Department of Environment and Natural Resources

Environment Protection Bill 2019

Objects of the Bill

1. In the absence of climate change legislation, the EDONT and a number of other submissions expressed concern that the Bill is silent when it comes to climate change and the need to reduce greenhouse gas emissions, and called for the Objects of the Bill to be amended accordingly. In addition it was proposed that climate change and greenhouse gas emissions should be a mandatory consideration for every decision-maker and authority throughout the Bill including clauses 42, 43, 66, 73, 84 and 125.

   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 greenhouse gas emissions must be taken into account by decision-makers and any policy, program, or process developed or implemented by the Government, including decisions made under the *Environment Protection Act 1970* (Vic).

   a. *On what basis was it determined not to reference climate change and the need to reduce greenhouse gas emissions in the Objects of the Bill?*

   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.

   Inclusion of references to climate change in clauses 66, 73, 84 and 125 would be inappropriate and raise climate change considerations above the other aspects of the definition of environment which need to be considered holistically as part of an ESD approach.

   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 the 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.

b. *How would it impact on the operation of the legislation if the Objects of the Bill were amended to include a specific reference to climate change such as that suggested by EDONT: "(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."?*

It would be inappropriate to include a specific objective around climate change in the objects of the Bill as this would undermine the focus of the Bill on the assessment and approval of significant environmental impacts. Such a change would 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, and therefore elevate climate change considerations above other matters of significant impact; e.g. impacts on species habitat or coastal processes.

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.

2. AMEC noted that it considers that the term 'wellbeing' in clause 3(b) is ambiguous and subjective, and suggested that the words 'social, economic and cultural' be included as adjectives to better define the term and provide consistency with the definition of 'environment' in clause 6.

a. *Can you clarify for the Committee what the term 'wellbeing' is taken to mean in the context of clause 1(b)?*

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 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).

b. *How would it impact on the operation of the legislation if clause 3(b) was amended as proposed by AMEC?*

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.

Definition of Ecologically Sustainable Development

3. It has been suggested to the Committee that the definition of Ecologically Sustainable Development (ESD) in clause 4 is human-centric and does not align with the definition set out in the *National Strategy for Ecologically Sustainable Development*.

a. *Given that the definition of ESD in section 3 of the Northern Territory Environment Protection Authority Act 2012 (NT EPA Act) is the same as that provided for in the National Strategy, can you clarify why it was considered necessary to provide a different definition in the Bill?*

The definition was revised and updated in consideration of modern drafting practices and expressions of the definition across jurisdictions.

b. *Is it a problem that the definition proposed in the Bill is different from that in the NT EPA Act?*

Clause 314 of the Bill identifies that section 3 of the NT EPA Act is to be amended by removing the definition of ESD and referencing the definition in this Bill. This will provide consistency between these two pieces of legislation.

Important Concepts

4. A number of submissions expressed the view that the meaning of 'environment' in clause 6 is so broad as to potentially create difficulties in the administration of the legislation.

a. *Was any consideration given to modelling the meaning of environment on equivalent provisions in Queensland, the ACT and the Commonwealth which are far more specific and are the only other jurisdictions to include social, cultural and economic factors? If not, why not?*

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 focusing on the biophysical aspects.

Consideration was given to amending the definition to reflect some more modern approaches, such as by including a 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.

5. In relation to the inclusion of social, cultural and economic factors, concern was raised by AMEC and others that, apart from the meaning of 'environment', the Bill does not include any other guidance as to how the Northern Territory Environment Protection Authority (NT EPA) or the Minister should weigh these factors.

   a. *What consideration is the NT EPA required to give to the social, cultural and economic advantages or disadvantages of a proposal?*

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.

The NT EPA has prepared the 'NT EPA Environmental Factors and Objectives'. These identify various factors of the environment that need to be protected, and the objective to be achieved in protecting the factor. Factors include biophysical matters as well as social and cultural matters.

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.

   b. *What provisions in the Bill ensure that the Minister takes these factors into account when making the final decision in respect of environmental approvals?*

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 the principles 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.

