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To Whom it May Concern,

SUBMISSION: ENVIRONMENT PROTECTION BILL

I welcome the opportunity to make a submission on the Northern Territory Government's (NTG's) *Environment Protection Bill*.

I have been a resident of the Northern Territory since 2005, where I have worked as a property, land rights, native title and environmental lawyer. I was the solicitor with carriage of legal proceedings commenced by traditional owners challenging environmental and mining regulatory approvals in relation to the conversion of McArthur River Mine to an open cut operation between 2006 and 2008. I am currently undertaking a PhD at Sydney University that looks at the intersection between development, Indigenous land rights and the environment in the Territory. I am a research associate at the Housing for Health Incubator at Sydney University. I have been employed as a sessional lecturer at Charles Darwin University (teaching environmental and planning law, and energy and resources law). I am currently a Board member of the Environmental Defenders Office (NT), where I was Chair between 2014 and 2017. I provide this submission in a personal capacity, drawing on the above experience.

General comments

I congratulate the NTG on the introduction to the Legislative Assembly of the draft *Environment Protection Bill*. The existing regulatory framework governing environmental assessment and protection in the Northern Territory is almost universally acknowledged to be completely inadequate, and many decades out of date. It has led to rapidly declining public confidence in the NTG's ability to assess, regulate and manage development activities. This has been seen most catastrophically in the environmental management of McArthur River Mine since its inception. I **attach** a copy of a recent article (written with Gillian Duggin of the EDONT) outlining the history of environmental regulation of that mine by way of illustration.

If enacted in its current form, the Bill will go some way to transforming the environmental assessment, approval and management in the Northern Territory and bring it more closely into line with other jurisdictions in Australia.

However, I note that much of the detail of how environmental assessment will operate is contained in regulations to be promulgated under the Act. Draft *Environment Protection Regulations* (Draft Regulations) were circulated for public comment together with the exposure draft of the Bill in late 2018. As far as I am aware, a new draft of the Regulations has not been circulated. Passing the Bill without considering updated Draft Regulations leaves many of the core questions about how environmental assessment will operate under the new regime unanswered. Critically, Regulations are not subject to parliamentary and public scrutiny. I believe that many of the provisions of the Draft Regulations should be removed and inserted in the Bill.

I welcome the following components of the Bill:

(a) a stand-alone environmental approval from the Minister for the Environment, which should go some way to alleviate validly held concerns in the community regarding regulatory capture, conflicts of interest and corruption in the Northern Territory (arising in part from the existing sectoral approvals process);
(b) the explicit integration of the principles of Ecologically Sustainable Development (ESD) in environmental decision-making under the Bill;
(c) a decision-making hierarchy to assist decision-makers;
(d) an enforceable "general environmental duty" to avoid environmental harm;
(e) stronger enforcement and compliance powers.

However, there are a number of key components of the Bill which require amendment, clarification or removal. These are summarized below.

1. **Third party appeal rights (both for judicial review and for merits review) should be reinstated**

The Bill's review provisions are extremely limited. Reviews are limited to judicial review only. Standing for judicial review is limited to proponents, persons directly affected by the decision and persons who made genuine and valid submissions during the assessment and approval process. These review provisions are in fact more restrictive than those existing under the current regime (which at least by default permits common law standing for judicial review). They represent an unacceptable capitulation to industry. These restrictive review provisions undermine transparency, accountability, public participation, and access to justice.

The Scientific Inquiry into Hydraulic Fracturing in the NT (Pepper Inquiry) recognized the critical importance of merits review in fostering better government decision-making, and found that "merits review should be available to third parties to challenge decisions made in relation to any onshore shale gas development" (p 420). The Pepper Inquiry's recommendations in this regard were predicated on an assumption that the NTG had already explicitly "committed to including avenues for review of decisions in respect of environmental assessment and approvals, including to 'limited third parties' such as members of environmental or industry groups, Land Councils and local government bodies, or people who have made a genuine submission during the assessment and approval process" (p 421). The Pepper Inquiry's recommendations (expressed to be

limited to petroleum exploration and development) were informed and limited in scope by this commitment. The Government has effectively backflipped from the position communicated to the Pepper Inquiry. It could be argued that the removal of merits review, and the limiting of judicial review to an extremely narrow category of persons, undermines the Pepper Inquiry and the assumptions that informed it. If the Pepper Inquiry had been appraised of the NTG's intention to dispense with the commitment for third party merits review and judicial review for environmental assessment and approvals, it is fair to assume that its recommendations would have been cast in broader terms.

