Submissions on the *Environment Protection Bill* 2019 to the Social Policy Scrutiny Committee

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Executive Summary

Ward Keller appreciates the opportunity to provide submissions on the *Environmental Protection Bill* 2019 (**proposed Act**). The proposed Act substitutes actual reform by action (which is relatively low cost, improves effectiveness in environmental regulation, improves efficiency for project proponents and provides gains for the environment and projects) with promised reform by regulation and bureaucracy (with additional costs and new taxes, reduced effectiveness with greater processes and more scope for issues, reduced efficiency for project proponents, more licences to obtain, more restrictions on transfers and increased uncertainty at additional costs to projects).

The existing *Environmental Assessment Act* (**EAA**) requires that any decision by a NT Minister that could reasonably be considered to be capable of having a significant effect on the environment must be referred to the Northern Territory Environment Protection Authority (**NTEPA**) to decide if an environmental assessment is required, and if so at what level (public environmental report, environmental impact statement or an inquiry). The responsible Minister is not to make their decision until they are in receipt of the NTEPA Assessment Report and any comments from the Environment Minister. Therefore the Minister primarily responsible for authorising the proposed action weighs the environmental effects and considers the recommendations in the Minister's decision to either approve or reject the project and in determining approval conditions. This allows:

(a) all Ministers making major decisions that might affect the environment to have the benefit of environmental assessment and recommendations; and

(b) the Minister with the primary responsibility and expertise in relation to the matter to determine whether the matter should proceed and under what conditions.

The proposed Act has separate environmental licensing, bonding, auditing, enforcement and transfer approvals. This means that:

(a) a unified approval now becomes two approvals with two separate licences and conditions;

(b) the Environment Minister (potentially confined by the NTEPA) has a veto over all major projects;

(c) given the broad definition of "environment" and that major projects continually effect the environment there is likely to be large degrees of regulatory overlap and Departmental duplication in regulation; and

(d) the Environment Minister (guided by the Department and NTEPA) must acquire skills to regulate all major projects.

The Government has not pointed to any systemic issues that justify such wholesale changes. What is missing in the proposed Act is the recognition of the right to develop, the primacy of the responsible Minister, simplicity, brevity and balance. The 13 sections of the EAA have become 303 sections of the proposed Act. Six (6) pages of laws has become one hundred and fifty six (156) pages of laws. Sixteen (16) sections and thirteen (13) pages of the *Environmental Assessment Administrative Procedures* became 213 sections of the draft *Environment Protection Regulations* with the current redraft of regulations not available.

Relatively late in the process and in response to requests about cost benefits analysis the Government commissioned a regulatory impact statement from (interstate) consultants

Marsden Jacob Associates. NT industry groups were invited to make submissions to the consultants and did so. Notwithstanding our request to have access to the regulatory impact statement, access has been denied.

The role of the NTEPA is fundamental, but it is disappointing that of the 8 members of the NTEPA seven (7) reside outside the Territory.

This is not to say the current system is perfect. In section 7 of these submissions we propose a better solution to both the current system and the proposed legislation. A better solution is one that sees all primary project entitlements approved at one time by the responsible Minister, including a stand-alone Mitigation, Monitoring and Reporting Plan recommended by the Minister for the Environment. Any variation of this plan by the responsible Minister must be accompanied by consultations with the Environment Minister and written reasons. This approach avoids the delay and additional burdens of duplicating the regulatory system and fragmenting project approvals while allowing the Minister for the Environment to focus on the core competency of the portfolio – environmental considerations. This approach also ensures that economic considerations can be considered concurrently with environmental considerations, something for which the proposed legislation does not provide. Other improvements to the assessment system, such as more focused Terms of Reference and greater transparency in the consultation process, both within government and with external stakeholders, including members of the public at-large, do not require changes to the current regime and can be undertaken by departmental and NTEPA action.

Notwithstanding changes made since the consultation draft of the proposed Act, 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.

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1. Introduction

We appreciate the opportunity to provide submissions on the *Environmental Protection Bill 2019* (**proposed Act**). While the proposed Act as tabled represents an improvement over the exposure draft on which Ward Keller previously provided submissions, we still have significant and substantial concerns with the proposal, from the substance of the changes to the current environmental impact assessment regime to poor drafting of the proposal, detailed below.

The most recent CommSec State of the States Report (April 2019) places the Northern Territory 7th of the 8 states and territories in economic performance.[1] It had also been either 7th or 8th in the prior two reports (October 2018 and January 2019). The Territory has underperformed in the national result in all indicators. Equipment investment continues to decrease, down almost 36% compared to the decade average. Construction work is also down in real, not just comparative, numbers. This was corroborated by the State final demand for the March Quarter 2019, released by the Northern Territory Department of Treasury and Finance on 5 June 2019, showing a 48.3% year-on-year decline in private investment.[2]

In the Mining Journal's *World Risk Report*, the Northern Territory dropped considerably from 2017 to 2018 in hard risks (including legal and regulatory risk), perceived risk, and investment risk. In investment risk, the Northern Territory is barely in the top one-third of 96 surveyed jurisdictions and lags behind every Australian jurisdiction save New South Wales. At the time of our prior submission, we noted that the Fraser Institute *Annual Survey of Mining Companies 2017* showed a similar deterioration of the Northern Territory's position.[3] There has been no significant change in that position since them. While the *Annual Survey of Mining Companies 2018* shows a modest increase for the Northern Territory in the Policy Perception Index, the rate of increase lags behind every other Australian jurisdiction measured. Even with the modest increase, the Northern Territory's ranking in barely in the top half of all jurisdictions surveyed, a significant drop over the prior four years.[4] While the Territory does better in the Investment Attractiveness Index, it still lags well behind Queensland and Western Australia.