6. Given their importance in the Environmental Impact Assessment (EIA) and Environmental Approval process (EA), concern was raised by a number of submitters that the meanings of 'material environmental harm', 'significant environmental harm' and 'significant impact' are too vague, in particular use of the adjective 'major'.

   a. *In relation to the meaning of material environmental harm, was any consideration given to definitions such as those in the Environment Protection Act 1997 (ACT), Environmental Protection Act 1994 (Qld) or the Environmental Protection Act 1986 (WA), which are far more detailed and specific? If not, why not?*

   Environmental harm definitions across all jurisdictions were reviewed as part of the policy development process. The drafting of the definitions follows modern drafting approaches while considering the specific needs of the Bill in establishing offences and obligations.

   b. *Similarly, with regards to the definition of significant environmental harm, was any consideration given to ACT, QLD and WA definitions where significant environment harm is described as 'irreversible, of a high impact or on a wide scale' which has a far more precise meaning than 'of major consequence'? If not, why not?*

   Environmental harm definitions across all jurisdictions were reviewed as part of the policy development process. The drafting of the definitions follows modern drafting approaches while considering the specific needs of the Bill. It was particularly important to link the definition of significant harm with the concept of significant impact to provide internal consistency in the Bill and to ensure that these matters operate effectively together.

   c. *AMEC noted that lack of clarity around thresholds is a pivotal concern to industry. What consideration was given to the inclusion of explicit threshold amounts for material and significant environmental harm such as those applying in the ACT, QLD and WA?*

   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 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.

   d. *In relation to the meaning of 'significant impact' it was suggested that the Bill should align with the definition used by the Commonwealth (see Matters of National Environmental Significance – Significant Impact Guidelines). Was any consideration given to this definition? If not, why not?*

   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, 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.

Principles of Ecologically Sustainable Development

7. Clause 17(2) provides that decision-makers 'must' consider and apply the principles of ecologically sustainable development when making decisions under the Act. However, subclause (3) then provides that in making a decision and stating the reasons for such, a decision-maker is not required to specify how they considered or applied these principles. Concern was raised by a number of submitters that this provision undermines transparency and accountability, defeats the purpose of the 'must' principle in subclause (2), and is internally inconsistent.

   a. *Can you explain why there is no requirement for decision-makers to specify how the decision maker has considered or applied these principles?*

   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.

   b. *What is the purpose of requiring that a decision-maker 'must' take ESD principles into consideration if there is no subsequent means of ensuring that they have complied with this obligation?*

   It is as it is stated. The decision maker must consider the ESD principles and account for them in their statement of reasons, but is not limited to 'checklisting' each ESD principle. This ensures that the principles are taken into consideration and decisions are made in a holistic manner. Statements of reasons are still required and will focus on the reasons for decision making rather than a checklist of items to be considered.

8. AMEC and MCA 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 *NT EPA Act* and section 3A of the *Environment Protection and Biodiversity Conservation Act 199 (Cth)* (EPBC Act).

a. *Can you explain why economic and social considerations have been omitted from the Decision-making principle?*

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.

b. *Given that the meaning of 'environment' also includes cultural factors, why doesn't the decision-making principle require that they also be taken into consideration?*

As noted, cultural considerations are inherent within the definition of environment. Including a separate reference to culture within this principle introduces ambiguity in the interpretation of the principle.

9. MCA and AMEC 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.

a. *Given that the Department's consultation report undertook to "ensure the wording of the principles is more consistent with wording in the Rio Declaration", can you explain why the Precautionary Principle has not been amended accordingly?*

As well as the Rio Declaration itself, 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 articulation of the principle. The principle used is consistent with the Environment Protection and Biodiversity Conservation Act 1999, section 3A(b).

10. MCA, AMEC and NTCA also noted that the 'Principle of Intergenerational and intragenerational' equity fails to incorporate Principle 3 of the Rio Declaration which provides that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

a. *Has any consideration been given to amending this Principle to more accurately reflect the wording in the Rio Declaration? If not, why not?*

As well as the Rio Declaration itself, 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 reflect the principle as contained in the Rio Declaration. The principle used is consistent with the Environment Protection and Biodiversity Conservation Act 1999, section 3A(c).

11. Submitters suggested that the 'Principle of conservation of biological diversity and ecological integrity', as drafted, effectively diminishes its importance in the decision-making process.

    a. *Can you clarify why the Principle does not align with the EPBC Act, as is currently the case in section 25AA(2)(b) of the NT EPA Act, and acknowledge that 'the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making'?*

    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.

    b. *How would it impact on the operation of the proposed legislation if the Principle was amended to align with the EPBC Act?*

    Redrafting of the principle to align with the EPBC Act 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.

12. AMEC suggested that the Bill should incorporate a clearly articulated principle which stipulates that the NT EPA must enumerate the estimated costs, jobs, potential royalties, taxes and comparative advantage developments will create in the Territory.

    a. *Why was the principle of economic competitiveness at clause 21 of the exposure draft not included in the Bill as introduced?*

    The clause was removed following the consultation process with many submitters identifying that this was not a principle consistent with the Rio Declaration. 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.

