessment and decision-making processes, the Committee notes that the approach taken in the Bill is consistent with the findings and recommendations of the Productivity Commission's 2013 report on *Major Project Development Assessment Processes.*[144]

3.139 As provided for in the proposed legislation, the Productivity Commission noted that:

> Reforms that could improve the timeliness of the assessment and approval stages of DAA [Development Assessment Approval] processes include:
>
> - increased use of statutory timelines
> - tighter specification of stop the clock provisions
> - using deemed decisions in combination with statutory timelines.[145]

3.140 Relevantly, the Productivity Commission subsequently recommended at 7.3 that:

> Governments should develop statutory timelines that specify the maximum time that may elapse between a proponent's assessment documentation being lodged and when the assessment agency provides its report and decision recommendation to the relevant decision maker.
>
> Legislation should also set the maximum time for the decision maker to make the decision. If no decision is made within the time period specified, the recommendation (along with the reasons, advice regarding the decision and any

[141] Department of Environment and Natural Resources, *Proposed Environmental Impact Assessment Timeframes*, Northern Territory Government, Darwin, 2019
[142] Committee Transcript, Public Hearing, 29 July 2019, p.42
[143] MCA, Submission 22, pp.5-6
[144] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013, pp.197-207
[145] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013, p.204

> conditions and offsets) made by the assessment agency should be deemed to be the decision by the decision maker and in the public domain.[146]

3.141 Recognising the need to allow some flexibility while avoiding unnecessary delay and cost, the Productivity Commission further recommended at 7.4 that:

> Governments should provide guidance, preferably in statutory form, for the use of any 'stop the clock' mechanisms. Such arrangements should only be available to assessment agencies when significant matters emerge that were not contained in the terms of reference or could not have been reasonably anticipated. Decision makers should only be able to stop the clock once. Proponents should be allowed to stop assessment and decision processes at any time. Any party that stops the clock should be required to disclose when these triggers are activated and the reason(s) for activation.[147]

Conditions of Environmental Approval

3.142 Clause 87 provides that a condition of an environmental approval may require the approval holder to report to the CEO on their compliance with the environmental approval or with any other requirements imposed by the Act. ALEC expressed the view that approval holders should be required to report on their compliance with all conditions of the environmental approval on an ongoing basis.[148]

3.143 The Department advised that this clause provides:

> the legislative basis to include compliance reporting as a valid condition on an environmental approval to require the approval holder to report on their compliance with the environmental approval. The clause has been included to explicitly recognise that conditions under the approval can require the approval holder to provide information about its level of compliance with the various conditions imposed under the approval. For example, if the approval contains a condition that the approval holder provide quarterly reports of their emissions, this clause identifies that the approval holder can also be required to provide a report of whether or not they complied with the condition and provided those quarterly reports.
>
> Each of the clauses relating to the types of matters that can be included as conditions on the approval are drafted in a discretionary manner which reflects that not all approvals would necessarily require a condition of that nature. It would be possible, although somewhat inconsistent with the drafting of the Bill, to include that the approval must include a condition requiring the approval holder to report on compliance with the approval.[149]

Committee's Comments

3.144 The Committee acknowledges ALEC's view and notes that reporting on compliance with conditions of environmental approvals is a key aspect of a proponent's social licence to operate. However, the Committee is satisfied that the Bill provides the

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[146] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013, p.206

[147] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013, p.207

[148] ALEC, Submission 24, p.9

[149] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.22

necessary legislative basis to include compliance reporting where it is deemed warranted to do so.

3.145 As noted by the Department, it would be somewhat inconsistent with the drafting of the Bill to require that an environmental approval include a condition requiring the approval holder to report on compliance with the approval. The Committee also notes that Part 5, Division 10 of the Bill includes safeguard provisions whereby the Minister can revoke or suspend an environmental approval where it becomes evident that a proponent has failed to comply with the conditions of their environmental approval.

Amendment of Environmental Approval

3.146 Clause 106 provides that the Minister may amend an environmental approval, including at the request of the approval holder. EDONT suggested that:

> this clause needs more substantive constraints on when and how the Minister may decide to amend an approval. At a minimum, the clause should specify that the Minister must be satisfied that it will not result in any detriment to the environment and must be consistent with the objects of the Act.[150]

The Committee also sought clarification as to why the Bill doesn't provide any guidance as to the circumstances under which a proponent may seek an amendment.

3.147 The Department subsequently advised the Committee that:

> Imposing limitations on when an approval holder can seek an amendment to an approval reduces flexibility and may result in unintended and adverse consequences if, for example, an approval holder is held to a condition that in practice is identified to not be operating as anticipated or which prevents the approval holder from introducing new technologies or approaches to limit environmental impacts.
>
> It is more usual to impose requirements on the decision-maker in determining whether or not to amend an approval than on proponents in seeking amendments; see for example s.38 *Waste Management and Pollution Control Act*, s.38 *Mining Management Act*.
>
> The Bill could be amended to require, in addition to the proposed consultation requirements, that the Minister consider the assessment report and objects of the Act, and that the Minister be satisfied that the proposed amendment will not prevent the significant impacts of the action from being appropriately avoided or mitigated or managed. This would be consistent with the Minister's considerations under clause 73 of the Bill, taking into account necessary changes given the clause refers to amendments of existing approvals.[151]

Committee's Comments

3.148 The Committee agrees with EDONT that clause 106 could be strengthened. As suggested by the Department, the Committee has recommended that the Bill be amended to provide that in determining whether or not to amend an environmental approval at the request of the proponent, the Minister must take into consideration the assessment report and objects of the Act, and must be satisfied that the proposed

[150] EDONT, Submission 1, p.10
[151] Department of Environment and Natural Resources, Responses to Written Questions, 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.23

amendment will not prevent the appropriate avoidance, mitigation or management of the significant impacts of the action.

Recommendation 8

The Committee recommends that Part 5, Division 9 be amended to require that, in addition to the proposed consultation requirements in clause 107, before amending an environmental approval at the request of the approval holder, the Minister must consider the assessment report and objects of the Act and must be satisfied that the proposed amendment will not prevent the significant impacts of the action from being appropriately avoided or mitigated or managed.

Revocation of Suspension of Environmental Approval

3.149 Clause 109 provides that the Minister may revoke an environmental approval:

(a) if the Minister becomes aware of information that was not available to the Minister at the time of granting the approval and the Minister is satisfied that the approval would not have been granted if the information had been available; or

(b) if the Minister, as a result of the monitoring of compliance with or enforcement of this Act or the approval or otherwise, is of the opinion that the approval holder is not a fit and proper person to hold the approval; or

(c) if the Minister believes on reasonable grounds that:

(i) the environmental impacts of an action cannot be appropriately avoided, mitigated or managed; and

(ii) an environmental offset is not appropriate; or

(d) at the request of the approval holder.

3.150 As noted previously, given that WK considered that the concept of a fit and proper person was not appropriate for an environmental approval, they suggested that clause 109(b) should be deleted. WK further advised that they were of the view that:

> as written, section 109(c) would allow revocation of an environmental approval, even if the initial approval recognised that all environmental impacts of the action in question could not be fully avoided, mitigated or managed. Sections 109(a) and 109(c) should be written as conjunctive not alternative.[152]

3.151 However, as the Department pointed out:

> These clauses address separate types of matters and are not appropriate to be conjunctive. Clause (c) would operate in circumstances where the Minister has reasonable grounds to believe that the operator is unable to fulfil the obligations of the approval to avoid, mitigate and manage the impacts, or a proposed offset is not appropriate. It is likely that this would be as a result of monitoring and

[152] WK, Submission 14, p.17

> compliance activity. It would be more appropriate to amend clause (c) to provide a link to monitoring and enforcement activity.[153]

3.152 ALEC raised concern that clauses 113(3) and (4) provide that a proponent may apply for, and the Minister may grant, a waiver from compliance with any obligations under an environmental approval relating to the management or rehabilitation of a site where an environmental approval has been revoked. Given concerns regarding the ongoing burden of legacy contamination, clarification was sought as to why the Bill doesn't provide any criteria or guidance as to the circumstances under which a proponent may apply for a waiver.[154]

3.153 The Department advised that:

> It is considered that the use of a waiver power of this nature would require consideration of the unique circumstances of the proponent. Guidance as to the circumstances under which a proponent may apply for a waiver … [and] the matters that the Minister must take into consideration when determining whether or not to waive compliance can be provided through the development of specific policy and guidance material. The general obligation for the Minister to consider the principles of ESD under clause 17(2) also provide guidance for decision-making.[155]

Committee's Comments

3.154 While the Committee does not agree that clause 109(b) should be removed, it acknowledges the concern raised by WK in relation to clause 109(c). As suggested by the Department, the Committee agrees that the operation of this clause could be clarified by linking it to monitoring and enforcement activity. The Committee also notes that this is consistent with the views of ALEC which recommended that clause 109 be extended to provide that the Minister may revoke an approval where there has been ongoing and consistent non-compliance with the approval.[156]

3.155 With regards to clause 113, the Committee is satisfied with the Department's response. While acknowledging ALEC's concern, the Committee notes that while specific policy and guidance materials can be developed regarding applications for, and waivers of compliance, decisions of this nature will necessarily require consideration of the specific circumstances of individual cases.

Recommendation 9

The Committee recommends that clause 109(c) be amended to provide that:

If the Minister, as a result of the monitoring of compliance with or enforcement of this Act or the approval or otherwise, believes on reasonable grounds that:

[153] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.23
[154] ALEC, Submission 24, p.
[155] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.24
[156] ALEC, Submission 24, p.9

Part 6: Environmental Offsets

3.156 Clause 125 provides that 'the Minister may establish an environmental offsets framework for the use of environmental offsets under this Act or an Act prescribed by regulation.' Given the importance of environmental offsets in the protection, management and conservation of the environment, NCLC questioned why the Bill does not require that the Minister 'will', rather than 'may', establish an environmental offsets framework.[157] The Department advised that:

> It was considered appropriate to give the Minister the discretion to develop the framework, consistent with other elements of the Bill that provide discretionary powers in relation to policy matters; e.g. environmental objectives and triggers.[158]

3.157 ICIN and Arnhem Land Fire Abatement (ALFA) questioned the extent to which the Bill caters for carbon offsets and suggested that they need to be defined separately from other types of environmental offsets.[159] The Committee also sought clarification as to how the framework would be developed. The Department subsequently advised the Committee that:

> The offset clauses have been drafted to provide flexibility in the development of the offsets framework. It is not considered necessary to separately define carbon offsets in the Bill for the purpose of the offsets framework.
>
> It is anticipated that the offset framework will consider biodiversity and carbon offsets in the first instance. The drafting of these clauses allows the framework to be extended to social offsets at an appropriate time.
>
> The intent of the offset provisions in the Bill is to provide a statutory power that can mandate an offset in circumstances where it is considered appropriate to use an offset. The environmental offset framework will be used to provide guidance and certainty to the community and proponents on how the offset statutory power in the Territory will be applied.
>
> As there is currently no statutory power in the Territory to mandate an offset, the proposed framework is being developed through a consultative process that is commonly applied in the development of government policies. Inclusion of specific provisions detailing how the offset framework would be developed is considered to be unnecessary and onerous.[160]

Committee's Comments

3.158 The Committee is satisfied with the Department's clarification as to the purpose and intended operation of the offset clauses within the Bill.