In this light, we are at a loss as to why the Northern Territory would be considering such job-killing, anti-development legislation. It is antithetical to every government pronouncement about the need for job creation and population growth and even runs counter to other Northern Territory policy initiatives. No problem has been identified that requires such a wholesale change to the environmental impact assessment process, certainly not one that these changes would address.

This submission is structured into sections on overall policy considerations, how to improve the current system, and then a section-by-section critique of the tabled legislation. Section 2 addresses the principles of ecologically sustainable development in Part 2, Division 1, of the proposed Act because those are the principles which are to ultimately guide decision-making under the legislation.

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[1] https://www.commsec.com.au/content/dam/EN/Campaigns_Native/stateofstates/april2019/CommSec_State_of_the_States_April2019.pdf.

[2] https://treasury.nt.gov.au/__data/assets/pdf_file/0007/703555/SFD-March-2019.pdf.

[3] https://www.fraserinstitute.org/sites/default/files/survey-of-mining-companies-2017.pdf.

[4] https://www.fraserinstitute.org/sites/default/files/annual-survey-of-mining-companies-2018.pdf.

Section 3 addresses what we believe is the most profound and job-killing change from the current environmental impact assessment regime, the switch from environmental impact assessment as a process to a product with veto power over all development vested in the Minister for the Environment. Section 4 and 5 then address problematic limitations on the Minister's decision-making ability. Section 6 addresses problems with what the Northern Territory Government is touting as mandatory time frames within which decision must be made. Section 7 then offers a better approach, a stand-alone mitigation plan approved by the responsible Minister upon recommendation from the Minister for the Environment. This submission then turns to a section by section critique to those sections not otherwise addressed in discussion of policy considerations. Finally, because it is raised as a justification for the wholesale change in the assessment regime, this submission concludes with a discussion of the Port Melville situation, 'the tail that wags the dog'.

2. Principles of ecologically sustainable development (Part 2, Division 1)

We have no issue with using principles of ecologically sustainable development as considerations for decisions made under the proposed Act. Indeed, that is to be expected. Some of what appears in the proposed Act, though, are corrupted versions of the principles as they appear in different source documents, and sometimes in a manner that leaves out key features of the principle related to economic utility and cost-effectiveness of mitigation. The result of this paraphrasing and 'pick and choose' approach is a process that will be expressly driven by anti-development objectives.

2.1. Section 18, Decision-making principle

Section 18(1) of the proposed Act provides, "decision-making processes should effectively integrate both long-term and short-term environmental and equitable considerations". The principle, as it appears in section 3A(a) of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), is "decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations" (emphasis added).

The principle should make reference to economic and social considerations. At the very least, if the EPBC Act is the source of this principle, the Northern Territory Government should explain why the emphasized language has been removed.

2.2. Section 19, Precautionary principle

The precautionary principle as it was adopted in 1992 by the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil (the Rio Declaration on Environment and Development, generally known as the **Rio Declaration**), provides in part that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (emphasis added).

Section 19 of the proposed Act does not refer to cost-effectiveness, providing further evidence of the explicit anti-development slant taken by this legislation. The principle should incorporate the concept of cost-effectiveness. Introducing the concept of "practicability" is insufficient.

2.3. Section 21, Principle of intergenerational equity

Section 21 in the proposed Act reads, “The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of present future generations.” The principle adopted in the Rio Declaration actually provides “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” The principle contains an explicit right to develop, expressly noted in the 1997 Report of the Secretary General on application and implementation of the Rio Declaration.

Why has the legislation written the right to develop out of the principle? We acknowledge that section 21 mimics section 3A(c) of the EPBC Act. The principles of ESD as they are contained in the EPBC Act, however, are underpinned by the need to develop identified in the Commonwealth's *National Strategy for Ecologically Sustainable Development*, out of which the EPBC Act grew. We are unaware of a similar Northern Territory-centric document.

3. Changing impact assessment from a process to a product with veto power vested in the Minister for the Environment

The purpose of environmental impact analysis is to provide decision makers with sufficient data on environmental impacts to make informed decisions about whether a project with potentially significant environmental effects should proceed, balancing a variety of factors and policies that includes both environmental and economic development.

The approach taken in Part 5 of this legislation turns the purpose of environmental assessment on its head. It takes what is supposed to be a process and turns it into a product. It creates a substantial level of additional bureaucracy. The additional approval process adds time and uncertainty to an already lengthy process, creating a roadmap to 'death by delay'. It is disheartening that a Territory that professes to be so focused on job creation would propose such investment and job-killing legislation.

We oppose the concept of an environmental approval as a permit whose approval is vested with the Minister for Environment. Part 5 gives the Minister veto power over virtually every development project in the Northern Territory. The scope of power this legislation grants to the Minister is breathtaking, and there is no other Australian jurisdiction of which we are aware in which so much authority is granted to a Minister with portfolio of the environment.[5]

Not only does the legislation grant the Minister the ability to refuse an environmental approval after environmental impact assessment has been conducted (section 69), it grants the Minister the power to establish criteria that triggers environmental impact assessment in the first place (section 30), and the power to establish environmental objectives by which an environmental impact assessment is presumably measured (section 28). This even extends to transfers of

[5] See, e.g., *Environmental Effects Act 1978* (Vic) ss 8-8E; *State Development and Public Works Organisation Act 1971* (Qld) ss 34D, 52; *Environmental Planning & Assessment Act 1979* (NSW) Div 5.1, subd 3; *Development Act 1993* (SA) s 48; *State Policies and Projects Act 1993* (Tas) s 26. Even in Western Australia, which vests more authority in the Minister for the Environment than other States, agreement with other responsible Ministers is required and there is an internal appeal process if there is disagreement amongst Ministers. See e.g., *Environmental Protection Act 1986* (WA) ss 45(1)-(4). Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), regardless of the significance of a projects' impacts, jurisdiction is limited to enumerated matters of national environmental significance

environmental approvals already granted (section 123). There appears to be no appeal from the Minister's decisions.