Management Hierarchies

13. For consistency with requirements under clause 73 'Matters to be consider by Minister in deciding on environmental approval', EDONT suggested that the language in clause 26 'Environmental decision-making hierarchy' should be mandatory.

    a. *How would it impact on the operation of the legislation if clauses 26(1) and (2) were amended by replacing the word 'should' with the word 'must'?*

    There would be little to no impact on the operation of the legislation if this amendment was adopted.

14. As issues relating to waste management and pollution are to be included in the next stage of reforms, WK questioned the inclusion of clause 27 'waste management hierarchy'.

    a. *How does this provision interact with existing provisions under the Waste Management and Pollution Control Act 1998* (NT)?

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 but supports the objectives of that Act, including objectives relating to reuse and recycling.

Declaration of environmental objectives and referral triggers

15. A range of concerns were raised by NTCA, EDONT, MCA, ALEC, NLC/CLC and ECNT in relation to this division.

    a. *Why doesn't the Bill include a definition of environmental objectives?*

The Bill does not require a definition of environmental objectives. Clause 28(2) identifies what the objectives must contain.

    b. *What is the purpose of environmental objectives?*

The Minister may declare environmental objectives to assist with the implementation of the Bill and the achievement of its objects. The objectives provide further guidance on the decision-making process.

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.

    c. *While Fact sheet 25 notes that the Minister will consult with the NT EPA and the public on proposed environmental objectives and referral triggers prior to their gazettal, it is noted that neither the Bill nor the Explanatory Statement provides any requirement for consultation. Why have the public consultation requirements provided for in clause 39 of the exposure draft not been included in the Bill as introduced?*

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.

d. *Given that the declaration of environmental objectives and referral triggers will have legal effect and have the potential to have a significant impact on the operation of the legislation, why is there no requirement for the Minister to table such, including a statement of reasons, in the Parliament?*

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.

e. *While the Bill requires the Minister to publish a statement of reasons for making a declaration, why doesn't the Bill provide a timeframe within which this must occur?*

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".

f. *Will declarations of environmental objectives and referral triggers be subject to disallowance provisions under the Interpretation Act 1978 (NT)? If not, why not?*

The objectives and referral triggers are policy documents. The effect of the documents is to provide guidance. The documents do not establish rights or obligations.

It is understood that the disallowance provisions of the Interpretation Act 1978 apply only to Regulations unless an Act explicitly provides that an instrument that is of a legislative or administrative character is a disallowable instrument.

Protected environmental areas and prohibited actions

16. A number of submissions raised concern that the consultation requirements regarding declarations of protected environmental areas that existed in the exposure draft have been removed from the Bill as introduced and should be reinstated.

    a. *Can you clarify why the consultation provisions have not been included in the Bill as introduced?*

    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.

    b. *How would it impact on the operation of the legislation if they were to be reinstated?*

    Reinstatement of the public consultation requirements matters within the Bill would re-establish inconsistency in the approach to such procedural matters. Declaration of a temporary protected environmental area may be ineffective if it is delayed by a required consultation period.

17. WK considered that 12 months was too long for temporary declarations and suggested that clause 35 be amended to provide for a 90 day period with the possibility of one, 90 day extension which it was suggested would be sufficient to address more permanently whatever the underlying issue is that prompted the declaration.

    a. *What considerations were taken into account when determining the 12 month period?*

    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.

    b. *How would it impact on the operation of the legislation if this timeframe was reduced as proposed by WK?*

    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.

18. AMEC queried the requirement for this division noting that existing legislation appears to be achieving the desired outcome of creating conservation estate and considered it to be duplicative and unnecessary.

    a. *Can you clarify how this division interacts with provisions under the Heritage Act 2011 (NT) or other relevant legislation, in relation to declaring sites of conservation significance and protected environmental areas?*

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.

19. The decision-making power the Bill confers on the Administrator in clauses 36, 38 and 39 is of concern to the Committee. As noted by EDONT, legislation does not generally confer decision-making powers of this nature on the Administrator. That these clauses require the Administrator 'to be satisfied' suggests that the Administrator is required to form a view on the matter.

    a. *Given that this decision-making power rested with the Minister in the exposure draft, can you explain why it is now proposed to give it to the Administrator?*

The Bill was amended in consideration of submissions that raised concerns about providing powers of this nature to 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.