Part 7: Financial Provisions

3.159 Part 7 provides for the establishment of environment protection bonds, environment protection levies and environment protection funds. As detailed below, clarification was sought as to the intended operation of these provisions and the extent to which

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[157] NCLC, Submission 25, p.10
[158] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.25
[159] ICIN, Submission 12, p.2; Arnhem Land Fire Abatement (ALFA), Submission 18, p.2
[160] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.25

they interact with existing provisions under the *Mining Management Act 2001* and the *Waste Management and Pollution Control Act 1998.*

Environment Protection Bonds

3.160 Clause 128(e) provides that a purpose of an environment protection bond is to secure 'the payment of any amount payable to the CEO by the approval holder for anything done by the CEO under the Act in relation to the approval holder's obligations.' AMEC raised concern that this clause is:

> extremely open ended, it gives the CEO the power to use the bond for anything relating to the Act. Traditionally, environmental bonds have been focussed on prevention, remediation and rehabilitation of environmental impacts. Clause (e), steps beyond this definition to allow the Government to effectively use the bond for whatever it chooses. Two obligations must be placed on the usage of Environmental protection bonds: firstly, the approval holder must be notified in writing by the CEO to increase transparency; and the approval holder should be allowed to appeal the use of their bond.[161]

3.161 AMEC also suggested that:

> The interest accrued on the Environmental Protection Bond should not be transferred to the Consolidated Account. The clear intent of this Part is the use of financial instruments to ensure the remediation, rehabilitation and post-closure monitoring and reporting, not to finance the Territory consolidated account.[162]

3.162 With regards to AMEC's concerns, the Department advised as follows:

> Clause 128 merely provides broad direction as to the purpose of environmental bonds. Clause 131 identifies that the process for making a claim on the bond is to be specified in the Regulations. This will include requirements to advise the approval holder of the intention to make a claim on the bond. It is anticipated that this process will be modelled on s44 of the *Mining Management Act 2001* and s103 of the *Waste Management and Pollution Control Act 1998*. The NT Government's usual practice is for interest from these types of accounts to accrue to the central holding account.[163]

Committee's Comments

3.163 The Committee is satisfied with the Department's clarification. As provided for in the *Mining Management Act 2001* and the *Waste Management and Pollution Control Act 1998,* it is understood that the Regulations will provide that where the Minister intends to make a claim on a security they will be required to notify the approval holder in writing as to the reason for making the claim and the amount of the bond that is to be claimed. The approval holder will then have an opportunity to make submissions to the Minister in relation to the matters in the notice.[164]

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[161] AMEC, Submission 23, p.12
[162] AMEC, Submission 23, p.12
[163] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.26
[164] *Mining Management Act 2001* (NT), s44; *Waste Management and Pollution Control Act 1998* (NT), s103

Environment Protection Levy

3.164 Clause 133 provides for the establishment of an environmental protection levy. AMEC and WK expressed the view that this was duplicative of the bond provision and noted that the exemption provided in clause 134(2) fails to provide assurance to businesses that may be subject to a levy under other legislation that they will not be double-taxed for the purposes set out in clause 133(2).[165]

3.165 Given the comments made by submitters, the Committee sought the Department's advice as to how an environmental protection bond differs from an environment protection levy and was advised that:

> An environment protection bond is used to protect the government (and therefore the taxpayer) from financial costs associated with undertaking environmental management activities in circumstances where the legally responsible person is not able to (e.g. because they are bankrupt). Bonds provide a mechanism that ensures environmental impacts caused by an activity are paid for by the person who caused the impacts. Environment protection bonds are refundable to the person who paid the bond at the completion of all remediation, rehabilitation and closure requirements specified for the activity.
>
> An environment protection levy is a non-refundable payment made to government by industry participants to provide a revenue stream to support the industry to operate in a sustainable and environmentally responsible manner. The levy is designed to address a particular environmental issue, therefore the revenue government collects from levies is isolated from other government revenue streams and is only permitted to be used for specific matters related to the industry responsible for paying the levy (e.g. to rehabilitate a historical landfill site). Levies are not refundable.
>
> An equivalent bond and levy system currently operates under the *Mining Management Act* in the form of a refundable 'security', and a non-refundable levy for the Mining Remediation Fund.[166]

3.166 Pursuant to section 44A of the *Mining Management Act 2001,* the Committee understand that an operator must pay an 'annual levy' in accordance with the condition of their authorisation for the purpose of providing revenue for the 'Mining Remediation Fund' and for the effective administration of the Act in relation to minimising or rectifying environmental harm caused by mining activities. As such, clarification was sought as to whether an environment protection levy would also be imposed on a mining operator under the proposed legislation.

3.167 The Department subsequently advised that:

> Clause 134(2) clearly states that a levy must not be imposed if a levy has been or is required to be paid for the same or substantially the same impacts. This clause has specifically been drafted to ensure that the mining industry is not required to pay a mining levy and a levy under the Bill (for as long as an equivalent system operates under the MMA [*Mining Management Act 2001*]. The wording 'or is required to be paid' ensures that where there is a known liability for a levy, even if that levy has not been charged, the Minister cannot impose a levy for the same or substantially the same environmental impacts.[167]

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[165] AMEC, Submission 23, p.12; WK, Submission 14, p.26

[166] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.26-7

[167] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.27

Committee's Comments

3.168 The Committee is satisfied with the Department's clarification regarding the difference between an environment protection bond and an environment protection levy and the intended operation of the legislation in instances where proponents may be required to pay a bond or levy for the same, or substantially the same, environmental impact under another Act.

Environment Protection Funds

3.169 Clauses 136-138 provide for the establishment of, payments to, and expenditure from environment protection funds by the Minister. Given that the funds may be used for research into environmental impacts and management of environmental impacts of particular industries, the Committee sought clarification from the Department as to whether any consideration had been given to the inclusion of a requirement for the Minister to consult with industry regarding the purposes for which the money in an environment protection fund may be expended.

3.170 The Department advised the Committee that it was currently:

> working with the Department of Treasury and Finance to develop governance frameworks for the environment protection funds. As part of this process, consideration has been given to similar funds operating in the Northern Territory.
>
> Improvements to existing models that have been identified include: broadening stakeholder input in the process of identifying expenditure priorities and subsequent expenditure decisions; identifying and reporting expenditure priorities; and providing greater detail regarding expenditures, and alignment with priorities.[168]

3.171 AMEC also noted that:

> The lack of transparency and reporting of these proposed funds is a concern for industry. The legislation should have clear transparency and probity provisions requiring a report to be tabled in Parliament annually accounting for:
>
> – what amount was raised;
>
> – how decisions were made to use the funds;
>
> – how the industry who contributed to the fund was consulted on the use of these funds (a logical extension the objects of this proposed Bill); and
>
> – what outcomes were achieved.[169]

3.172 In response to this concern, the Department advised that:

> Reporting requirements are expected to be included as part of the governance frameworks for funds approved by the Minister. Expenditure from the fund would also be detailed in the Department's annual report. The inclusion of a specific requirement for the Minister to report to the Legislative Assembly is considered to place an additional administrative burden when the matters would be captured through alternative, and existing, reporting obligations.[170]

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[168] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.27

[169] AMEC, Submission 23, p.13

[170] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.28

3.173 In light of AMEC and WK's comments regarding environment protection bonds and levies, the Committee also queried whether any consideration had been given to requiring that funds cannot be transferred into general revenue. The Department noted that:

> The Bill does not place a limit on the proportion of payments that are required to be placed into the fund (compare this with s.46C of the *Mining Management Act* which specifies that at least 33% of levy monies paid by an operator are to be paid into the mining remediation fund). Consequently, all monies collected through these payments are required to be paid into the fund.[171]

Committee's Comments

3.174 The Committee considers the Department's explanation of these matters to be satisfactory.

Part 8: Environmental Audits

3.175 Clause 142 provides that 'the CEO may direct an approval holder to cause an environmental audit to be carried out by a qualified person if the CEO believes or suspects on reasonable grounds than an approval holder has contravened, or is likely to contravene, a condition of an environmental approval.' While acknowledging the purpose of post-decision monitoring to ensure compliance with conditions of an approval, WK raised concerns regarding what it considered to be:

> the incredibly open-ended nature of auditing described in the proposed Act and its CEO should not be granted license to go on fishing expeditions. The purpose of an environmental audit should be limited to determinations of whether an approval holder is compliant with conditions of the environmental approval. Further, an order or notice to prepare a post-approval audit should be limited to situations where the Minister or statutory decision-maker believes or suspects on reasonable grounds that:
>
> - the approval holder has contravened, or is likely to contravene, a condition of the environmental approval, or
> - the environmental impacts of the action are significantly greater than indicated in the information available to the Minister or statutory decision-maker when the environmental approval was granted.
>
> This comports with the purpose of environmental audits provided for in section 458 of the *EPBC Act*. It also comports with the intent of the audit provisions of the *Waste Management and Pollution Control Act,* which generally requires some underlying open and transparent trigger for an audit, such as the issuance of a pollution abatement notice or a court order.[172]

3.176 Noting that the circumstances under which the CEO may require an environmental audit to be carried out were amended following consideration of submissions on the exposure draft of the Bill, the Department acknowledged that "the operation of the

[171] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.27-8
[172] WK, Submission 14, p.18

Act would be improved by including an additional circumstance reflective of s.458 of the *EPBC Act*.[173]

Committee's Comments

3.177 As acknowledged by the Department, the Committee agrees with WK that amending clause 142 to more closely align with the section 458 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) and the intent of existing audit provisions under the *Waste Management and Pollution Control Act 1998*, would enhance transparency and accountability and improve the operation of the legislation.

Recommendation 10

The Committee recommends that, similar to section 458 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), clause 142 be amended to provide that:

The CEO may direct an approval holder to cause an environmental audit to be carried out by a qualified person if the CEO believes or suspects on reasonable grounds:

(a) that an approval holder has contravened, or is likely to contravene, a condition of an environmental approval; or

(b) that the action authorised by the environmental approval has, has had or is likely to have an environmental impact significantly greater than was indicated in the information available to the Minister when the environmental approval was granted.

Part 9: Enforcement

3.178 This part provides for a range of compliance and enforcement mechanisms. Concerns were raised regarding a number of provisions under this part including, the appointment and powers of environmental officers; stop work notices; closure notices and certificates; and proponents' duty to notify incidents.

Environmental Officers

3.179 Clause 159 provides that 'the CEO may appoint or authorise a person as an environmental officer.' Given the powers the Bill confers on environmental officers under Division 1, NTCA questioned the absence of any provision requiring that the CEO must not appoint or authorise a person as an environmental officer unless satisfied that the person has the skills, qualifications, training and experience to properly perform the functions of an environment officer.[174]

[173] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.28
[174] Northern Territory Cattlemen's Association Inc. (NTCA), Submission 21, p.2

3.180 Noting that the appointment provisions for environmental officers reflect the standard drafting approach taken in Territory legislation, the Department advised that:

> Environmental officers are public servants and subject to the *Public Sector Employment Management Act 1993* and the Code of Conduct. It is implicit in the role of the Chief Executive Officer in ensuring the appropriate administration of the Act that the CEO is confident in the skills, qualifications and experience of appointed officers. Inclusion of a specific requirement for the CEO to document the reasons for being satisfied about these matters (which is an inherent requirement when such clauses exist) places an unnecessary administrative burden on the process.
>
> While it is acknowledged that there are some examples in the Territory's statue book where the person making the appointment must be satisfied that the appointee has relevant skills or qualifications (e.g. s.59 *Mining Management Act*; s31 *Independent Commissioner Against Corruption Act*), these are specific examples and inconsistent with the general approach taken in Territory laws.[175]

3.181 Clause 162(1) 'Powers of environmental officers – purposes', enables environmental officers to 'do anything or cause anything to be done' for the purposes of exercising a power under the Act. Given the provisions of clauses 162(2) and 163, the Committee sought clarification as to why this broad power was required. In response the Department advised the Committee that:

> Subsection (1) ensures that officers have the necessary breadth of powers to investigate and enforce compliance with the Act. Clause 162(2) builds on subclause (1) and was incorporated on the advice of the Department of the Attorney-General and Justice. Clause 163 provides some specific powers of officers however these do not necessarily ensure that the officer can fulfil all of their responsibilities under the Act.[176]

3.182 The Committee also noted that the Bill does not express any limitations on the intrusive and coercive powers of environmental officers other than to provide that the power to enter premises given by section 163 does not apply to residential premises unless the entry is with the consent of the occupier or the entry is under a search warrant issued pursuant to clause 170. Given the significant infringement on a person's right to privacy and property, the Committee is concerned that clause 170 'Application for and issue of search warrant', provides that an environmental officer may apply to a justice of the peace rather than a judicial officer for a search warrant to enter land or premises.