Based on data from the NTEPA website, the average (mean) time since 2010 for projects for which an EIS was required took over 900 days to get from Notice of Intent to assessment report. For mining projects, the mean was over 1100 days. Even if one uses the median rather than the mean, the figure is still over 900 days for mining projects. The government has touted timing requirement in the legislation and associated regulations, but as we will discuss elsewhere in this submission, time limits on discretionary actions are generally not legally enforceable, and automatic actions that accrue from failing to meet a deadline are legally suspect. We also believe that additional steps proposed for the assessment process will ultimately result in a longer project approval process, with associated increased costs and uncertainty.

The product that the Territory contemplates here also creates an unanticipated consequence by providing project opponents with additional and independent opportunities to litigate against a project. The process contemplates the issuance of an environmental approval in advance of any primary operational entitlement. For politically controversial projects, this means of litigation over the environmental approval, followed by additional litigation over operational entitlements – two bites of the apple,' as it were – creating significant additional uncertainty and cost for project proponents.

Project proponents should not be subject to additional delays beyond what is already a lengthy and robust process. Environmental impact assessment should remain a process, with decision-making authority vested in the Minister responsible for the sector in which the project lies, with consideration for the recommendations of the NTEPA and Minister for the Environment.

In this submission, we put forward what we believe is a better approach. That approach is one that sees all primary project entitlements approved at one time by the responsible Minister, including a stand-alone environmental approval that replaces the current Assessment Reports, a document that is often of little value in its current form.

4. NTEPA should not be making value judgments that place limitations on the Minister for the Environment's decision making ability

Part 5 of the proposed Act gives NTEPA the authority to prepare "a statement of unacceptable impact". NTEPA should not be engaging in value judgments as to whether impacts are acceptable or unacceptable. A value judgement of this nature involves the weighing of competing social, commercial, or economic benefits against environmental impacts. Those judgments are province of the ultimate decision-maker, not NTEPA, an unelected and effectively interstate body. Vesting NTEPA with the authority to make value judgements inappropriately confines the Minister's decision-making power.

The NTEPA role should be limited to providing objective analysis and conclusions with respect to environmental impacts. More specifically, NTEPA should be limited to (1) assessing potentially significant environmental impacts against objective thresholds to determine the significance of those impacts and (2) determining whether a potentially significant environmental impact can be avoided, mitigated, or offset to a level less than significant, again

as measured by objective criteria.[6] It is then up to the decision maker, not NTEPA, to make the value judgement as to whether the residual impact is acceptable or unacceptable based on all relevant considerations.

5. The legislation hamstrings the ability of the Minister for Environment to have regard for the economic benefit of a project

5.1. Summary

- NTEPA may only have regard for principles of Ecologically Sustainable Development (**ESD**) in undertaking its environmental impact assessment duties, principles from which concepts of cost-effectiveness and economic utility have bee scrubbed.
- There are legal impediments to the Minister's consideration of a project's economic utility in the Environmental Approval process.
- There are practical impediments to the Minister's consideration of a project's economic utility in the Environmental Approval process.
- Removing the impediments, if indeed they can be removed, only creates new problems; unnecessary duplication would result from two different Ministers making two different decisions based on the same documentation for the same activity.

5.2. Limitations to NTEPA consideration of economic benefit under the proposed *Environment Protection Act 2019*

NTEPA is a "decision-maker" under the proposed Act (section 4). As a decision-maker, it must consider the principles of ESD in making a decision pursuant to section 17(2).

The ESD principles in the proposed Act are at sections 18-24. They do not allow for consideration of a project's economic benefit or utility, even though a proponent is required to produce that evidence under the NTEPA Guidelines for the preparation of a Social and Economic Impact Analysis Report. As we also note earlier, the principles have been altered to remove consideration of cost-effectiveness or economic utility.

While NTEPA is not actually making a final decision in reviewing an Environmental Impact Statement or other environmental assessment prepared pursuant to the proposed Act, under section 42(b)(i), "[t]he purpose of the environmental impact assessment process is to ensure that…all actions that may have a significant impact on the environment are assessed, planned and conducted taking into account…the principles of ecologically sustainable development…"

This is not a criticism of NTEPA. It is just a recognition that NTEPA cannot (and may not have the capacity or capability) to assess economic or social benefits as part of its impact assessment.

5.3. Limitations to Ministerial consideration of economic benefit/utility under the proposed *Environment Protection Act 2019*

The Minister for the Environment is also a decision maker pursuant to section 4 of the proposed Act, and the Minister is bound by section 73 of the proposed Act in making a decision on a statement of unacceptable impact or an Environmental Approval.

[6] It may help to think of offset as a particular type of mitigation, one that occurs off-site to compensate for the on-site impact.

Although it is not explicit, the Minister might be able to weigh economic utility and benefits in under section 73(1)(d), but it is not certain:

> In addition to the matters set out in Part 2[7], the Minister must have regard to the following in deciding whether to grant or refuse an environmental approval for an action:
>
> (a) the objects of this Act;
>
> (b) the assessment report on the action;
>
> (c) whether the proponent is a fit and proper person to hold an environmental approval;
>
> (d) any other matters the Minister considers relevant.