The Territory Parks and Wildlife Conservation Act 1976 contains similar requirements for the Administrator to be satisfied that certain actions have been taken before approving certain declarations.

    b. *Given that s32(3) of the Northern Territory (Self Government) Act 1978 (Cth) requires the Administrator exercise powers in accordance with instructions from the Minister, and s34(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 Executive Council, what does it*

mean for the Administrator 'to be satisfied'? If it is not the Administrator who is to be satisfied of the relevant matters, why is the Bill drafted in those terms?

The Bill was amended in consideration of submissions that raised concerns about providing powers of this nature to 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.

The Territory Parks and Wildlife Conservation Act 1976 contains similar requirements for the Administrator to be satisfied that certain actions have been taken before approving certain declarations.

c. *How would it impact on the operation of the legislation if this decision-making power was transferred back to the Minister?*

Elevation of these responsibilities by the Minister was in response to concern from some stakeholders that they should not be held by the Minister. The operation of the Bill would be improved if this power was placed with the Minister.

Placing these responsibilities with the Minister is consistent with more modern approaches to declarations of this nature, e.g. Mineral Titles Act 2010 and Planning Act 1999.

d. *As with environmental objectives and referral triggers, why is there no requirement for temporary and permanent declarations, including statements of reasons, to be tabled in the Parliament?*

These declarations are gazetted which is consistent with requirements for similar instruments under other legislation; e.g. reserved land declarations under the Mineral 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. Further the tabling of these policy instruments in the Legislative Assembly would introduce an additional administrative burden on the department and Assembly.

However, the Department acknowledges that tabling of these declarations would provide an additional level of oversight, scrutiny and accountability to the declaration process.

e. *While the Bill requires the Minister/Administrator to publish a statement of reasons for making a declaration, why doesn't the Bill provide a timeframe within which this must occur?*

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".

f. *Will temporary and permanent declarations of protected environmental areas be subject to disallowance provisions under the Interpretation Act 1978? If not, why not?*

It is understood that the disallowance provisions of the Interpretation Act 1978 apply only to Regulations unless an Act explicitly provides that an instrument that is of a legislative or administrative character is a disallowable instrument.

Purpose of environmental impact assessment process

20. In relation to clause 42(a), it has been suggested that the term 'unacceptable' is vague and open to interpretation. Similarly, the phrase 'in the future' is not defined and there is a lack of guidance as to what test the decision-maker should apply to these matters.

    a. *To avoid ambiguity, has any consideration been given to more closely aligning clause 42(a) with the Objects of the Bill? If not, why not?*

    Clause 42 and clause 3 (objects) serve different purposes. Clause 3 provides a holistic view of the intention of the Act, while clause 42 is specifically related to the impact assessment process.

    To avoid any potential ambiguity in interpretation, the assessment process will be defined further in Regulations and any necessary administrative procedures and guidance material. This will include advice to proponents and the community about the interpretation of unacceptable.

    b. *Alternatively, given that the concept of 'unacceptable impact' also arises in Part 5 of the Bill, has any consideration been given to defining the term in Part 1 or Part 2 of the Bill? If not, why not?*

    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.

21. While supporting the intent behind clause 43 'General duty of proponents' EDONT suggested that these provisions could be strengthened.

    a. *Noting that clause 10(2) provides that an impact may be cumulative, what effect would it have on the operation of clause 43(a) if it was amended to read '…. and its potential impacts, <u>including cumulative impacts</u>, and benefits'?*

    The inclusion of the words "cumulative impacts" in clause 43 was considered. It was noted that single proponents are not necessarily in the 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 EPA considers this to be necessary.

    b. *Was any consideration given to requiring that proponents also have a general duty under any EIA process to demonstrate compliance with each of the duties articulated in clause 43? If not, why not?*

    The duties contained in this clause are of a policy nature.

    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).

22. AMEC noted concern from industry that the Government will not be expected to adhere to the legislation.

    a. *To what extent will the EIA and EA processes, and the provisions of the Bill more generally, apply to Government projects including roads and infrastructure?*

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.

Referrals

23. In the absence of a definition of 'strategic assessment' can you clarify how this differs from a 'standard assessment', other than it being an assessment of a strategic proposal?

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, reduce 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.

24. 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. However, EDONT noted that the Bill does not appear to include a corresponding offence provision for failing to comply with this obligation.

a. *Can you clarify whether the Bill includes an offence provision where a proponent fails to meet their obligations to refer a proposed action to the NT EPA for assessment? If there is no offence provision, can you explain why this is the case?*

There is no offence for failing to refer a project for assessment.