3.183 While noting that this clause was modelled on section 73 of the *Waste Management and Pollution Control Act 1998,* which provides for a justice of the peace to issue a search warrant, the Department advised the Committee that there would be "minimal operational impact if this section was amended consistent with s.68 of the *Independent Commissioner Against Corruption Act 2017*"[177] which requires that search warrants must be issued by a judicial officer.

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[175] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.29

[176] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.29

[177] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.30

Committee's Comments

3.184 While it is acknowledged that CEO's are required to comply with *Employment Instructions* published by the Office of the Commissioner for Public Employment[178], the Committee considers that it is misleading to suggest that the provisions in the Bill reflect the standard drafting approach taken in Territory legislation. For example, the Committee notes that recently introduced legislation including the Animal Protection Bill 2018, the *Hemp Industry Act 2019* and the *National Disability Insurance Scheme (Authorisations) Act 2019* all incorporate appointment clauses which require the CEO to be satisfied that the appointee has the relevant skills, qualifications and experience to perform the functions of the role.

3.185 If, as the Department stated, it is implicit in the role of the CEO that they be confident as to these matters, the Committee fails to see how the inclusion of an explicit clause would place any unnecessary administrative burden on the appointment process. As such, the Committee has recommended that clause 159 be amended accordingly.

3.186 The Committee is satisfied with the Department's response regarding clause 162(1) and notes that the Bill has been drafted in a similar manner to provisions in Division 3, Subdivision 1 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) and section 152 of the Liquor Bill 2019 which include comparable:

> powers of inspectors given the nature of the Act in providing approvals and the role of officers in ensuring compliance and the appropriate enforcement of significant and large scale projects.[179]

3.187 However, given the significant entry and seizure powers the Bill confers on environmental officers, and noting that legal qualifications are not a prerequisite for appointment as a justice of the peace, the Committee does not consider that justices of the peace have the appropriate training and expertise to determine whether a search warrant should be issued and ensure that no abuse of power is being exercised. Since warrants may be obtained by telephone to a Judge and Judges are rostered on to be available to take such applications 24 hours, the Committee has recommended that clause 170 be amended to provide that search warrants may only be issued by a judicial officer.

Recommendation 11

The Committee recommends that clause 159 be amended to provide that the CEO must not appoint a person to be an environmental officer unless satisfied that the person has the skills, qualifications, training and experience to properly perform the functions of an environmental officer.

Recommendation 12

The Committee recommends that clause 170 be amended to provide that search warrants may only be issued by a judicial officer.

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[178] *Public Sector Employment and Management Act 1993* (NT)*, s24*

[179] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.29

Environment Protection Notices

3.188 Clause 185 provides that the CEO 'may' lodge a copy of any environment protection notice issued or confirmed by the CEO in relation to land with the Registrar-General. AMEC suggested that in the interest of transparency, this clause should be amended to provide that the CEO 'must' lodge a copy of the notice with the Registrar-General. In response the Department pointed out that:

> A requirement to lodge the notice would place additional administrative burdens and costs on the CEO, Registrar-General and owner of the land in terms of both placing and removing the notice in circumstances where it was unnecessary for the notice to be lodge; e.g. because the notice did not relate to an ongoing land contamination issue and the matters raised in the notice have been addressed to the satisfaction of the CEO.[180]

3.189 The Committee also sought clarification from the Department as to what factors the CEO is expected to take into account when deciding whether or not to lodge a copy of an environment protection notice and was advised that:

> The CEO would be expected to consider a range of matters that resulted in the issuance of the notice. For example, the reasons the notice was considered necessary; the potential for ongoing land contamination, remediation or rehabilitation activities associated with the matters that resulted in the issuance of the notice; the specific obligations specified in the notice, including the steps to be taken by the person issued with the notice; and the time period for completing the obligations specified in the notice.[181]

Committee's Comments

3.190 The Committee is satisfied with the Department's advice.

Stop Work Notices

3.191 Clause 194 empowers the NT EPA to issue stop work notices to a proponent or approval holder. AMEC suggested that this would seem to be contrary to the role of the NT EPA as set out in the Department's fact sheet regarding the *Changing Role of the NT EPA* which states that:

> The NT EPA does not have any regulatory responsibilities under the draft Bill and Regulations. That is, the NT EPA is not responsible for ensuring compliance with the environmental approval. Compliance and enforcement responsibilities sit with the Chief Executive Officer of the Department of Environment and Natural Resources.[182]

3.192 However, the Department explained that:

> This clause is not about ensuring compliance with the environmental approval (which sits with the Chief Executive Officer), rather it seeks to ensure that commenced projects that may have the potential for significant environmental impact are considered by the NT EPA to determine whether or not impact assessment is required. The clause enables the NT EPA to require proponents

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[180] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.31

[181] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.31

[182] Department of Environment and Natural Resources, *The changing role of the NT EPA,* Northern Territory Government, Darwin, 23 April 2019, p.2; AMEC, Submission 23, p.14

> to cease undertaking action while decisions are made regarding the need for environmental impact assessment. This responsibility appropriately sits with the NT EPA given its responsibilities in ensuring that proponents comply with the environmental impact assessment process.[183]

Committee's Comments

3.193 The Committee is satisfied with the Department's explanation.

Closure Notices and Closure Certificates

3.194 For projects or actions where closure plans or something similar are already required under different legislation (for example, sections 40 and 46 of the *Mining Management Act 2001),* WK expressed the view that project proponents should not be subject to duplicative provisions.[184] However, as the Department pointed out:

> These provisions are written in a discretionary manner. This allows the Minister to consider the specific circumstances associated with a particular project before determining whether or not a closure notice or certificate is required. For example, if the Minister for Primary Industry and Resources has, or intends, to impose a similar requirement on a mining activity, then the Minister for Environment need not require them. Administrative processes between agencies are appropriate to ensure that there are no duplicative or inconsistent requirements placed on proponents where particular obligations may exist in other legislation.[185]

3.195 With regards to mining and petroleum activity in particular, WK suggested that clauses 202 – 204:

> Unfairly mix mineral and petroleum titles with land titles to the detriment of landowners such as pastoralists, who have no control over the actions of the party at whom any notice should be directed.[186]

WK further suggested that:

> Given the gravity and severity of a closure notice, simply addressing a notice to "the occupier" and "posting it to, or leaving it on, the land" is not sufficient notice. The CEO certainly has access to land records. Reasonable efforts must be made to provide actual notice to the parties.[187]

The Committee notes that a similar concern was raised regarding the serving of environment protection notices under clause 187(4) of the Bill.[188]

3.196 In response, the Department noted that:

> The issuance of a closure notice and its recording on land title is discretionary. Matters such as those raised by Ward Keller would be considerations when the Minister and CEO are determining whether to issue and/or record a notice.
>
> The powers at 204(4) and 187(4) are included to ensure that there is capacity to serve notices in this manner where the CEO has been unable to provide notice in another manner. The Bill could be expanded to include an obligation to 'take

[183] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.31
[184] WK, Submission 14, p.19
[185] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.32
[186] WK, Submission 14, p.20
[187] WK, Submission 14, p.20
[188] WK, Submission 14, p.19

> all reasonable measures' to provide notices, noting that the safety net provided by these clauses as drafted should be retained.

Committee's Comments

3.197 The Committee is satisfied that the Bill does not subject project proponents to duplicative provisions in relation to closure notices and certificates. While acknowledging that occupiers may not always be recorded on land records, the Committee agrees with WK that the Bill should require that reasonable efforts must be made to provide actual notice to the parties concerned. As suggested by the Department, the Committee has recommended that clauses 187 and 204 be amended accordingly.

Recommendation 13

The Committee recommends that clauses 187(4) and 204(4) be amended to include an obligation to take all reasonable measures to provide notices to an occupier.

Duty to Notify Incidents

3.198 WK suggested that clause 224 'Application of Division' is unclear:

> The way it is written the Division could apply to activities that are otherwise legal and valid under the environmental approval. If the incident occurs at a site where an action is undergoing assessment, it would appear that there is already a contravention of the legislation for undertaking activity without approval.[189]

However, as the Department pointed out, clause 227(2) provides that 'a person is not required to notify an incident under this Division if it is an ordinary result of an action required to be taken to comply with an environmental approval or another requirement of this Act.'

3.199 The Committee also raised concern regarding clause 229 'Incriminating Information' which requires a person to self-incriminate which is contrary to common law privilege and may be inadmissible under the *Evidence (National Uniform Legislation) Act 2011* (NT). A similar concern applies in relation to clause 175 'Compliance with requirement to provide information.' While noting that both of these clauses include a 'direct use' immunity, neither clause provides for a 'derivative use' immunity. As such, the Committee sought clarification from the Department as to the justification for the significant abrogation of the fundamental right against self-incrimination.

3.200 The Department subsequently advised the Committee that:

> The Bill has been drafted to provide additional clarity about the effect of the self-incrimination provisions in respect of derivative use immunity to prevent issues of interpretation arising about the extent of the immunity provided. Providing derivative use immunity would undermine the operations of the Bill.
>
> It is well established in environmental law that the privilege against self-incrimination can be overridden by legislation where there is clear justification for doing so, such as if there is a clear public benefit and assists in avoiding serious

[189] WK, Submission 14, p.20

> risk. For example, if use of the privilege could seriously undermine the effectiveness of the environmental regulatory regime by preventing the collection of evidence and/or causing or increasing levels of environmental harm, significant abrogation of the right would be considered appropriate.
>
> Humans have a collective interest in having access to a healthy environment. If use of the privilege by an individual jeopardises the integrity of the environment and the effective operation of the regulation intended to protect it, the use of the right by an individual person would not be considered to be in the interest of the public as it could lead to unlawful practices that result in environmental pollution and degradation.
>
> These provisions were modelled on s.82(2) of the *Independent Commissioner Against Corruption Act* and are consistent with the approach to self-incrimination and derivative use immunity for environmental legislation in other jurisdictions, including the *Environmental Protection Act 1986* (WA), *Protection of the Environment Operations Act 1994* (NSW) and *Environment Protection Act 1993* (SA).[190]

Committee's Comments

3.201 The Committee is satisfied with the Department's advice regarding the duty to notify incidents and the associated abrogation of the right against self-incrimination.

Part 10: Civil Proceedings

3.202 Clause 230 provides that 'a person who is affected by an alleged act or omission that contravenes or may contravene this Act may apply to the court for an injunction or another order under this Division.' EDONT suggested that, compared to clause 214 of the exposure draft, the Bill appears to attempt to narrow this standing and contains vague language as it is unclear who may be considered to be 'affected'. Noting the Courts have well established processes to determine who may be an affected person, the Department acknowledged that while consideration was given to providing more guidance around this term:

> it was identified that this may result in appropriate persons being excluded from the definition, and alternatively persons that are not affected by a particular alleged Act or omission seeking injunctions in order to delay projects.[191]

3.203 Clause 243 provides that the purpose of Division 2 'Civil penalty orders, other civil orders and directions' is to 'enable the CEO to give directions to remediate environmental harm or rehabilitate the environment; and to bring a proceeding for a civil penalty or other civil order. Given the extent and nature of power the Bill confers on the CEO in this regard, the Committee sought clarification as to the intended operation of this Division. The Department advised that:

> Clause 244 recognises that better environmental outcomes may be achieved through enforcing remediation and rehabilitation and publication of contraventions, than through lengthy prosecution processes.