However, the ability to take into account economic or social utility may be limited by section 17(2) as applied by section 73(1), both of which are written as a mandatory action. If the Minister is not satisfied that the action in question is consistent with the principles of ESD as they are written in the proposed Act, it is possible that she may not be able to grant the Environmental Approval regardless of the weight she may wish to give to economic or social or utility. This concern is further magnified because section 73(1) of the proposed Act eliminates section 87(1)(c) of the previously released exposure draft of the legislation which required the Minister to have regard for the "benefits" of the project.

In summary, if the Minister accepts that there will be an unacceptable environmental impact that "cannot be appropriately avoided, mitigated, managed, or offset", section 66(1)(b), the Minister may not eb able to take into account economic benefit or utility. If the Minister rejects a statement of unacceptable impact, the Minister could potentially take economic considerations into account, but we believe the minister's action would be vulnerable to judicial challenge for having failed to have sufficient regard for the contents of the statement of unacceptable impact and for having violated section 73(1).

Please note that all of this is compounded by the failure of the proposed Act to define "acceptable" or "unacceptable", and fails to provide a definition of significance tied to thresholds.

5.4. Practical limitations on Ministerial decision-making

The decision-making process for an Environmental Approval requires a recommendation by NTEPA to either grant the Environmental Approval, which may include conditions pursuant to section 65(3), or provide a statement of unacceptable impact for the Minister's consideration pursuant to section 66. If the Minister accepts the statement of unacceptable impact, she must refuse to grant the Environmental Approval. We note above the legal difficulties facing a Minister who wished to reject the recommendation of NTEPA

These legal difficulties, in turn, creates a practical hurdle. The decision of the Minister with regard to an Environmental Approval or a statement of unacceptable impact requires a written statement of reasons. That should propose no problem is the Minister accepts the statement of unacceptable impact. The necessary documents, for all intent and purposes, will already have been prepared. If the Minister rejects the statement of unacceptable impact, she must still prepare a statement of reasons, only now she must rely on an agency that is already on

[7] The principles of ecologically sustainable development.

record as believing the impact to unacceptable to assist in the preparation of a statement of reasons for refusing to accept the statement of unacceptable impact .

This practical difficulty is compounded by the relatively short timeframes in the legislation within the Minister must act or risk having a recommendation become the final decision by default. We note elsewhere, though, that we believe timeframes for discretionary action are legally suspect.

5.5. Changing the legislation to allow the Minister for the Environment to have regard for economic benefit and utility will not "fix" the problem.

Giving the Minister for the Environment the authority to have regard for economic consideration in situations where none currently exists in the legislation does nothing to address the underlying fundamental issue we have raised with respect to the legislation; the Minister for the Environment should not have veto power over every major development project in the Northern Territory. It also creates additional problems for the legislation. Two different Ministers would now be tasked with duplicative roles. Both would be reviewing the same data and documents (from the same departments and agencies) to determine whether each should grant his or her separate approval for the same activity. This adds additional time, cost, and risk to a project. Responding to this issue should not be to simply give the Minister for the Environment more authority.

6. Mandatory timeframes are not always mandatory

We recognize that the government has added required timeframes for a number of actions contemplated by the proposed Act and has touted them as providing additional certainty to the process. For many of the actions in the proposed Act subject to time requirements, however, those limitations can only be directory, not mandatory. They are nothing than guidelines with no legal effect.

Mandatory timeframes can apply to non-discretionary actions, those actions for which there is no independent judgment applied or exercised. A minimum time for the acceptance of submissions is a good example. If the law mandates that there must be a minimum of thirty calendar days for in which submissions must be accepted, the law provided no discretion to shorten the time below the minimum. In setting a time for submissions to be provided, no judgement is exercised. The only question is whether at least 30 days has been provided for. If that outcome is violated and a thirty-day minimum is not provided, judicial remedy exists.

That does not hold for discretionary actions, those decisions which require the exercise of judgment. A timeframe touted here as mandatory is not; it can only be guidance and cannot be judicially enforced. Judicial remedy does not exist when more than one outcome is available based on the exercise of a decision-makers judgment. A judge can review a decision once discretion is exercised. She cannot order that discretion be exercised in a particular fashion in the first instance.

We do not believe that default action if a decision-maker fails to exercise discretion (such as the automatic approval given to NTEPA recommendation if the Minister fails to act on an environmental approval within 30 days. See section 74) is saving. That default action itself may be seen as judicially suspect if regard is not had for all the required criteria.

Mandatory timeframes for final actions, including default actions, may have other unintended adverse consequences. If, for example, an environmental approval is granted thirty days after a NTEPA recommendation – either by affirmative action or by default – the likely sequence of

events is that the environmental approval will run well in advance of operational entitlements to be issued by the responsible Minister. This could lead to litigation against the project even before operational approvals are granted, exposing a project to further risk and uncertainty. One rejoinder might be that even directory timeframes provide guidance and prod the appropriate parties into timely action. The response, however, is what is preventing that from happening now?

As a related issue we are concerned about the focus on timeframes at the end of the assessment decision-making process to the exclusion of the time necessary to complete process as a whole. When the exposure draft of the proposed Act was released for review and submission, it was accompanied by proposed regulations. Our review of the proposed regulations identified a number of new steps in the assessment process which increased the assessment timeframe, as well as existing steps in which the time for government action had been increased. During the Social Policy Scrutiny Committee hearing on the proposed Act we heard that proposed regulations would not be released until August or September. Discussion of the timing of one action in the assessment process should not occur in isolation from that of the entire process.