Merits review is nothing to be scared of, but enhances government decision-making. The Commonwealth Administrative Review Council (ARC) states that "the central purpose of the system of merits review is improving agencies' decision-making generally by correcting errors and modeling good administrative practice" (ARC 2007, p 11). The ARC recommends that administrative decisions that will, or are likely to, affect the interests of a person should, in the absence of good reason to the contrary be subject to merits review (ARC 1999, paras 1.2, 2.4). Conjecture about possible delays to the approval process caused by merits review is just that, and does not constitute a valid reason for displacing this important and foundational principle.

The Bill should include third party appeal rights (both for judicial review and for merits appeal) in the interests of transparency, public participation, access to justice and to restore the NTG's "social licence to regulate".

Consistent with the Pepper Inquiry (Recommendation 14.24), at a minimum standing should be expanded for *both* merits review and judicial review to the following:

- Proponents;
- Persons who are directly *or indirectly* affected by the decision;
- Members of an organized environmental, community or industry group;
- Aboriginal Land Councils;
- Registered Native Title Body Corporate and registered claimants under the Native Title Act;
- Local government bodies; and
- Persons who have made a genuine and valid objection during any assessment or approval process.

2. **More clearly articulate the principles of ESD and their relationship to decision-making under the Bill**

Consideration of, and application of, the principles of ESD is the central pivot around which government environmental decision-making should revolve, and has been foundational to environmental regulation globally since the Rio Declaration in 1992. While it has been incorporated in the Bill, application of the principles of ESD in decision-making should be strengthened and clarified.

Section 17(3) states that a decision-maker is not required to specify how the decision-maker has considered the principles of ESD. The Department's response to concerns raised about this exemption is that "requiring decision makers to explicitly discuss how each principle has been considered in their decision-making detracts from consideration of environmental outcomes and instead focuses decision making into a process." This explanation defies logic – the purpose of stating how the principles of ESD have been incorporated enhances environmental outcomes by requiring their substantive rather than procedural application. It means that the public can be assured that the principles of ESD have actually been considered and applied, rather than just accepting a bald assertion that they have. This exemption is unacceptable and will lead to continued poor decision-making, poor transparency and a lack of accountability. Decision makers should be required to specify how they have considered and applied the principles of ESD.

3. **Lack of substantive criteria regarding environmental assessment processes and lack of integration between Bill and Draft Regulations**

The current NT *Environmental Assessment Administrative Procedures* are characterized by a lack of substantive and objective criteria to establish in what circumstances environmental assessment will be required, the level or method of environmental assessment (whether by environmental impact statement or public environment report), and what environmental assessment documentation must contain.

While the Bill and Draft Regulations (as circulated during the consultation process in late 2018) are more detailed, to a large extent they fall into the same trap and fail to adequately set out substantive and objective criteria to guide decision-makers applying the environmental assessment process (which would give the public some confidence in the regulatory process).

I note the following issues with the provisions governing environmental assessment under the Bill and Draft Regulations:

a) The Draft Regulations contain the bulk of the processes for environmental impact assessment. For example, the possible methods and criteria for environmental assessment are in the Draft Regulations. This detail is crucial for understanding how environmental assessment will work in the NT and should be removed from the Draft Regulations and inserted in the Bill. Regulations can be amended without parliamentary or public scrutiny and it is important that any amendments to this process be subject to transparent parliamentary and democratic processes.
b) To improve transparency and accountability, there should be a public register of referrals made under the Bill (see *Environmental Protection Act* 1986 (WA) and EPBC Act 1999 s 74(3)), and a public register of decisions to accept/refuse a referral together with a statement of reasons.
c) "Strategic assessments" are not defined anywhere in the Bill or Draft Regulations, nor are clear and objective criteria set out for when they would be appropriate. There are no criteria listed for accepting or refusing a strategic assessment referral (regulation 21).

d) Under the Bill, only proponents can refer actions for strategic assessment. It is unlikely that a proponent would seek to have a project strategically assessed (including for assessment of cumulative impacts). 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.
e) Section 50 of the Bill gives a statutory decision-maker discretion to refuse to consider an application if the decision-maker considers that the action should have been referred to the statutory decision-maker. This should be mandatory (ie a statutory decision-maker must refuse to consider the application).

4. **Require consideration of climate change**

While consideration of climate change impacts is a component of ESD, there should be stand-alone provisions requiring consideration of climate change impacts in environmental assessments. The Bill should require assessment of the likely greenhouse gas emissions of all major projects. This should include a requirement that environmental impact statements have a climate impact statement that states:

a) How the proposal contributes to relevant goals and targets to reduce greenhouse gases;
b) Specific measures to avoid, minimise and offset emissions from the project;
c) The measures in place to ensure downstream emissions are avoided, minimized and offset;
d) The full cost of the project's emissions; and
e) Full and proper consideration of alternative options.

Yours sincerely

Kirsty Howey