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[190] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.33-4; see also Statement of Compatibility with Human Rights, *Environment Protection Bill 2019 (Serial 94),* https://parliament.nt.gov.au/committees/spsc/94-2019, pp.7-8

[191] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.34

> The Director of Public Prosecutions has published its guidelines regarding prosecution matters, including factors that should be considered when determining whether or not to pursue a prosecution. The Chief Executive Officer will have regard to those guidelines in determining the appropriate enforcement action to be taken. It is expected that as a matter of practice the Chief Executive Officer would seek legal advice through the Department of the Attorney-General and Justice however it would be inappropriate for such requirements to be incorporated into the legislation.[192]

3.204 Where additional information comes to hand following the making of a direction, the Committee also sought advice as to what recourse the CEO has to make a subsequent application for a civil order or to commence criminal proceedings. The Department subsequently advised that:

> The Chief Executive Officer may apply for a civil order (clause 245) to enforce a direction and may also commence criminal proceedings (clause 254). The Chief Executive Officer may not use material that was provided for the purposes of a civil proceeding in criminal proceedings (clause 255). This ensures that the CEO does not commence civil proceedings as a tool to obtain information for criminal proceedings. This does not, however, prevent the CEO from commencing criminal proceedings prior to the person completing the actions required by the direction, where new information comes to the attention of the CEO.
>
> There are also offences relating to the provision of false or misleading information which may be appropriate should it be identified that the CEO based their decision to pursue civil proceedings on the basis of information that the approval holder was aware was false or misleading.[193]

3.205 ALEC raised concern that clause 248 'Civil Orders' does not conform with recommendation 14.32 of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* which provided that there should be a rebuttable presumption of fault in circumstances of environmental harm which ALEC considered to be a higher burden of proof than the 'balance of probabilities' as provided for in clause 248(1).[194]

3.206 In response to the Committee's query regarding whether any consideration was given to implementing provisions that reverse the onus of proof or create rebuttable presumptions for pollution and environmental harm offences, the Department advised that:

> Consideration was given to establishing presumptions regarding the consequences of pollution – i.e. that pollution causes harm in the absence of evidence to the contrary. Given the nature of the offences relates to the establishment of environmental harm more generally, this approach was not followed. It is noted that all offences create a reverse onus proof on the defendant to establish a defence.[195]

Committee's Comments

3.207 The Committee is satisfied with the Department's advice and notes that the provisions in the Bill were modelled on equivalent provisions in the *Environment*

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[192] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.34-5

[193] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.35

[194] ALEC, Submission 24, p.9

[195] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.36

Protection Act 1993 (SA). As the Department pointed out, while many other jurisdictions have adopted civil proceeding processes, environmental and project management legislation in the Northern Territory does not currently incorporate similar provisions:

> Under the *Environment Protection Act 1993* (SA), civil proceedings may be brought by the Environment Protection Authority, a person whose interests are affected by the subject matter of the application and any other person with the Court's permission. Under that Act, the Environment Protection Authority has capacity to recover civil penalties.[196]

Part 11: Offences, Penalties and Criminal Proceedings

3.208 Clause 266 'Liability of partners and unincorporated associations' sets out when a partner in a partnership arrangement, or the officers of an unincorporated associated, that is considered to have committed an offence under the Act may also be considered to have committed that offence. As noted in the Explanatory Statement:

> The clause is included as a deterrent to partners and officers of unincorporated associations from failing to comply with their duties to prevent and minimise environmental harms or impacts from activities that they are involved in.[197]

3.209 However, AMEC expressed the view that this clause:

> Will have a negative effect on the joint venture structure frequently adopted in mining and mineral exploration. A joint venture can take many forms. A common type is a "farm-in" that gives an ownership interest in the principal mining company's project, subject to the farm-in party achieving certain expenditure commitments over an agreed period of time.
>
> AMEC considers that a hierarchy of liability starting with the environmental approval holder or alleged transgressor (and if there is more than one holder, in the proportions of their holdings) as the first in the hierarchy of liability is more appropriate. The current wording of the legislation provides no direction over who is liable and in what sequence accountable.
>
> A 'Hierarchy of liability' is found within the *Contaminated Land Management Act 1997* (NSW) and Queensland's *Environmental Protection Act 1994* (QLD). Both operate on the "polluter pays" principle, but the hierarchy is provided to delineate who is accountable after the polluter. This delineation will provide clarity to the operation of this section, but also provide transparency to the businesses as to how to structure their finances.[198]

3.210 Modelled on section 92 of the *Waste Management and Pollution Control Act 1998,* the Department advised the Committee that:

> The provision is included because the smaller nature of the Territory means that projects are not always undertaken within company structures, and there is a greater use of partnerships and unincorporated bodies. The clause includes specific defences identifying the circumstances in which a partner is not considered liable for the action. Although it is the duty of the defendant to provide the legal burden of proof of the defence, the defence provisions would, as a matter of practice, be considered by the Chief Executive Officer before seeking to rely on these provisions.

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[196] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.35

[197] Explanatory Statement, *Environment Protection Bill 2019 (Serial 94),* https://parliament.nt.gov.au/committees/spsc/94-2019, p.56

[198] AMEC, Submission 23, p.15

> The *Contaminated Land Management Act 1997* (NSW) (refer s.6) and *Environmental Protection Act 1994* (QLD) (refer s.363M) appear to provide hierarchies associated with responsibility for land contamination, although do not contain hierarchies of general responsibility. More generally, Chapter 7, Part 5, Division 2 of the *Environment Protection Act 1994* (QLD) contains what is referred to as 'chain of responsibility' provisions. These provisions enable the regulator to issue orders to 'related persons' of companies to carry out environmental obligations of the company. These provisions were introduced following a number of incidents where conditions of approval, financial assurances and other regulatory tools proved inadequate to manage and rehabilitate contaminated sites operated by companies experiencing financial difficulties.[199]

Committee's Comments

3.211 The Committee is satisfied with the Department's response and notes that, as part of its response to the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory,* the Government has committed to introducing 'chain of responsibility' legislation similar to that introduced in Queensland.[200] It is understood that this will be progressed separately to the reforms of the environmental impact assessment and approval process.[201]

Part 12: Review of Decisions

3.212 Part 12 provides for judicial review of decisions of the Minister, the Chief Executive Officer, the NT EPA or an environmental officer, and merits review by the Northern Territory Civil and Administrative Tribunal (NTCAT) of reviewable decisions of the Chief Executive Officer or an environmental officer as specified in the Schedule. Concern was raised by a number of submitters that these provisions have been substantially amended from those contained in the exposure draft of the Bill.[202]

3.213 Whereas clause 254 of the exposure draft provided for open standing for judicial review, clause 276(1) of the Bill limits standing to:

(a) a proponent of an action to which the decision relates; or

(b) an applicant for the decision; or

(c) a person directly affected by the decision;

(d) a person who has made a genuine and valid submission during an environmental impact assessment and environmental approval process under this Act to which the decision relates.

3.214 In calling for open standing for judicial review to be reinstated, submitters noted that the Bill no longer complies with recommendation 14.23 of the *Scientific Inquiry into*

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[199] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.36-7

[200] Hydraulic Fracturing Inquiry Implementation Taskforce, *Scientific Inquiry into Hydraulic Fracturing Implementation Plan,* Department of the Chief Minister, Darwin, 2018, p.21

[201] Department of Environment and Natural Resources, *Response to submissions on draft environment protection legislation for the Northern Territory, February 2019,* https://denr.nt.gov.au/__data/assets/pdf_file/0006/669750/response-public-submissions.pdf, p.14

[202] see for example: EDONT, Submission 1; pp.12-13; NCLC, Submission 25, pp.12-14; ECNT, Submission 13, p.5; ALEC, Submission 24, p.7; AMEC, Submission 23, p.15; MCA, Submission 22, p.10

Hydraulic Fracturing in the Northern Territory which was supported by the Government, and provided that:

> prior to the grant of any further exploration approvals the *Petroleum Act* and *Petroleum (Environment) Regulations* be amended to allow open standing to challenge administrative decisions made under these enactments.[203]

3.215 The Committee subsequently sought clarification from the Department as to the rationale for removing open standing for judicial review as provided for in the exposure draft of the Bill, and was advised that:

> The Northern Territory Government determined to amend standing for judicial review by removing open standing and replacing it with defined standing in response to industry concerns raised during the consultation process on the draft Bill. This decision was announced by the Acting Minister for Environment and Natural Resources, the Hon Lauren Moss, on 30 October 2018.
>
> The Government committed to implementing the recommendations of the *Scientific Inquiry into Hydraulic Fracturing* in relation to the regulation of the onshore gas industry, not in relation to environmental regulation more broadly.
>
> The review rights provided for in the Bill are consistent with recommendations made by the Productivity Commission in its November 2013 report *Major Project Development Assessment Processes.*[204]

3.216 As noted above, clause 276(1)(d) provides that standing for judicial review extends to persons that made a 'genuine and valid' submission during the environmental impact assessment and environmental approval process to which the decision relates. Clause 276(2) further provides that a 'genuine and valid' submission by a person does not include:

(a) a submission by the person in the form of a form letter or petition prepared by another body or organisation; or

(b) a submission made after the end of the submission period, unless the court considers that in the circumstances it should be considered a genuine and valid submission.

3.217 MCA NT expressed the view that these criteria are:

> too narrow to prevent parties from anywhere in the world, with no potential to be directly affected by a decision, to lodge appeals against ministerial, departmental and NT EPA decisions, purely from a basis of ideological opposition to a project.
>
> To close this loophole, the MCA NT recommends that the definition of a 'genuine and valid submission' be included in Section 4 Definitions in the Bill and included in Section 276 as well that these are submissions that provide **adequate grounds for concern about potential environmental impacts on the basis that these were missed in the EIA and approval s processes underpinning decisions.**[205]

3.218 Conversely, ECNT noted that they were:

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[203] Northern Territory Government, *Hydraulic Fracturing in the Northern Territory – Government Response to Recommendations from the Final Report,* https://cmsexternal.nt.gov.au/__data/assets/pdf_file/0008/673082/government_responses_to_recommendations.pdf, p.31

[204] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.37

[205] MCA, Submission 22, p.6

> thoroughly opposed to a restriction based on whether someone has submitted a 'genuine and valid' submission. We strongly object to the characterisation in clause 276 of form submissions as being something other than a 'genuine and valid' submission. Here at the Environment Centre, we often encourage citizens to exercise their democratic rights to make submission on environmental topics with the assistance of submission guides that we collaborate to prepare. Our assistance (or the assistance of other organisations) should not preclude those citizens from taking action through the courts on environmental issues that they care about. Citizens who submit through some sort of form still have 'genuine and valid' concerns or opinions – otherwise they would not have bothered to submit at all.[206]

3.219 In response to these concerns, the Department subsequently advised that additional guidance provided in clause 276(2) is:

> Intended to assist the Court in determining whether or not a particular person should be provided with standing to seek a review of the decision. It is noted that this term applies to judicial review. The courts have well established principles regarding the criteria that need to be established in order to seek judicial review of decisions.
>
> Within the guidance provided by the Bill, the Court is considered best placed to determine whether in the interests of justice a particular person should be afforded the right to seek review of a specific decision. Further definition of the term is not considered necessary.
>
> The Productivity Commission in its November 2013 report *Major Project Development Assessment Processes* recommended standing be granted to persons that had taken a substantial interest in the assessment process. The Commission recognised that the location of a particular submitter is not determinative of their interest in a particular matter.[207]

3.220 Concern was also raised that clause 277 of the Bill limits the standing for merits review by NTCAT to 'affected persons' as specified for a reviewable decision in the Schedule. In accordance with recommendation 14.24 of the *Scientific Inquiry into Hydraulic Fracturing,* submitters noted that in addition to a person that is directly or indirectly affected by the decision, or a person that has made a valid or genuine submission during an assessment or approval process, the eligibility test in clause 255(4) of the exposure draft of the Bill extended merits review standing to include the following third parties:

- a member of an environmental, community or industry organisation, whether incorporated or not;
- an Aboriginal Land Council;
- a Registered Native Title Prescribed Body Corporate or a registered claimant under the *Native title Act 1993* (Cth);
- a local government body[208]

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[206] ECNT, Submission 13, p.6

[207] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.38

[208] Northern Territory Government, *Hydraulic Fracturing in the Northern Territory – Government Response to Recommendations from the Final Report,* https://cmsexternal.nt.gov.au/__data/assets/pdf_file/0008/673082/government_responses_to_recommendations.pdf, p.31; see also: EDONT, Submission 1; pp.12-13; NCLC, Submission 25, pp.12-14; ECNT, Submission 13, p.5; ALEC, Submission 24, p.7