It is our belief that the proposed Act will ultimately increase the time to complete project approval, resulting in increased costs and uncertainty. Our calculations indicate that pursuant to the consultation draft of the regulations the proposed Act would add not less than 133 days to the environmental impact assessment process, without accounting for any additional time that might arise from greater requirements in a Term of Reference.

7. A better approach: A stand-alone mitigation plan approved by the responsible Minister

7.1. The concept

A better approach would be one that sees all primary project entitlements approved at one time by the responsible Minister, including a stand-alone environmental approval.

At the back end of the current assessment system, the existing problem is less with the process than it is with the product, the product being Assessment Reports. In their current form, they are of little utility to the responsible Minister. A more useful document for the responsible Minister would be an actual mitigation plan, including monitoring and reporting requirements. It would include the point in the project timeline at which the mitigation is to occur and identify the agency within government responsible for ensuring compliance. As an aside, we note there is nothing in the current legislative regime that prevents this.

This is the document that would become the "action item" that would go the responsible Minister for consideration. While it could be approved in advance of operational entitlements, the expectation is that it would be approved concurrent with the operational entitlement being sought. If the responsible Minister approves the operational entitlement he or she must also approve the mitigation plan as a stand-alone item. If the Minister's approval deviates from the mitigation plan recommended by the Environment Minister, those deviations must be accompanied by written reasons based on evidence before the responsible Minister and after consultation with the Environment Minister. This approach still results in an environmental approval. The approval, though, comes from the responsible Minister as part of a single, concurrent suite of project permits and approvals.

This approach does not mean that NTEPA and/or the Department of Environment and Natural Resources (**DENR**) have no enforcement powers. If a particular mitigation measure falls within their jurisdiction of NTEPA/DENR to monitor and enforce, the authorisation to enforce remains. It is simply approval of the mitigation plan, with appropriate monitoring and reporting provisions, that lies with the responsible Minister.

7.2. Benefits of the concept over the government's current approach

We acknowledge that this concept does not meet the government's desire to consolidate matters relating to environmental impact and management, but the government's approach conflates approval with enforcement and fragments project approval even more, scattering decision-making amongst different Ministerial portfolios. In this regard, the government's approach runs counter to the spirit, if not the letter, of *A plan for budget repair* (**Plan**), whose recommendations the government adopted almost in full in April 2019.

A key point in Chapter 2 of the Plan is "Attracting private investment and streamlining major project facilitation is the key to kick-starting an economic recovery in the Territory". One of the recommendations is "2.1. Reform the current major projects process to expedite and improve the efficiency of project approvals". Amongst the options for expediting and improving the efficiency of the current process are "establishing a one-stop-shop for declared priority major projects with resourcing able to be mobilised to expedite regulatory approval processes" and "centralising a number of regulatory and investment attraction functions to improve the overall coordination of industry development and support, and reduce beige tape". Fragmenting project approvals runs counter to this approach, now adopted by the government.

The government's current approach to environmental approval also runs counter to *The Territory Critical Minerals Plan* (**TCMP**), released by the government in April 2019. A process that increases fragmentation of project approval is not consistent with TCMP policy of "support[ing] critical minerals projects to commence production."

The approach we put forward avoids the 'zero-sum' approach taken by this legislation, granting primacy of the Minister for Environment (and by inference, DENR and NTEPA) over all development in the Northern Territory at the direct expense of other relevant Ministries. It allows the Minister for the Environment to focus on the core competency of the portfolio – environmental considerations – and ensures that economic considerations can be appropriately considered concurrently with environmental considerations, while ensuring an adequate level of transparency that many believe is absent from the existing system.

8. Specific comment on sections of the proposed *Environment Protection Act 2019*

8.1. Section 3, Objectives

Objective 3(d) is a new addition from the exposure draft. 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.

Objective 3(e) is a new addition from the exposure draft. While Aboriginal people are clearly stakeholders with an important role to play in the environmental impact assessment process, the objective appears to elevate Aboriginal interests above all others in that process, independent of other 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.

8.2. Part 2, Division 2, Management hierarchy

While the proposed Act provides for management hierarchies, there is no adequate provision of a policy framework hierarchy. The legislation refers to principles, policies, objectives, and triggers. Presumably, these all relate to each other in some fashion. The legislation should clearly explain the hierarchy and how each links back to the instrument above it in the hierarchy.

8.3. Section 27, Waste management hierarchy

In its 13 March 2019 response to Ward Keller's submissions on the exposure draft, DENR 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.

8.4. Sections 29-31, Triggers

One element, a condition precedent, is missing from referral triggers – an underlying discretionary action on the part of government to permit an action as defined in section 5(1). It does not have to be Ministerial action; discretionary action at a level below the Minister should suffice. Quite simply, if the action is 'by-right', and no government approval is currently required to undertake the activity, the imposition of an environmental approval should not be required,

8.5. Part 3, Division 2, generally – Protected environment areas and prohibited actions

Consultation requirement with regards to declarations of protected environmental area that existed in the exposure draft have been removed from the proposed Act. Why is this so? 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.

Is there, or will there be, any relationship between Sites of Conservation Significance (**SOCS**) and protected environmental areas? We asked this question in out prior submissions on the exposure draft, seeing it as a 'back-door' means of legislating SOCS. We were not provided with an adequate response.

8.6. Section 35, Temporary declarations of protected environmental area

We appreciate the power of the Minister to declare permanent development moratoria has been removed from the legislation, vesting that authority only in the Administrator. We believe, however, that a twelve-month period is too long. 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.