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

25. WK suggested that the concept of a strategic proposal in clause 49 should be expanded to include location based plans, irrespective of whether or not a specific action or actions have been formally proposed. It has also been suggested to the Committee that, in addition to proponents, third parties, such as adjacent or downstream landowners, environmental organisations, Aboriginal Land Councils, native title representative bodies, registered native title claimants and pastoralists should have an opportunity to refer actions for strategic assessment.

a. *Was any consideration given to the inclusion of location based plans in the concept of a strategic proposal?*

The concept of a strategic proposal at clause 13 includes "a plan". This can include a location based plan.

b. *What opportunity do third parties, such as those noted above, have when it comes to ensuring that proposed actions which have the potential to have a significant impact on the environment are referred to the NT EPA for assessment?*

Third parties may raise any concerns about proposals with the NT EPA at any time through administrative processes. 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 the 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.

Consideration by NT EPA and Environmental Assessment by NT EPA

26. 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 the subsequent mandatory requirement for an EA in Part 5.

    a. *Was any consideration given to including an explanation under clause 61, or as a stand-alone clause 61A, to clarify the operation of the legislation in relation to the requirements to conduct an EIA in Part 4 and the mandatory requirement for an EA in Part 5? If not, why not?*

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.

Fit and proper person to hold environmental approval

27. Clause 62 provides a number of factors the Minister 'may' have regard to in determining whether a person is, or is not, a fit and proper person to hold an environmental approval. EDONT and NLC/CLC suggested that this clause could be strengthened.

    a. *Why doesn't clause 62(a) require that the Minister 'must' have regard to the factors listed in subclauses (i) to (iv)?*

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 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.

    b. *In addition to considering contraventions relating to work health and safety legislation or offences committed that involve an element of fraud or dishonesty, was any consideration given to also including contraventions of a law of the Territory or another jurisdiction that relate to Aboriginal Sacred Sites? If not, why not?*

It is agreed that clause 62(a)(1) could be extended to include matters relating to heritage and culture, including Aboriginal sacred sites.

c. *Clause 62(b) provides that the Minister 'must' have regard to the matters prescribed by regulation. Given the importance of ensuring that a person is a fit and proper person to hold an environmental approval, can you explain why the Bill does not incorporate such matters in the primary legislation in a similar manner to that provided for in section 15A of the Petroleum Act 1984 (NT)?*

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.

28. WK questioned the inclusion of clause 62 given that the concept of a fit and proper person test is generally associated with a licence or operational permit. Furthermore, since provisions under clause 93 provide that an environmental approval is not personal property for the purposes of the *Personal Property Securities Act 2009* (Cth) WK considered this clause to be inappropriate.

    a. *Do similar provisions and requirements regarding whether a person is a fit and proper person to hold an environmental approval exist in equivalent legislation elsewhere in Australia?*

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 person tests. Many jurisdictions also include 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.

NT EPA to provide assessment report and other documents to Minister

29. Fact sheet 5 states that 'the assessment report will be accompanied by a draft environmental approval if the NT EPA considers the environmental impacts and risks are manageable, or a statement of unacceptable impact if it does not.' However, clause 65 provides that the NT EPA 'must' provide a draft environmental approval with the assessment report where 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.

a. *Can you explain this different use of 'may' and 'must' in these clauses, and how this is consistent with the statement in Fact sheet 5?*

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.

Decision of Minister on environmental approval and statement of unacceptable impact

30. AMEC, MCA, and NTCA raised concerns 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.

a. *Was any consideration given to the inclusion of a dispute resolution mechanism if a conflict arises between an environmental and development approval, similar to that provided for under s48J of the Environmental Protection Act 1986 (WA)?*

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 processes 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.

The supposed "power of veto" associated with the Minister's decision is equivalent to that under the Commonwealth's EPBC Act.

31. Clause 70 'Consultation on proposal to grant an amended approval' requires the Minister to consult with the NT EPA and the proponent. In addition, where the amendment relates to a potential health impact of an action the Minister must make 'reasonable efforts' to obtain the views of the Chief Health Officer and where an amendment relates to a

potential impact on a social or cultural matter that is within the responsibility of a Minister – that Minister.

a. *Why is there not a requirement for the Minister to consult with or seek submissions from the affected community in such circumstances?*

The community's views have been considered during the impact assessment process and in the development of the draft conditions of the approval. These views would still be of relevance when considering amendments to conditions.

The potential benefit of further consultation was weighed against the potential for this to cause additional delays and costs to proponents.

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.

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 be mindful of any community concerns raised during the assessment process in preparing its comments.