3.221 However, as advised in relation to judicial reviews, it is noted that recommendation 14.24 of the *Scientific Inquiry into Hydraulic Fracturing* was specific to regulation of the onshore gas industry as opposed to environmental regulation more broadly. In addition, the Department noted that:

> The Northern Territory Government determined to remove merits review of decisions made by the Minister under the Bill, and the requirement to define standing in association with those decisions, in response to industry concern raised during the consultation process on the draft Bill. This decision was announced by the Acting Minister for Environment and Natural Resources, Hon Lauren Moss, on 30 October 2018.
>
> The term 'eligible person' was used to identify those parties that would have standing for merits review of the Minister's decision. The definition was no longer required once merits review of the Minister's decisions was removed.
>
> Merits review was retained for decisions made by the Chief Executive Officer and Environmental Officers. These decisions are generally of a compliance and enforcement nature. It was considered appropriate that review of these decisions be limited to those persons directly affected by the decisions. The review rights provided for in the Bill are consistent with recommendations made by the Productivity Commission in its November 2013 report *Major Project Development Assessment Processes.*[209]

3.222 AMEC also questioned whether NTCAT was appropriate for the review of environmental decisions:

> As the NTCAT website states in its About section, *NTCAT is much less formal than a court and its procedures are less complicated. Lawyers are permitted in most cases but usually are not necessary.*
>
> For the review of a decision on projects that are measured in the tens of millions of dollars, which are likely to hinge on the interpretation of complex scientific evidence, this is not the appropriate court. AMEC recommends the Supreme court as being the appropriate court for the review of decisions.[210]

3.223 However, as pointed out by the Department:

> The Northern Territory Government has established NTCAT specifically to review decisions of an administrative nature. The members of NTCAT are selected for their specialist knowledge and qualifications.
>
> The decisions of the Chief Executive Officer and Environmental Officers are decisions of an administrative nature which are appropriately reviewed by NTCAT. Review by NTCAT is more efficient and cost effective, and less complicated than court proceedings for both applicants and decision-makers.[211]

Committee's Comments

3.224 The Committee is satisfied with the Department's clarification and advice regarding the Review of Decision provisions within the Bill. As noted by the Department, the approach taken in the Bill is consistent with the recommendations of the Productivity Commission's report *Major Project Development Assessment Processes.* As

[209] Department of Environment and Natural Resources, Responses to Written Questions, 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.37
[210] AMEC, Submission 23, p.15
[211] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.38

provided for in recommendations 9.1 and 9.2, the Productivity Commission was of the view that:

> Judicial review is appropriate for major project primary approval decisions where a Minister is the decision maker. For decisions not made by a Minister, including those that are deemed because a Minister has not made a decision, limited merits review appropriate (along with judicial review). Jurisdictions that do not have statutory judicial review for these decisions should provide for it in legislation.
>
> Standing to initiate judicial or merits reviews of approval decisions should be limited to:
>
> - proponents
> - those whose interest have been, are or could potentially be directly affected by the project or proposed project
> - those who have taken a substantial interest in the assessment process.
>
> In exceptional circumstances, the review body should be able to grant leave to persons other than those mentioned above to bring a review application if a denial of natural justice would occur if they were not granted leave.[212]

Part 13: General Matters

3.225 As detailed below, concerns were raised regarding provisions relating to delegations by the Minister and Chief Executive Officer; contents of the public register; exemptions to directions to provide information; and the inclusion of specific guidance and procedural documents regarding appropriate and effective consultation with Aboriginal communities.

Delegation

3.226 Given that clauses 278 and 279 provide relatively unfettered powers of delegation of the very significant powers given by the Act, the Committee sought advice from the Department as to why the Bill does not require that such powers may only be delegated to appropriately qualified persons. Noting that drafting of the delegation powers in the Bill are consistent with equivalent provisions in other legislation of the Northern Territory,[213] the Department advised that:

> In determining whether or not to delegate their powers, the Minister, Chief Executive Officer and NT EPA, would need to be confident that the person delegated was able to perform the powers and functions in an appropriate manner.
>
> The delegator is responsible for ensuring that delegates appropriately exercise powers and functions. There are a range of other pieces of legislation and frameworks that can assist in this process …This is standard practice in the granting of delegations and a matter that is managed administratively. For example, the NT EPA currently requires all instruments of delegation to be accompanied by Guidelines that identify when and how delegations will be

[212] Productivity Commission, *Major Project Development Assessment Processes,* Australian Government, Canberra, November 2013, p.35

[213] See for example: *Mining Management Act 2001* (NT), s.81; *Petroleum Act 1984* (NT), s.7; *Waste Management and Pollution Control Act 1988* (NT), s8

> exercised. The Minister has imposed a similar requirement for the exercise of delegations under the Petroleum (Environment) Regulations.[214]

Committee's Comments

3.227 The Committee is satisfied with the Department's advice and notes that section 27 of the *Public Sector Employment Management Act 1993* (NT) Act provides that the delegation of any of the CEO's powers or functions is to be in writing. Sections 46 and 46A of the *Interpretation Act 1978* (NT) also provide further guidance regarding the power to authorise another person to exercise power or perform a function, and the power of delegation.

3.228 Taking into consideration the aforementioned provisions, the Committee notes that, with the exception of Queensland, the delegation powers in the Bill are consistent with equivalent legislation elsewhere in Australia which also provide a broad delegation to persons, employees and where relevant, Authorities, or other entities without reference to the qualifications of the delegate.[215]

Public Register

3.229 Pursuant to clause 284 the CEO must keep a public register of prescribed activities, obligations, decisions and enforcement of actions under the Act and must include information required by regulation. However, EDONT raised concern that:

> This provision has been significantly narrowed from the Exhibition Bill, indicating a retreat from transparency. It is essential that the Bill mandates what information is to be kept in a public register (rather than the Regulations). This must include documents such as referrals, EIA documents, environmental approvals and approval notices, audits, and all forms of documents issued in accordance with compliance powers.[216]

3.230 The Committee notes that Schedule 1 of the exposure draft provided that the public register must include documents and information prescribed by the Regulations in relation to 'environmental referrals; environmental approvals; mandatory environmental audits; environmental bonds; and environmental protection notices. As such, the Committee sought clarification from the Department as to why it was determined to not specify the matters to be included on the public register in the Bill as introduced.

3.231 The Department subsequently advised that:

> It was determined to include the matters for inclusion on the Public Register within the Regulations rather than the Bill to more easily facilitate updates to the Register and inclusion of additional items. It was noted that a number of the items that would be required on the Register will be identified through the Regulations.

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[214] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.39

[215] See for example, *Environment Protection Act 1997* (ACT), s13; *Environment Protection Act 1970* (Vic), ss. 50AM(5), 68; *Environment Protection Act 1993* (SA), ss 18C, 64C, 115; *Environmental Protection Act 1986* (WA), ss 18-20; *Environmental Management and Pollution Control Act 1994* (Tas), s16; *Protection of the Environment Administration Act 1991* (NSW), s21; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 515

[216] EDONT, Submission 1, p.14

> A single Schedule identifying all public register requirements provides administrative efficiency and interpretation.[217]

Committee's Comments

3.232 The Committee is satisfied with the Department's advice.

Directions to Provide Information

3.233 Under Part 13, Division 5, Clause 288 provides that a proponent or approval holder may seek an exemption from compliance with a direction notice on the ground that it would be unreasonable to do so. EDONT and ALEC raised concern that, given there is no constraint placed on when this power may be exercised, it could enable exemptions be sought in relation to a wide range of matters. EDONT expressed the view that "there must, as a minimum, be a requirement for the Minister to consider the public interest and the objects of the Act in making the decision."[218]

3.234 ALEC recommended that the clause should be amended to:

> include additional information to define what would be 'unreasonable' for the proponent to comply with. What a proponent considers as 'unreasonable' may in fact not accord with public expectations of disclosure and transparency. Any power that reduces public access to information should be highly regulated and qualified.[219]

3.235 Conversely, WK objected to the inclusion of Division 5 in the Bill suggesting that it was a:

> highly unusual regulatory overreach. Direct proponents will already be undergoing environmental impact analysis. Approval holders will already be undertaking expenditure to comply with the conditions of an approval. What this Division does is potentially require a proponent going through the process or an approval holder who has already completed the process to provide additional information with no direct nexus to its project or be fined up to $15,500. Penalties aside, this Division adds unnecessary cost and burden to both proponents and approval holders. It should be deleted in its entirety.[220]

3.236 In response, the Department advised that:

> Part 13, Division 5 has been included in the Bill to facilitate the collection, collation and publication of environmental data and information on behalf of the Northern Territory Government. The Division responds to obligations under the Territory's Assessment Bilateral Agreement made with the Australian Government under s.45 of the *Environment Protection and Biodiversity Conservation Act 1999.*
>
> The Division provides the Minister with broad powers to direct proponents and approval holders to submit certain information which will improve understanding about the state of the Territory's environment. These directions are intended to apply broadly to groups of proponents or in relation to groups of actions rather than targeted at specific proponents as part of the impact assessment approval process. For example, the direction might be used to require all proponents operating within the Darwin Harbour to provide copies of any monitoring data that

[217] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, pp.39-40
[218] EDONT, Submission 1, p.14
[219] ALEC, Submission 24, p.10
[220] WK, Submission 14, p.21

> may be collected within 6 months of the collection of the data. This would ensure the Government held up to date information about the Harbour and address 'commercial in confidence' claims made by proponents to avoid providing data until it is obsolete.
>
> For these reasons, it is considered appropriate to include a power for the Minister to grant exemptions to specific proponents on which a broad direction may place an unnecessary burden or impost. However, because these requests would be specific to the circumstances of the proponent it was not considered necessary for the Bill to provide the Minister with additional criteria regarding when the exemption may be exercised. An amendment that required the Minister be satisfied that granting the exemption would not undermine the objects of the Bill would support the operation of the Act.[221]

Committee's Comments

3.237 As noted by the Department, the primary purpose of Part 13, Division 5 is to ensure that the legislation complies with the Territory's obligations under its Assessment Bilateral Agreement made with the Australian Government under s.45 of the *Environment Protection and Biodiversity Conservation Act 1999.* As such, the Committee does not consider that this Division represents a regulatory overreach.

3.238 As acknowledged by the Department, the Committee, does however, consider that amending clause 288 to require that the Minister be satisfied that granting an exemption would not undermine the objects of the Act would improve transparency and accountability.

Recommendation 14

The Committee recommends that clause 288 be amended to require that the Minister must be satisfied that granting an exemption will not undermine the objects of the Act.

Guidance and Procedural Documents

3.239 Clause 291 provides that 'the Minister, the CEO and the NT EPA may publish guidance documents in relation to any requirements or processes under this Act'. While the NCLC recommended that the Bill be amended to include a stand-alone division regarding effective engagement with Aboriginal people,[222] ECNT recommended that clause 291 be amended to include a requirement to "develop guidance for proponents about consultation with Aboriginal peoples."[223]

3.240 However, as the Department pointed out:

> The NT EPA continues to develop guidance material to assist proponents in understanding the NT EPA's expectations for consultation and the development of material required for the impact assessment process. The NT Government has prepared and published the *'Remote Engagement and Coordination Strategy'* which provides guidance on how to improve engagement with Aboriginal community members.