8.7. Section 49, Referral of strategic proposal

The concept of a strategic proposal is better defined here than in the exposure draft. It should be expanded, though, to specifically include location-based plans, irrespective of whether or not a specific action or actions have been formally proposed.

8.8. Section 62, Fit and proper person

The concept of a fit and proper person 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 an environmental approval is not personal property for purposes of the *Personal Property Security Act 2009* (Cth). It is inappropriate, and the power of DENR/NTEPA should not be expanded, to introduce a fit and proper person test here.

8.9. Sections 66-67, 75-80, Statement of unacceptable impact

We have noted in section 4 above that NTEPA should not be making value judgments; that role should be reserved for the relevant Minister. In this light, the entire concept of a statement of unacceptable impact should be deleted, including sections 66, 67(1)(c), and the entirety of Part 5, Division 4. This also applies to section 302(2).

8.10. Sections 70-71, Consultations after Minister proposed a final action

The consultation requirements of section 70 and 71 ring hollow when one realises the limitations placed on the Minister's ability to actually have regard for any results of the consultative process. The Minister is required to consider and apply the principles of ecologically sustainable development in making a decision on an environmental approval. See section 17-24. This means that factors not within those principles, such as economic development and technological/financial feasibility, may be irrelevant and the Minister may not have regard for them as part of the consultation.

We further note that the provisions of section 70(2) allowing the time for decision-making to be stayed during consultation may result in a significant increase in time for decision-making that the proposed Act's proponents have claimed. It is, in effect, an exception that may swallow the rule.

8.11. Section 92, Environmental approval prevails over other statutory authorisations

While the Bill's proponents have dismissed both our concerns and our characterisation that the Minister is effectively being granted veto power over every development activity in the Northern Territory, section 92 reinforces our view that the Minister for the Environment (and by inference, DENR and NTEPA) is being given primacy over all development in the Northern Territory at the expense of other relevant Ministries.

8.12. Part 7, Division 9, Transfer of environmental approval

A potential transferor of project entitlements should not be subjected to multiple and potentially duplicative transfer approval requirements. All transfer approvals should be vested only in the Minister or decision-making authority for the sector that encompasses the project.

8.13. Section 109, Revocation of environmental approval

As we have noted above with regard to section 62, the concept of a fit and proper person is inappropriate for an environmental approval. Section 109(b) should be deleted.

As written, section 109(c) would allow revocation of an environmental approval, even if the initial approval recognised that all environmental impacts on 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.

8.14. Section 127 (Part 7, Division 1, generally), Financial provisions

Projects which already subject to security requirements pursuant to other legislation, such as the *Mining Management Act 2001* , should be expressly exempt and not subject to further bonding requirements. "Double-dipping" and other increased financial burdens will only inhibit growth and investment in the Territory.

This is addressed in section 129(8), but the reference in the last clause should refer to an action or project, not environmental impact. The same action or project should not be subject to two environmental bonds. Section 129(8) does not prevent this.

8.15. Sections 133-134 (Part 7, Division 2, generally), Environmental protection levy

The increased taxation of the "environmental protection levy" is yet another unjustified burden on industry that will inhibit growth and investment in the Territory. A business should not be saddled with a levy that neither has a direct nexus to the project or addresses specifically identified legacy issues within that project's sector.

Moreover, with respect to the mining industry, this levy is a double tax; section 44A of the Mining Management Act already provides for a levy "for the effective administration of this Act in relation to minimising or rectifying environmental harm caused by mining activities." Projects subject to section 44A should not be subject to this double taxation. Section 134(2) is insufficient protection, as project proponents may also be subject to environmental protection bonds.[8]

Section 134(2) provides no safe harbour because it provides no assurance that businesses already subject to a levy under other legislation will not be double-taxed by this legislation. The purposes of the levy spelled out in section 133(2) do not establish a nexus between those purposes and the project subject to the levy.

A person should not be subject to multiple levies on different permits/entitlements for what is effectively the same action. The legislation does not prevent that. Section 134(2) should be rewritten to reflect that, along the lines of "An environment protection levy must not be imposed on a person if a levy has been, or is required to be, paid by the person under another Act for the same, or substantially the same, action for which an environmental approval is sought."

8.16. Section 136 (Part 7, Division 3, generally), Environmental protection funds

The concerns raised with regard to levies in Part 7, Division 2, are equally applicable to the environmental protection funds provisions of Division 3.

[8] Sections 127-128. We also note that the explicit ability in the exposure draft of the proposed Act to require financial assurance as a condition of a closure certificate has been deleted from the version tabled, but we remain concerned that the inherent ability to so require still remains. See section 211.

8.17. Part 8 (sections 140 *et seq*.), Environmental audits, environmental auditors and environmental practitioners

The current *Environmental Assessment Act 1982* and *Environmental Assessment Administrative Procedures 1984* do not expressly provide for post-approval auditing procedures. That authority generally resides with the relevant decision-maker and through legislation directly addressing those underlying actions. For example, post-approval monitoring of mining activity would occur through review of a Mining Management Plan in accordance with the Mining Management Act. NTEPA has the authority to require audits of holders of an environmental protection approval or license pursuant to the Waste Management and Pollution Control Act.

The proposed bill and regulations essentially lift the auditing provisions from the Waste Management and Pollution Control Act, but expands the powers of the CEO to order and undertake audits.[9] The Waste Management and Pollution Control Act generally requires some open and transparent trigger based on a contravention of the Act for an audit, such as the issuance of a pollution abatement notice or a court order, although as identified above that may not always be the case. Nevertheless, the proposed Act provides no such standards at all.