32. NLC/CLC and AMEC suggested that clause 73 'Matters to be considered by Minister in deciding on environmental approval' be amended to more adequately reflect the Objects of the Bill and the definition of environment.

a. *With regards to clause 3(e), was any consideration given to the inclusion of a specific reference to Aboriginal communities and the need for free, prior and informed consent?*

The Northern Territory Government determined not to include a 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 and where matters of free, prior and informed consent are more appropriately addressed.

b. *Consistent with the definition of 'environment', why isn't the Minister required to be satisfied that the economic, social and cultural aspects of the project have been taken into account?*

The Minister is not explicitly required to consider social, cultural and economic aspects because these matters form part of the definition of 'environment'. The Minister is required to consider the objects of the Act and the assessment report which will

contain an assessment of those matters. The Minister also has capacity to consider other matters that are considered relevant.

33. Clause 74 'Time for decision on environmental approval' provides that the Minister must make a decision to grant or refuse an environmental approval within 30 days after receipt of the assessment report and draft environmental approval. Where the Minister fails to do so, the Minister is taken to have accepted the NT EPA's recommendations for the action.

    a. *Given the potential for unintended consequences of default provisions where actions are not undertaken within the prescribed timeframe, can you clarify why the Ministerial discretion to extend the decision-making timeframe beyond the 30 business days as provided for in clause 88(2) of the exposure draft has not been included in the Bill as introduced?*

The NT EPA is providing expert advice to the Minister regarding whether or not the project should be approved and the 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.

34. Where the Minister does not accept the statement of unacceptable impact and proposes to grant an environmental approval, clause 80 sets out who the Minister must consult with prior to finalising the approval.

    a. *Given that an approval may include conditions that relate to a potential health impact or a potential impact on a social or cultural matter, why does the Bill not require that the Minister consult with or seek submissions from the affected community?*

The community's views have been considered during the impact assessment process and in the development of the statement of unacceptable impact. These views would still be of relevance when considering the grant of an approval.

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 the conditions to manage the potential environmental impacts.

Conditions of Environmental approval

35. EDONT and ALEC suggested that where an environmental approval is subject to conditions it should be a requirement that the proponent report on compliance with such. That is, extend the application of clause 87 to all approval conditions.

    a. *What types of conditions does clause 87 apply to and how do they differ from conditions that are not subject to clause 87?*

Clause 87 applies to any condition with a reporting requirement included on the environmental approval and extends to any other requirements imposed under the Act. The 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.

    b. *What effect would it have on the operation of the legislation if clause 87 was applicable to all conditions that the Minister considers necessary in relation to the potential environmental impacts of an action and subsequently imposes on an environmental approval?*

Clause 87 applies to all conditions imposed on an approval.

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 report on compliance with the approval.

Amendment of environmental approval

36. Clause 106(1)(a) provides that the Minister may amend an environmental approval at the request of the approval holder. Clause 107 then details the consultation the Minister must undertake before amending the approval.

    a. *Why doesn't the Bill provide any guidance as to the circumstances under which a proponent may seek an amendment?*

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.

b. *Given that the amendment may include conditions that relate to a potential health impact or a potential impact on a social or cultural matter, why doesn't the Bill require that the Minister consult the affected community?*

The community's views have been considered during the impact assessment process and in the development of the draft conditions of the approval. These views would still be of relevance when considering amendments to conditions.

The potential benefit of further consultation was weighed against the potential for this to cause additional delays and costs to proponents.

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 the conditions to manage the potential environmental impacts.

Revocation or suspension of environmental approval

37. WK raised concerns that, as drafted, clause 109(c) allows 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.

a. *In light of this concern, how would it impact on the operation of the legislation if clauses 109(a) and 109(c) were written as conjunctive rather than alternative?*

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 compliance activity.

It would be more appropriate to amend clause (c) to provide a link to monitoring and enforcement activity.

38. ALEC raised concerns 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.

a. *Given concerns regarding the ongoing burden of legacy contamination, why doesn't the Bill provide any criteria or guidance as to the circumstances under which a proponent may apply for a waiver?*

It is considered that 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 can be provided through the development of specific policy and guidance material.

b. *Similarly, why doesn't the Bill provide any criteria or guidance as to matters the Minister must take into consideration when determining whether or not to waive compliance?*

Guidance as to 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.

Transfer of environmental approval

39. Where the Minister approves the transfer of an environmental approval, clause 123 provides that the Minister may amend the environmental approval following consultation as specified in clause 122.

a. *Given that the Minister may propose to amend a condition that relates to a potential health impact or a potential impact on a social or cultural matter, why doesn't the Bill there require that the Minister consult the affected community?*

The community will have been consulted during the impact assessment process. Conditions will have been developed in consideration of the outcomes of that process and the proponents proposed activity.