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[221] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.40
[222] NCLC, Submission 25, p.9
[223] ECNT, Submission 13, p.2

> The Bill ensures that the NT EPA (and CEO and Minister) have the necessary legislative authority to prepare relevant guidance material (refer clause 391). Suitable guidance is required on a broad range of issues. Particularly given it was stated in the objects of the Bill, it was not considered necessary to specify here that guidance must include appropriate engagement with Aboriginal people.[224]

Committee's Comments

3.241 The Committee is satisfied with the Department's response and notes that the NT EPA's May 2019 *Guidance for Proponents – Stakeholder Engagement* includes specific advice regarding effective engagement with Aboriginal stakeholders and statutory obligations for Aboriginal stakeholder engagement. The Committee also notes that proponents are required to report on the outcomes of stakeholder engagement that occurred during the environmental impact assessment process and demonstrate how Aboriginal and key stakeholder knowledge has been captured from the engagement process and integrated into the assessment of environmental factors.[225]

3.242 The NT EPA's guide also references the *Remote Engagement and Coordination Strategy* which provides practical advice, mechanisms and tools designed to achieve more consistent and accountable remote engagement practices; greater transparency of decision making processes; relevant and culturally appropriate communication, engagement and feedback.[226]

Part 14: Repeals and Transitional Matters

3.243 A number of concerns were raised regarding the intended operation of the transitional arrangements set out in Part 14 of the Bill. WK sought clarification as to whether clause 296 'Saving of existing assessments commenced but not completed' applies to actions for which at least a notice of intent has been submitted.[227]

3.244 By way of clarification the Department noted that:

> Under the Environmental Assessment Administrative Procedures 1984, 'impact assessment' is commenced after the NT EPA has determined that an environmental impact statement (EIS) or public environmental report (PER) is required in relation to the action. It does not commence on the referral of the project.
>
> This is because proponents do not have the responsibility for referring projects – the responsibility currently sits with the relevant Minister ('responsible Minister', e.g. the Minister for Primary Industry and Resources) that has authority to issue an approval in relation to the project.
>
> Any project that has been referred, but about which the NT EPA has not made an assessment decision, would be treated as a referral under the Act. It would

[224] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.41
[225] Northern Territory Environment Protection Authority, *Guidance for Proponents – Stakeholder Engagement,* May 2019, https://ntepa.nt.gov.au/environmental-assessments/env-assessment-guidelines, pp.11-17
[226] Department of Housing and Community Development, *Remote Engagement and Coordination Strategy,* Northern Territory Government, Darwin, 2015
[227] WK, Submission 14, p.22

> therefore be the subject of public consultation requirements prior to the NT EPA making its assessment decision.[228]

3.245 Given that the environmental impact assessment process can be lengthy and expensive, WK also expressed the view that proponents:

> should not be penalized by having the rules changed in the middle of the game. Transition provisions should give these project proponents the opportunity to complete the assessment process under the current assessment regime.[229]

3.246 However, as highlighted by the Department, the transitional provisions have been drafted to ensure that proponents within the current assessment system are able to follow substantially the existing process, with some amendments.

> The environmental impact assessment process may run for a substantial number of years (most processes take between 2 and 4 years, including assessment timeframes for the NT EPA and proponent timeframes to collate, analyse and present information). Much of the time taken is outside of the control of the NT EPA as it is associated with the proponent's need to undertake ecological surveys across seasons, their financial capacity etc. It is unreasonable and impractical to expect the NT EPA to operate under two quite different frameworks in terms of time and process for such an extended period of time.
>
> Additionally, the effect of the transitional arrangements on proponents already 'in the system' were carefully considered, so that they would provide a benefit, rather than a detriment. For example, the transitional processes also enable an environmental approval to be granted, where the assessment report has not been completed. This provides additional certainty to proponents at the outcome of the process. …
>
> There is a strong perception in the community that it is an established practice for proponents to withhold information from the draft environmental impact statement (EIS) and include it in the Supplement in order to avoid public scrutiny until the process is complete. The amendments therefore address the lack of transparency in the system once a draft environmental impact statement has been submitted, by requiring the Supplement to be published for comment, and converting processes to business days to support administrative efficiency.[230]

3.247 GEMCO sought clarification as to the impact of the legislation on existing projects:

> The transitional provisions provide a mechanism for managing projects at various stages of the assessment process under the EA Act [*Environment Assessment Act 1992* (NT)]. However, we are concerned that the transitional provisions as currently drafted do not operate as intended with respect to existing operations that have completed assessment processes in the past and, in particular, to existing operations that commenced prior to the introduction of the EA Act.[231]

3.248 Noting that the proposed legislation operates prospectively, the Department advised that:

> Existing operations are not captured by the Bill unless those operations are being amended in such a manner that it constitutes a significant variation. For

[228] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.41
[229] WK, Submission 14, p.21
[230] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.42
[231] GEMCO, Submission 8, p.2

> legislation to apply retrospectively or retroactively, it must explicitly state that it is intended to apply to the past acts (retrospective) or in the past (retroactive).[232]

3.249 While acknowledging that the Bill provides assurances to industry that current operations will not require reassessment and granting of an Environmental Approval under the proposed legislation, MCA NT raised concern that:

> Section 301, however, indicates that if the EIA for a development proposal has proceeded to the stage when an environmental assessment report (EAR) has been prepared after commencement of the new Act, then an Environmental Approval will be required. The MCA NT is strongly opposed to this provision as it is unreasonable and unjust to require a proponent, who commenced an EIA process in good faith that it could reach completion under the current legislation, would at such a late stage, and potentially up to 4 years on, be assessed and require Environmental approval under the new legislation.
>
> This provision also appears to contradict Section 296, which states that if an assessment of a proposed action commenced under the former Act but an assessment report was not completed before the commencement (of the new Act) the former Act continues to apply to that assessment as if the former Act had not been repealed.
>
> For these reasons, the MCA NT strongly recommends that project proposals requiring formal EIA, that have proceeded past the stage of receipt of approved Terms of Reference, be allowed to complete its full EIA process and project approval under existing legislation, i.e. the *Environmental Assessment Act* and relevant sectoral legislation, e.g. the M*ining Management Act*.[233]

3.250 By way of clarification, the Department noted that:

> Clause 296 is about the process for completing the assessment process. It allows assessment processes to generally continue under the existing regime, with amendments to increase transparency (through publication of the Supplement) and conversion of timeframes into business days.
>
> Clause 301 requires the NT EPA to prepare an environmental approval to accompany the assessment report if the report was not completed prior to the commencement of the Act. The granting of an environmental approval is clearly a benefit to the proponent, rather than a disadvantage.
>
> Clause 296 is drafted in terms of 'subject to this Division' which enables the inclusion of clause 301. There is no contradiction between these clauses.[234]

Committee's Comments

3.251 The Committee is satisfied with the Department's clarification of the transitional arrangements as set out in Part 14 of the Bill, and notes the Department's comment that "relevant stakeholders were generally supportive of the transitional arrangements when they were described to them during the consultation process."[235]

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[232] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.42
[233] MCA NT, Submission 22, p.7
[234] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.42
[235] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.42

Part 15: Consequential Amendments

3.252 As provided for under clause 312, EDONT, ALEC and ECNT considered it inappropriate that a mine operator has three years to apply for an authorisation or mining management plan without transitioning to requiring an environmental approval under the new legislation and suggested that the period be reduced to 12 months.[236]

3.253 However, as the Department pointed out:

> This timeframe was determined in consideration of the complexity associated with preparing and approving mining management plans following an impact assessment process. It was noted that of the 6 assessment reports completed for mining projects since 2017, all mining operators were still in the process of applying for and seeking approval of mining management plans. This demonstrates the length of time associated with these processes.
>
> Reduction of this timeframe is likely to have a negative impact on industry and lead to less effective environmental management because there is not adequate time to conduct detailed investigations and analysis over seasons in order to inform effective management obligations or controls to be applied.
>
> Under current assessment processes, there are often outstanding matters that require further detailed investigation and analysis before the mining management plan can be approved. The 3 year timeframe provides an appropriate time during which operators can obtain and analyse the information, and the Department of Primary Industry and Resources can assess it.[237]

3.254 While the Explanatory Statement notes that clause 315 omits section 25AA(2) from the *Northern Territory Environment Protection Authority Act 2012* (NT), EDONT suggested that, as drafted, the Bill would appear to also omit subsection (1) which requires the NT EPA to have regard to the principles of ecologically sustainability. However, the Department advised that:

> Section 315 does not omit subsection (1), it merely removes the number (1) from the beginning of the clause. This is because numbering is no longer required with the omission of subsection (2). The effect of this amendment is that the NT EPA is still required to have regard to the principles of ecologically sustainable development however it is now using the principles established by the Environment Protection Bill 2019 and not separate principles established under the NT EPA Act. This provides greater consistency in its consideration and decision-making.[238]

Committee's Comments

3.255 The Committee is satisfied with the Department's clarification regarding the intended operation of the consequential amendments to the *Mining Management Act 2001* and the *Northern Territory Environment Protection Authority Act 2012* as set out in clauses 312 and 315.

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[236] EDONT, Submission 1, p.15; ALEC, Submission 22, p.10; ECNT, Submission 13, p.6

[237] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.43

[238] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.44

Additional Issues

3.256 In addition to issues regarding specific clauses within the Bill as discussed in the preceding sections, submitters also raised a number of other matters regarding the development of the Bill as detailed below.

Environmental Protection Policies and General Environment Duty

3.257 EDONT and NCLC expressed their concern that the provisions relating to environment protection policies and general environmental duty contained in the exposure draft have been held over to be reintroduced in the second stage of the environmental regulatory reform process. As EDONT noted, "in our view there is no sound reason for removing these provisions which give key powers and obligations to protect the environment."[239] Similarly, NCLC noted that:

> The Land Councils are disappointed by the Government's decision to remove the 'general environmental duty' and urge these provisions to be reinstated. These provisions are consistent with approaches adopted in Queensland and South Australia and provide a vital safeguard against adverse environmental impacts and the significant economic, social and cultural costs that will be borne by the Government and Northern Territory Citizens.[240]

3.258 The Department subsequently clarified that:

> Submissions on the consultation draft Bill identified that the inclusion of powers associated with the establishment of environment protection policies and the general environmental duty had generated concerns. In particular, a lack of explicit detail regarding the proposed use of environment protection policies and their likely content, was considered to have resulted in ambiguity regarding their application and purpose.
>
> Concerns in relation to the general environmental duty included uncertainty about the interaction between the proposed duty and a similar existing duty under the *Waste Management and Pollution Control Act 1988.*
>
> Although these matters are considered essential to a complete and modern environmental regulatory regime, it was recognised that these provisions were ancillary to, and not a fundamental requirement for, improving the environmental impact assessment and approval system. As such, provisions regarding both matters could be incorporated into the legislation at a later date (when it replaces the WMPC Act) to support more operational licensing, compliance and enforcement matters.[241]

Committee's Comments

3.259 The Committee is satisfied with the Department's response. Given that it is understood that environment protection policies will primarily cover matters associated with "the establishment of measures or limits for the generation of wastes and pollution and particular management standards for certain matters of concern, such as impacts from noise" and to avoid any conflict with the existing environmental

[239] EDONT, Submission 1, p.8
[240] NCLC, Submission 25, p.10
[241] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.44

duty in the *Waste Management and Pollution Control Act 1998*,[242] the Committee agrees that it would be sensible to address these matters in the next stage of the reform program.