We recognize that the purpose of post-decision monitoring is to ensure compliance with conditions of approval. We object, however, to the incredibly open-ended nature of auditing as described in 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[10] or a court order.[11]

Even in this light, we are still sceptical of the overkill nature of these provisions. If an adequate mitigation plan is place – including monitoring and reporting provisions – that environmental auditing of environmental approvals is not necessary.

[9] The ability of NTEPA to do the same appears to have been removed from the exposure draft.

[10] WMPC Act s 48(1)(b).

[11] WMPC Act s 49.

Please also note that our references above to environmental approvals is not to be taken as tacit support for the concept of an environmental approval by the Minister for the Environment. Our objections to environmental approvals are noted elsewhere in this submission.

In its 13 March 2019 response to Ward Keller's submissions on the exposure draft, DENR essentially said it would defer consideration of concepts derived from the to be replaced Waste Management and Pollution Control Act to a later date, with appropriate further public consultation. DENR should be held to that assurance. Based on the two-stage approach that DENR claims to have taken in regards to proposed changes to the environmental protection regime generally, we do not believe that expansion of the auditing system should be considered at this stage.

We also note the dearth of environmental auditors based in the Northern Territory as an additional reason for not expanding the environmental auditing regime at this time. Requiring or encouraging environmental auditors from interstate for Territory projects is not consistent with the aims of the Territory to grow the population and buy local.

8.18. Sections 186-188, relationship of environmental protection notices to owners/occupiers of land

With respect to closure notices, we identify below concerns on potentially innocent parties stemming from the lodgement of such a notice under sections 202-204. Our concerns are similar here. Landowners or other occupiers of land should not suffer a blot on land title for actions over which they may have no control.

8.19. Section 204, Notice to owners and occupiers of land

Given the gravity and severity of an environmental protection notice, simply addressing a notice to "the occupier" and "posting it to, or leaving it on, the land" is not sufficient notice, especially given that "the land" may be hundreds, if not thousands, of square kilometres. The CEO certainly has access to land records. Reasonable efforts must be made to provide actual notice to the parties.

8.20. Part 9, Division 4, Closure notices
Part 9 Division 5, Closure certificates

As with so many other provisions of the proposed Act, the closure notice and closure certificate provisions create costly duplication and unnecessary red tape for project proponents that will only inhibit growth and job creation.

Specific to mines, section 40 of the Mining Management Act already requires a plan and costing of closure activities as part of an Mining Management Plan, which must be approved by the Minister for Primary Industry and Resources. Under section 46, that Minister may also issue a certificate of closure upon rehabilitation.

Projects or actions for which closure plans or something similar are already required under different legislation should not be subject to these duplicative provisions of the proposed Act.

Outside of the mining context, closure notices and closure certificates are a concept more closely linked to licencing and abatement noticing under the waste management regime of the Waste Management and Pollution Control Act. These provisions should be deferred until the next stage of DENR's two-step approach.

8.21. Sections 202-204, relationship of closure notices to owners/occupiers of land

With respect to mining and petroleum activity in particular, the actions authorised here 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. Landowners or other occupiers of land should not suffer a blot on land title for actions over which they have no control.

Even worse, the language in these sections suggests that innocent parties will not only suffer a blot on title, they may be legally required to undertake the activities specified in a closure notice. A notice issued to the landowner/occupier of the land pursuant imposing responsibility on occupier/landowner liability pursuant to section 200(1) for the actions specified in the notice.

The discretion provided for in sections 199 and 202 is of no comfort, especially given the extreme discretion given to the Minister and CEO, respectively, to issue and lodge a closure notice. The legislation also provides no transparency to the process. The entirety of Part 9, Division 4 should be removed in favour of an approach more akin to pollution abatement notices in Part 10, Division 2 of the Waste Management and Pollution Control Act.

8.22. Section 204, Notice to owners and occupiers of land

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.

8.23. Part 9 Division 5, Closure certificates

We note that the express requirement to provide financial assurance for a closure certificate has been removed from the proposed Act as tabled. We are in accord with this change. We wish confirmation, however, that financial assurances will not be a "criteria" for purposes of section 211.

8.24. Section 223, Emergency authorisations

We find this provision somewhat unusual. While we appreciate flexibility, the ability to authorise an approval holder to disregard some portion of the Act or an environmental approval only serves to highlight the excessive breadth and potentially arbitrary nature of the legislation.

8.25. Section 224, Application of Division related to notification of incidents

Section 224 is unclear. The way it 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 in contravention of the legislation for undertaking activity without approval.

8.26. Section 230, Who may bring proceedings

We acknowledge that the open standing provisions of the exposure draft have been dropped in favour of current section 230, "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." The section, however, conflates standing to challenge an

environmental approval with standing to challenge a contravention of provisions not directly related to an environmental approval. It may make sense to differentiate between the two.

As an example, the United States National Environmental Policy Act 1969, the legislation on which much western environmental assessment law is based, requires that an applicant have participated in the process, have an injury-in-fact, and that the injury is within a zone of protected interest – an environmental interest for example, as opposed to an economic or pecuniary interest. Those are appropriate standards for challenges to an environmental assessment. They may not be appropriate for other challenges under the proposed Act.

8.27. Section 234(1), Certain considerations for granting injunctions not relevant

Any proceeding based on Ministerial action should be limited, as an evidentiary matter, to the record before the Minister at the time of his or her decision. Subject to possible exceptions related to transparency in the decision making process, litigation must not be the first time at which inadequacies in the Ministerial decision or underlying documentation (to the extent the public had a right of access) are identified.