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 be mindful of any community concerns raised during the assessment process in preparing its comments.

Part 6 Environmental offsets

40. Given the importance of environmental offsets in the protection, management and conservation of the environment, why doesn't the Bill provide that the Minister 'must' rather than 'may' establish an environmental offsets framework?

The offset clauses have been drafted to provide flexibility in the development of the offsets framework.

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

41. ICIN and ALFA noted that clauses 125 and 126 do not appear to cater for carbon offsets. Since a carbon offset is measured and regulated by the Clean Energy Regulator through the sale of Australian Carbon Credit Units under the *Carbon Credits (Carbon Faming Initiative) Act 2011*(Cth), it was suggested that it needs to be defined separately from other types of environmental offsets.

   a. *Is it anticipated that the Environmental Offsets Framework will extend to carbon offsets?*

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.

   b. *In the absence of any provisions requiring the Minister to consult with or seek submissions from the wider community, how will the framework be developed?*

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.

Environment protection bonds

42. Clause 128(e) provides that a purpose of the 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 was very open-ended and effectively allows Government to use environmental protection bonds for whatever it chooses.

    a. *Can you explain how this clause is intended to operate and why there is no requirement for the CEO to notify the approval holder as to the use of the bond, or any provision for the approval holder to appeal the use of their bond?*

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 s.44 of the Mining Management Act 2001 and s.103 of the Waste Management and Pollution Control Act 1998.

    b. *Can you also clarify whether interest accrued from environment protection bonds is retained in the Environment protection bond account?*

The NT Government's usual practice is for interest from these types of accounts to accrue to the central holding account.

Part 7 Division 2 Environment protection levy

43. AMEC and WK suggested that the environment protection levy 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 spelled out in clause 133(2).

    a. *Can you explain how an environment protection bond differs from an environment protection levy?*

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. The Bill clearly provides provisions to ensure that a person must not be required to pay a levy or a bond for the same, or substantially the same, environmental impacts, if they are required to pay it under another Act.

b. *In respect of the mining industry it is noted that, pursuant to section 44A of the Mining Management Act 2001 (NT), 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, can you clarify whether an environment protection levy would be imposed on a mining operator under the proposed legislation?*

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). This 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.

Part 7 Division 3 Environment protection funds

44. Clauses 136 – 138 provide for the establishment of, payments to, and expenditure from Environment protection funds by the Minister.

a. *Given that the funds may be used for research into environmental impacts and management of environmental impacts of particular industries, was any consideration 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? If not, why not?*

The Department is 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.

The Minister will approve the governance framework.

b. *Was any consideration given to including a provision stipulating that funds cannot be transferred into general revenue? If not, why not?*

The Bill identifies the purposes for which funds can be used.

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.

c. *Why doesn't the Bill include a requirement for the Minister to prepare and table in the Assembly an annual acquittal report detailing how the funds were used and what outcomes were achieved?*

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.

Environmental audits

45. 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 that an approval holder has contravened, or is likely to contravene, a condition of an environmental approval.

    a. *Given the purposes of an environmental audit set out in clause 141, was any consideration given to extending clause 142 to also include circumstances where the environmental impacts of the action are significantly greater than was indicated in the information available to the Minister when the approval was granted, as provided for in section 458 of the EPBC Act? If not, why not?*

The circumstances under which the CEO could require an environmental audit to be carried out were amended in consideration of submissions received on the draft Bill.

The operation of the Act would be improved by including an additional circumstance reflective of s.458 of the EPBC Act.

Environmental officers

46. The NTCA, raised concerns about the lack of a requirement of qualifications or training for Environmental Officers despite their significant powers under the Bill.

    a. *Similar to provisions in s15 of the Animal Protection Act 2018 and s23 of the Hemp Industry Bill 2019, why doesn't the Bill provide 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 environmental officer?*

The provisions for appointment of an environmental officer reflect the standard drafting approach taken in Territory legislation.

Environmental officers are public servants and subject to the Public Sector Employment and 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 statute 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; s.131 Independent Commissioner Against Corruption Act), these are specific examples and inconsistent with the general approach taken in Territory laws.

47. Clause 162 'Powers of environmental officers – purpose', enables an Environment Officer to 'do anything or cause anything to be done' for the purposes of exercising a power under the Act. Compare for example, s18 of the *Animal Protection Act 2018* which is far more prescriptive and specific.

    a. *Given the provisions of 162(2) and 163, why is the broad power under clause 162(1) required?*

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.