Regulations

3.260 Concern was raised by a number of submitters that ascertaining the adequacy of many of the provisions within the Bill is difficult in the absence of the associated Regulations. While noting that it is not usual for Regulations to be drafted with a Bill, the Department advised that:

> consultation draft Regulations were released with the consultation draft Bill in order to assist stakeholders to understand the proposed environmental impact assessment process and how the legislation (Bill and Regulations) would operate together. … The draft Regulations cannot be finalised until the Bill is finalised and passed. The intent of the Regulations, is however, described in the factsheets associated with the Bill.[243]

3.261 During the public hearing, Ms Joanne Townsend (Chief Executive Officer, Department of Environment and Natural Resources) further noted that:

> We recognise that the Regulations provide the procedural details of the Bill and there is considerable stakeholder interest in knowing and having the opportunity to examine and critique the proposed process behind the Bill. Accordingly, we intend to release the revised Regulations for public review following completion of parliamentary processes on the Bill. In addition to the Regulations, the Bill will be supported through public guidance documents, providing a further level of detail and support to what is contained in it. This body of material will also be placed in the public arena.[244]

Committee's Comments

3.262 The Committee is satisfied with the Department's response and notes that pursuant to section 63 of the *Interpretation Act 1978 (NT)* all subordinate legislation is disallowable and, as provided for under clause (2)(g) of the terms of reference of the Public Accounts Committee, is subject to scrutiny by the Parliament.[245]

Regulatory Impact Statement

3.263 All jurisdictions, including the Northern Territory, have committed to implement best practice regulation principles as agreed to by the Council of Australian Governments (COAG):

> COAG has agreed that all governments will ensure regulatory processes in their jurisdictions are consistent with the following principles:
>
> - establishing a case for action before addressing a problem

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[242] Department of Environment and Natural Resources, *Response to submissions on draft environment protection legislation for the Northern Territory, February 2019,* https://denr.nt.gov.au/__data/assets/pdf_file/0006/669750/response-public-submissions.pdf, p.7

[243] Department of Environment and Natural Resources, *Responses to Written Questions,* 24 July 2019, https://parliament.nt.gov.au/committees/spsc/94-2019, p.5

[244] Committee Transcript, Public Hearing, 29 July 2019, p.67

[245] Legislative Assembly of the Northern Territory, *Thirteenth Assembly – sessional Orders – As adopted 20 March 2018,* https://parliament.nt.gov.au/business/standing-and-sessional-orders, pp.12-13

- a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed
- adopting the option that generates the greatest net benefit for the community
- in accordance with the COAG Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that
    a. benefits of the restrictions to the community as a whole outweigh the costs
    b. the objectives of the regulation can only be achieved by restricting competition
- providing effective guidance to relevant regulators and regulated parties in order to ensure the policy intent and expected compliance requirements of the regulation are clear
- ensuring regulation remains relevant and effective over time
- consulting effectively with affected key stakeholders at all stages of the regulatory cycle
- government action should be effective and proportional to the issue being addressed.[246]

3.264 Consistent with this commitment, the Territory Government has adopted a formal *Regulation-Making Framework* process to "ensure impacts of regulation are appropriately assessed and made fully transparent to Government prior to decisions being made."[247] The *Regulation-Making Framework* incorporates a two-step process:

- a PRIS [Preliminary Regulation Impact Statement], which is a preliminary analysis identifying likely impacts, consultation process and policy options, including non-regulatory responses, is submitted to the RIC [Regulation Impact Committee] through the RIU [Regulation Impact Unit].
- where the RIC determines after assessment of a PRIS that impacts are material, a full RIS [Regulation Impact Statement] will need to be prepared by the agency. Where impacts are assessed as not significant, the agency will be advised that a full RIS does not need to be prepared, and a PRIS certificate is issued.[248]

3.265 Given the nature of the proposed legislation, the Department advised that both a PRIS and RIS was prepared. An RIS certificate was subsequently issued by the RIU and submitted to Cabinet along with the RIS for assessment. The Committee notes that the RIC is chaired by the Department of Treasury and Finance and includes representatives from the Departments of the Chief Minister, the Attorney-General and justice, and Trade, Business and Innovation.[249]

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[246] Department of Treasury and Finance, *The Northern Territory government Regulation-Making Framework,* Northern Territory Government, Darwin, November 2017, p.5
[247] Department of Treasury and Finance, *The Northern Territory government Regulation-Making Framework,* Northern Territory Government, Darwin, November 2017, p.6
[248] Department of Treasury and Finance, *The Northern Territory government Regulation-Making Framework,* Northern Territory Government, Darwin, November 2017, p.6
[249] Department of Treasury and Finance, *The Northern Territory government Regulation-Making Framework,* Northern Territory Government, Darwin, November 2017, p.6

3.266 AMEC, NTCA, MCA NT and WK raised concerns that while they had been consulted in relation to the preparation of the PRIS and RIS, they had not seen a copy of the final RIS that was submitted to Cabinet and were of the view that it should be published. It was also suggested that the RIS was conducted very late in the development of the Bill and stakeholders had been given insufficient time to respond.[250] For example, MCA NT noted that:

> The RIS process for this Bill was done very late in the process, January 2019, when drafting was almost complete of the revised Bill … In addition to being tardy, the data gathering period was way too short to have allowed gathering of adequate data from industry to make a sound determination. Minerals Council members participated but had only one week to answer a range of questions that realistically would have required weeks or months to respond with relevant considered defensible quantitative data.
>
> Given this rushed process we believe the RIS process could not have obtained adequate information from Territory industry and business to have accurately indicated to the Legislative Assembly that the new legislation would meet its intended objectives. Because of this the Minerals Council believes the Bill should not have been tabled back in May, and the Minerals Council has requested of the government to see a copy of the RIS but our request has been denied.[251]

3.267 In response to these concerns, the Committee heard that regulatory impact statements are not publicly released in the Northern Territory and that this has been a long standing government policy.[252] In relation to the timing of the RIS, the Committee was advised that agencies cannot undertake a regulatory impact assessment "without having a fairly complete document or Bill in which to assess impacts."[253] Noting that it is one part of the overall Bill development process, the Department advised that there was a six week timeframe for the RIS consultation process:

> We did not receive feedback in relation to dissatisfaction with the timeframe in relation to that. The reality is that we completed the regulatory impact assessment in accordance with the NT's *Regulation-Making Framework.* We collected data from as many different contributors as we could. Data was also used in relation to other jurisdictions. So, it was a comprehensive process completed in the timeframe and in accordance with the *Regulation-Making Framework* to deliver the outcome.[254]

Committee's Comments

3.268 The Committee is satisfied with the Department's responses to concerns regarding the regulatory impact statement process undertaken in relation to the Bill. In response to a question from the Leader of the Opposition, the Hon Gary Higgins MLA, regarding release of the RIS, the Minister for Environment and Natural Resources, the Hon Eva Lawler MLA, reiterated that:

> The purpose of the RIS is to ensure impacts of regulation are appropriately assessed and made fully transparent to government prior to decisions being made. They are not prepared as public documents, for the advice of the public,

[250] Committee Transcript, Public Hearing, 29 July 2019, pp.19, 25,30, 32, 34,36, 51
[251] Committee Transcript, Public Hearing, 29 July 2019, p.34
[252] Committee Transcript, Public Hearing, 29 July 2019, p.70
[253] Committee Transcript, Public Hearing, 29 July 2019, p.76
[254] Committee Transcript, Public Hearing, 29 July 2019, p.77

> or as a public justification or explanation. That has always been the case for successive governments. [255]

3.269 Acknowledging the concerns from submitters in relation to accessing a copy of the finalised RIS, the Committee suggests that in future the Department may wish to consider informing stakeholders that are invited to provide comment on the RIS that it is not Government policy to publish finalised Regulatory Impact Statements.

[255] Daily Hansard, *Day 4 – Tuesday 13 August 2019,* http://www.territorystories.nt.gov.au/jspui/handle/10070/753833, p.24-5

Appendix 1: Submissions Received

Submissions Received

1. Environment Defenders Office NT Inc.
2. Sheri Lochner
3. Jayson Burhop
4. Dr Charlie Ward – North Australian Research Unit
5. Nick O'Loughlin
6. NT Council of Social Service
7. Heidi Jennings
8. GEMCO
9. Elissa Shuey – Not for Publication
10. Robyn Liddle
11. Dr David Liddle
12. Indigenous Carbon Industry Network
13. Environment Centre NT
14. Ward Keller
15. Jimmy Cocking
16. Kirsty Howey – North Australia Research Unit
17. Climate Action Darwin
18. Arnhem Land Fire Abatement (NT) Ltd.
19. Protect NT Inc.
20. Grusha Leeman
21. NT Cattlemen's Association Inc.
22. Minerals Council Australia – NT Division
23. Association of Mining and Exploration Companies Inc.
24. Arid Lands Environment Centre
25. Northern and Central Land Councils
26. Proforma Submission (21)

Note

Copies of submissions are available at: https://parliament.nt.gov.au/committees/spsc/94-2019

Appendix 2: Public Briefing and Public Hearings

Public Briefing – 20 May 2019

Department of Environment and Natural Resources

Joanne Townsend: Chief Executive Officer
Paul Purdon: Executive Director Environment Protection
Karen Avery: Executive Director Environment Policy and Support
Kathleen Davis: Director Environment Policy

Public Hearing – 29 July 2019

- Gillian Duggin: Principal Lawyer/Executive Officer, Environmental Defenders Office NT Inc.
- Eric Lede: Acting Coordinator, Indigenous Carbon Industry Network
  Jennifer Ansell: Chief Executive Officer, Arnhem Land Fire Abatement (NT) Ltd.
- Shar Molloy: Director, Environment Centre NT
  Claire Boardman: Policy Officer, Environment Centre NT
- Neil van Drunen: Manager South Australia, Northern Territory and Policy, Association of Mining and Exploration Companies
  Matt Briggs: Chief Executive Officer, Prodigy Gold
- Ashley Manicaros: Chief Executive Officer, Northern Territory Cattlemen's Association Inc.
- Dr Janice Warren: Manager Policy and Research, Minerals Council of Australia NT Division
  Brian Fowler: General Manager Northern Territory and Sustainability, Arafura Resources Ltd
  Nicole Conroy: Technical Director Environment and Team Leader Impact Assessment and Permitting, GHD Consultants
- Kevin Stephens: Partner, Ward Keller
  Bradly Torgan: Special Counsel
- Alex Read: Policy Officer, Arid Lands Environment Centre
- Greg McDonald: Manager Minerals and Energy, Northern Land Council
  Diane Brodie: Research and Policy Officer, Northern Land Council
- Joanne Townsend: Chief Executive Officer, Department of Environment and Natural Resources
  Paul Purdon: Executive Director Environment Protection, Department of Environment and Natural Resources
  Alaric Fisher: Executive Director Flora and Fauna
  Karen Avery: Executive Director Environment Policy and Support, Department of Environment and Natural Resources
  Kathleen Davis: Director Environment Policy, Department of Environment and Natural Resources

Note

Copies of hearing transcripts and tabled papers are available at:
https://parliament.nt.gov.au/committees/spsc/94-2019

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Daily Hansard, *Day 1 –Thursday 20 June 2019*, http://www.territorystories.nt.gov.au/jspui/handle/10070/308154

Daily Hansard, *Day 4 – Tuesday 13 August 2019,* http://www.territorystories.nt.gov.au/jspui/handle/10070/753833

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Dissenting Report by Mrs Lambley

Dissenting Report

From Robyn Lambley, Member for Araluen

Deputy Chair of the NT Parliament Social Policy Scrutiny Committee

The Environmental Protection Bill 2019

The Social Policy Scrutiny Committee was invited to scrutinise the Environmental Protection Bill 2019 by the NT Legislative Assembly on 16th May 2019.

Fragmented two stage legislative process

This Bill is the first of two pieces of Legislation that will reform the current Environmental Assessment Act. A second Bill and tranche of Environmental reforms will apparently be presented to the NT Parliament within months. The second tranche is flagged to focus on pollution control and waste management.

The Government should have incorporated all the Environmental reforms into one Bill. The fact that they have chosen to legislate reforms in two separate legislative tranches raises concerns about the lack of understanding of the full context of this Bill. This decision has created suspicion and uncertainty. Not knowing what is contained in the second Bill raises questions pertaining to this Bill that cannot be answered. This blindsided the Committee's ability to properly scrutinise this Bill and was raised as an issue by stakeholders.

Regulatory Impact Statement (RIS)

The Government failed to commence the Regulatory Impact Statement (RIS) until at least half way through the consultation on the Bill. The RIS is a mechanism that was prepared by an Independent consultant to measure the cost of implementing the initiatives within the legislation. The RIS will indicate if the Bill will mean greater efficiencies effectiveness and if the Bill will streamline processes and reduce red tape, as claimed by the Government.

The RIS has been completed and has been in the possession of the NT Government for some time. The Government has refused to make the RIS public. Without the knowledge contained in the RIS it is difficult, if not impossible, to properly assess the likely effectiveness of the Bill. The NT Government should have provided the RIS to the Social Policy Scrutiny Committee to enable us to properly deliberate on the pros and cons of this Bill.