Specific to an the conduct of environmental impact assessment, while an applicant may not have meaningfully participated in the environmental impact assessment process below, any issue raised in a civil proceeding should nevertheless have been raised prior to litigation with sufficient particularity to avoid unjustified obstructionism.

8.28. Section 236(c), Other civil orders

Section 15 of the proposed Act provides that civil remedies and the common law are not affected by the legislation. As such, awards for damages should not be provided for in the proposed Act. Actions challengeable under the legislation should only be those for which damages are an inadequate remedy at law.

8.29. Part 13, Division 5, Directions to provide information (section 285 *et seq*.)

This Division is highly unusual regulatory overreach. Direct proponents will already be undergoing environmental impact analysis. Approval holders will already 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.

8.30. Part 14, Division 2, Transitional matters

Environmental impact assessment, especially if an EIS is required, is a long and expensive process that can take several years. In reviewing the NTEPA website, there are currently two projects whose EIS are open for public comment and another thirteen at various other stages of the assessment process, projects with the collective potential to provide hundreds of millions of dollars on investment and hundreds of jobs to the Northern Territory. The proponents of these projects 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.

8.31. Section 296, Saving of existing assessments commenced but not completed

We seek clarification here of the of the phrase "if an assessment of a proposed action commenced under the former Act…" Does this refer to actions for which at least a notice of intent has been submitted?

8.32. Section 297(2), Termination of assessment under former Act

Passage of time should not be the only determinant under which NTEPA may terminate the assessment process under the Environmental Assessment Act. Lack of effort on the part of the proponent of the action to complete the process should be an explicit determinant. That is recognised in the Explanatory Statement for the proposed Act, but not in the proposed Act itself.

8.33. Section 300(3), Assessment report completed under former Act before commencement

We assume the list of prescribed Acts (section 295) is provided as it is because there are no other actions or projects requiring statutory authorisation under statutes other than the prescribed Acts. Is this the case? If it is not, why have the prescribed Acts been so limited?

8.34. Section 301, Assessment report completed under the former Act after commencement

This section renders section 296(1) meaningless. If an assessment report is completed under the Environmental Assessment Act, the Environmental Assessment Act should control. This section admittedly applies to a small number of actions, but it these actions are this far along in the process, they should not have the proverbial goal line moved and be subjected to addition delay and red tape at the end of the process.

8.35. Section 302, Process for environmental approval

In light of our objections to section 301, we oppose section 302(1). In light of our objections to NTEPA making value judgments, as opposed to objective statement of impact, we oppose section 302(2).

9. Port Melville is no justification for wholesale change to the environmental impact assessment regime

Finally, because it is being used as justification for the legislation, we conclude by addressing Port Melville. We do not see the Port Melville issue in the same manner as those who cite it as evidence for wholesale change to the Northern Territory's environmental impact assessment regime. Port Melville went through a referral process; it was the outcome that project opponents did not like. Using Port Melville as justification for the proposed legislation is using the tail to wag the dog.

Ezion Logistics Hub (Tiwi) Pty Ltd (**Ezion**) submitted a Notice of Intent for Port Melville on 17 March 2014. NTEPA had called in the project for referral under regulation 7 of the Environmental Assessment Administrative Procedures. A Statement of Reasons issued from NTEPA on 16 October 2015 whose summary provided as follows:

> The NTEPA has considered the environmental risks associated with Port Melville. Environmental management of some of the risks has been identified in the NOI and additional information, while the remainder will be addressed through monitoring and management actions detailed in the OEMP and/or the

> granting of permits and approvals under separate legislation. The NTEPA considers that Port Melville can be managed in a manner that avoids significant environmental impacts provided that the commitments and safeguards detailed in the NOI, additional information and OEMP, and the recommendations provided here are implemented and are subject to regular monitoring, auditing and review.

NTEPA went on to decide:

> The environmental significance of the Port Melville project is such that a public environmental report or an environmental impact statement is not necessary and, subject to clause 14A of the EAAP, the administrative procedures are at end in respect of the proposed action. This decision is in accordance with clause 8(2) of the EAAP.

Ten days later, on 26 October 2015, a delegate of the Commonwealth Minister for the Environment determined that operation of Port Melville was not a controlled action under the EPBC Act. That was the action challenged in court, ultimately resulting in a consent order on 21 October 2015 quashing that decision.[12] On remand, however, the Commonwealth reached the same conclusion that Port Melville was not a controlled action.[13] Port Melville thus did not evade any process. Opponents simply did not like the outcome of no assessment beyond Commonwealth referral. There was no bilateral process because it was never clear if there was a responsible Minister in the Northern Territory to whom a recommendation could actually be made.

If this is how the situation unfolded, the problem was not with the assessment process *per se*, but with how the Territory treated the initial port project. If the project had been declared a port under the predecessor to the *Ports Management Act 2015* the development would presumably have required Ministerial approval of some sort, with referral required under regulation 6 of the Environmental Assessment Administrative Procedures.

It has also pointed out that Ezion began construction and actually completed substantial work prior to completion of the NOI, requiring its revision and effectively setting a new baseline. The remedy here would be the give NTEPA the ability to issue a cease and desist order until the referral/assessment concludes and allow NTEPA to assess impacts based on the pre-construction baseline.

Regardless of one's position on the outcome of Port Melville, it was a unique situation. One action in thirty years that may have avoided Northern Territory referral is not justification for the wholesale changes in the environmental impact assessment regime as is proposed.

[12] Order, *The Environment Centre Northern Territory Inc* (NTD3/2016), 21 October 2018.

[13] C Walsh, "Port Melville supply base on Tiwi Islands approved again," *NT News*, 16 December 2018.