No net improvement to the process of assessing environmental approval

Compelling evidence was provided to the Committee that there is no evidence that the Bill will improve the process for proponents. In fact it was proposed by numerous stakeholders that the Bill will add to the administrative burden and to the time and regulatory burden. This Bill does not meet the fundamental objective of the Government to make Environmental approvals simple, fairer and better.

The view was that the current Environmental legislation, although old, is not broken, and that this Bill will create a slower and more burdensome process for developers and miners. The NT already has a slow and onerous system, to add to this is ridiculous. To create more red tape is ridiculous.

Singular Minister

Concern was raised about the fact that the Minister for Environment will have the final decision on approvals. The Committee was informed that most NT Environmental processes apparently take years (an average of 2½ years) and yet the Minister for the Environment is given just 30 days to make a final decision. This "singular Minister" model of approval was identified as an anomaly by a number of stakeholders.

Consultation Process

Many people provided evidence that the consultation of the Environmental Protection Bill 2019 was rushed and thus, has unintended consequences. This Bill should be withdrawn to allow the two tranches (or Bills) of environmental reforms to be scrutinised and debated simultaneously and allowing a full and thorough consultation with all stakeholders.

In good faith I cannot support the recommendations made by the Social Policy Scrutiny Committee Report in relation to the Environmental Protection Bill 2019.

The Social Policy Scrutiny Committee should be recommending that the Government withdraws this Bill and starts again.

I will not be supporting this Bill in Parliament.

Robyn Lambley MLA

Member for Araluen

2nd September 2019

Dissenting Report by Mrs Finocchiaro

Dissenting Report: Environment Protection Bill 2019

I write to dissent from the Social Policy Scrutiny Committee report into the Environment Protection Bill 2019 after careful consideration of the draft legislation and active participation in the scrutiny committee process.

The CLP Opposition supports clear, certain, equitable, efficient and effective environmental legislation which is critical to ensuring sustainable economic development in the Northern Territory and to reassure Territorians that the Government has got the balance right.

The CLP Opposition is unashamedly pro-development and believes that the Northern Territory has limitless potential. It is important when considering major reform or substantial changes to "the rules of the game", which is the effect of this Bill that we remind ourselves that the Northern Territory economy is small and developing.

The Territory has many attributes that will make our future bright if the policy and legislative settings are right: strong economic growth powered by our abundance of natural resources, tourism opportunities showcasing our pristine environment, the connection of Aboriginal people to the land and sea, to name only a few. It is critical that the Territory's largest landholders, Aboriginal Territorians, share in the endeavour so that together as Territorians we can provide the economic, cultural and social environment for future generations to live their lives with minimum reliance on the Federal Government.

As Territorians raising our families here, the CLP Opposition is acutely conscious of the need to protect our environment for future generations because of its importance not only to our ongoing existence, but also to our unique Territory lifestyle, something we are fierce protectors of.

However, it is important to recognise that **all** development comes at a price to our environment. As legislators we have a responsibility to Territorians to ensure our regulatory frameworks balance the often competing environmental, social, cultural and economic factors. On balance, the safeguards to our environment must be robust strategies protected by legislation.

This Bill does not strike the right balance between the absolute need to develop and the imperative of protecting our environment

In the document titled "Frequently Asked Questions" tabled to the Scrutiny Committee on 20 May 2019 the following questions were asked and answered: "Why are you reforming the environmental impact assessment process?"

> *"Government, industry and the community all recognise that there is a need for reform and modernisation of the Northern Territory's environment protection framework - particularly the process of environmental impact assessment and approval.*
>
> *There have been several reviews of the Territory's Environmental Assessment Act over the last 10 years. These reviews and other feedback from non-government organisations, industry and individuals have identified:*
>
> - *A lack of transparency in the current environmental impact assessment system particularly in respect of decision making.*
> - *Uncertainty about the responsibilities of proponents, the NT EPA and government agencies, and lengthy and uncertain timeframes for completing assessments.*

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- *Inconsistency and inequity in the application of rules and processes for similar projects, different approaches and conditions for managing similar environmental impacts across different industries.*
- *Gaps in the assessment system which have meant that some major projects have not undergone assessment and approval.*
- *Other cases where the legislation under which approval is given does not provide for enforceable conditions to protect the environment.*
- *Failure and inability to take appropriate action to ensure proponents comply with environmental obligations.*
- *A risk that agencies responsible for promoting a sector do not act with appropriate rigour to manage environmental impacts (sectoral capture).*

These issues result in our current system being slow and costly for industry and government, complex for regulators and unclear in its outcomes for the community. [emphasis added]

These are not matters that can be resolved with minor 'tweaking' of the existing legislation.

These inadequacies have contributed to a general lack of confidence in the Territory's capacity to manage the environment, and to attract and facilitate industry investment" [emphasis added]

In trying to achieve these outcomes, the Bill has a fundamental flaw which has the effect that, as identified in the Ward Keller written submission to the Scrutiny Committee *"the proposed Act will increase regulatory burden, complexity, administration and time taken to develop a project. The proposed Act is not consistent with the robust development of the Territory and is an investment and job-killer."* A profound allegation to make and one that makes you stop and think.

The Fraser Institute Annual Survey of Mining Companies lists over 80 jurisdictions around the world and ranks them into investment desirability based on feedback it receives on a jurisdictions geologic attractiveness and Government policy. Western Australia made it into the top 10 whilst the Territory trailed far behind. Environmental approval times was one of the areas where the Territory fell behind in the ratings. This is not good enough.

The Territory is currently facing unprecedented economic hardship and is in desperate need of private investment and diversification. Many industries, but particularly mining, have been targeted by this Government through expansive reviews and the impost of a new hybrid mining tax culminating in a great level of uncertainty for industry. The Territory needs jobs and opportunities that attracts people to move to the Territory and importantly, stops people from leaving. It is hard to live in the Territory when you do not have a job, and it is impossible to enjoy living in the Territory if our lifestyle is not protected. Therein lies the desperate need for balance.

The CLP Opposition agree with the Northern Territory Cattlemen's Association (NTCA) submission which noted the danger of the unintended consequences in adding to the cost of development in the Northern Territory.

We note that an Australian Bureau of Industry Economics study in the early 1990s found that delay costs could constitute up to 10% of project costs (BIE 1990). A more recent study by the Australian Productivity Commission (2009) on the oil and gas sector found that a one year delay in the approval of exploration activity could reduce the net present value of the project by between 7% and 9%,

depending on the discount rate. Similarly, delay in the approval of oil and gas production activity could reduce the net present value of the project by 11–18%.

The Productivity Commission (2013) concluded that a one-year delay reduces the net present value of a major offshore LNG facility by 9%. Deloitte Access Economics (2011) referred to an Australian Petroleum Production and Exploration Association (APPEA) figure cited in the Hawke Review that a one-year delay would cause losses to a typical LNG project equal to 11.4% of the project cost.

The Bill's sheer size creates greater complexity and additional processes that impacts on the confidence of proponents to invest. As stated by Mr Brian Fowler during the public hearing *"This Act is taking a relatively straightforward process, with a current Bill that is less than 50 pages, and we are going to supplant that with a new Act which is somewhere in the north of 150 and growing."*

Kevin Stephens of Ward Keller went on to explain his concerns around the length and complexity of the Bill during the public hearing:

> *"The first thing about this Bill and why I say it promotes expensive detailed regulatory provisions over action is that the existing Environmental Assessment Act is 13 sections long and six pages. It is this here. Under this, we have just approved the most significant project tin the Territory's history—INPEX—and all other projects. Ever since 1982, every project developed in the Territory has been successfully developed under this legislation that is six pages long and 13 sections.*
>
> *We will replace that with 293 sections and 137 pages, and I have not counted the 49 sections dealing with transitional provisions and other legislation to do pretty much exactly the same things that are already done there, with no appreciable difference or benefits, other than the crucial ones which I am complaining about and which I think will harm the Territory.*
>
> *We do not have the draft regulations, but I can tell you of the 16 sections that at the moment comprise the Environmental Assessment Administrative Procedures that help make everything work, we do not have a draft regulations anymore. But when there were originally draft regulations put out to accompany the draft consultation Bill, those 13 pages and 16 sections became 213 sections."*

The CLP Opposition is firmly of the view that for legislation to be effective, it has to be workable.

In considering whether this Bill achieves what it set out to achieve (as extracted above), we raise the following concerns with the Bill:

1. Part 2 "Principals of Environment Protection and Management" does not adequately incorporate a balanced focus on the environment *and* economic and social considerations in that:
    - the words "economic, social and cultural" are not included in the principals of economically sustainable development (Part 2, Division 1);
    - intergenerational/intragenerational equity does not include the right to develop to meet the needs of current or future generations (clause 21);
    - single Minister has the power of veto over decisions and is not required to consult Cabinet (Association of Mining and Exploration Companies Inc (AMEC) and Minerals Council of Australia Northern Territory (MCA NT) raised these concerns in their submissions despite comment from the Department of Environment and Natural Resources (DENR) that a Minister was unlikely to make a unilateral decision);

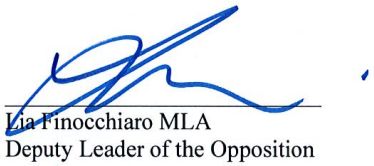
- Minister is not explicitly required to consider the social, cultural and economic impacts and is confined to the matters listed in the "Objects" of the Bill;

2. Transparency is eroded in a number of areas including:
   "a decision-maker is not required to specify how the decision-maker has considered or applied" the principals of economically sustainable development (clauses 17(3));
   - there is no timeframe for the Minister to publish a statement of reasons for making a declaration of environmental objectives or referral triggers (clauses 28 and 30);
   - there are inadequate safeguards around "Triggers" set out in Part 3 Division 1 in that the Minster can declare referral triggers by geographic location or activity without notice or consultation; and
   - temporary declarations of protected environmental areas have an unjustifiably long timeframe (clause 35(2)).
3. Outsources responsibility to the NT EPA in a number of areas including:
   - at the public hearing Kevin Stephens of Ward Keller raised the following concerns about the centralisation of power with the NT EPA:
     "It centralises development power in the Minister for Environment and Natural Resources, giving that Minister a veto right over all major development in the Territory. It reduces the power of the NT Minister, at the expense of the NTEPA—an NTEPA which is Territorian in name only, as seven out of the eight members do not live in the Territory.";
   - the Minister is effectively constrained by the NT EPA (for example, clauses 74 and 77) and if the Minister does not do as recommended by the NT EPA, the Minister has to essentially explain themselves to the NT EPA. (Part 5, Division 3, Clauses 70,72,74,79,80, Part 5, Division 5); and
   - NT EPA can recommend an assessment can be made on its own initiative Part 3, Division 1 (clause 31).
4. The timelines proposed in the Bill on the face of it present an improvement to the current legislation (clauses 74 and 77) however, they are aspirational only and "stop the clock" provisions (clauses 70(i), 71(2), 80(3), 99(4), 100(2), 108(3), 120(2) and 122(3)) do not provide a 'whole of Government' timeframe.
5. Environmental Audits are unlimited in their scope and are not confined to the conditions of the Environmental Assessment (clause 142).
6. Environmental Officers have extensive powers without limitation or the requirement that they be suitably qualified "An environment office may do anything or cause anything to be done or take any action the environment office believes on reasonable grounds is necessary" (Clause 162, Part 9, Division 1).
7. Many submitters including, AMEC, Ward Kellar, MCA NT, and the Northern Land Council to name a few, highlighted the importance of adequate resourcing to effectively implement this Bill.

In addition, the Regulations which support this Bill are yet to even be drafted meaning stakeholders have been unable to assess and provide feedback to the Scrutiny Committee on the full impacts of this legislation.

Equally concerning is the fact that the Government prepared a Regulatory Impact Statement (**RIS**), sought feedback from stakeholders to inform the development of the RIS, but are refusing to publish it. If this RIS proves that the Bill strikes the right balance between environmental protection and the necessary future development of the Territory, then why is the Government refusing to release it, even in part?

It is primarily for these reasons that the CLP Opposition cannot support the Bill in its current form.



Lia Finocchiaro MLA
Deputy Leader of the Opposition
Member for Spillett
13 September 2019

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