It is noted that while the Animal Protection Bill 2018 contains limited functions for authorised officers, s.18(2) nevertheless contains a broad power that enables those officers to undertake their functions under the Act.

The Department suggests that the Work Health and Safety (National Uniform Legislation) Act 2011 (Division 3 Subdivision 1) and s.152 of the Liquor Bill 2019 provide a more appropriate comparison for 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.

    b. *How would it impact on the operation of the legislation if clause 162(1) was removed?*

Subsection (1) ensures that officers have the necessary breadth of powers to investigate and enforce compliance with the Act. Clause 163 provides some specific powers of officers but these do not necessarily ensure that the officer can fulfil all of their responsibilities under the Act.

Removal of the clause would limit the operation of the Act and undermine its compliance and enforcement capacity.

48. 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 under section 170.

While authorised officers under the *Animal Protection Act 2018* have a similar range of powers as those proposed for environmental officers, the Committee notes that they may only enter premises, residential or otherwise, with the occupier's consent or under a search warrant. In addition, an authorised officer must give an occupier at least 48 hours advance notice of their intention to enter the premises.

a. *Given the significant infringement on a person's right to privacy and property, what justification is there for an Environmental Officer to search premises and seize property in the absence of the occupier's consent or a search warrant?*

The Department suggests that the Work Health and Safety (National Uniform Legislation) Act 2011 (Division 3 Subdivision 1) and s.152 of the Liquor Bill 2019 provide a more appropriate comparison for 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.

The Bill requires officers to obtain consent or a warrant when inspecting residential premises. Extension of these requirements to business premises would undermine the operation of the Act by enabling approval holders to prevent the appropriate and timely investigation of potential breaches of compliance, potentially extending environmental harms and undermining compliance and enforcement capacity.

The provisions are consistent with environmental laws of this nature in other jurisdictions.

49. Clause 170 'application for and issue of search warrant' provides that an environmental officer may apply to a justice of the peace for a search warrant to enter land or premises. Compare for example, s68 of the Independent *Commissioner Against Corruption Act 2017* where an application for a search warrant must be to a judge.

    a. *While judges have the appropriate training and expertise to ensure that no abuse of power is exercised, what qualifies a justice of the peace to make a determination as to whether a search warrant should be issued?*

Clause 170 is modelled on s.73 of the Waste Management and Pollution Control Act which allows a Justice of the Peace to issue a search warrant.

This has provided additional administrative assistance where warrants are being sought out of hours.

There would be minimal operational impact if this section was amended consistent with s.68 of the Independent Commissioner Against Corruption Act 2017.

Environment protection notices

50. 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 with the Registrar-General.

a. *What factors is the CEO expected to take into account when deciding whether or not to lodge a copy of an environment protection notice with the Registrar-General?*

The CEO would be expected to consider the 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.

b. *What effect would it have on the operation of the legislation if the CEO was required to lodge a copy of the notice with the Registrar-General?*

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 lodged; 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.

Stop work notices

51. Clause 194 empowers the NT EPA to issue stop work notices. Given that Fact Sheet 6 notes that the NT EPA does not have a regulatory role and is not responsible for ensuring compliance with the environmental approval, can you explain why this power does not, instead, rest with the Chief Executive Officer as the regulator?

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 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 processes.

Closure notices and Closure certificates

52. For projects or actions where closure plans or something similar are already required under different legislation (for example ss 40 and 46 of the *Mining Management Act*

2001), WK expressed the view that they should not subject to duplicative provisions under the proposed legislation.

a. *How will the proposed legislation interact with other legislation such as the Mining Management Act 2001 in relation to closure notices and closure certificates?*

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.

53. With respect 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 actions of the party at whom the notice should be directed, but may be legally required to undertake activities specified in a closure notice. Similar concerns were raised in relation to Environment protection notices under clause 187(4).

a. *While it is understood that an owner or occupier may request that NTCAT review the decision to record the notice against the land title, what recourse does the landowner or occupier have in relation to complying with obligations in respect of environment protection or closure notices in circumstances such as that outlined by WK?*

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.

54. Given the gravity and severity of a closure notice, WK suggested that simply addressing it ‘to the occupier’ and ‘posting it to, or leaving it on, the land’ as provided for in clause 204(4) is not sufficient notice. Similar concerns were raised in relation to Environment protection notices under clause 187(4).

a. *While it is acknowledged that occupiers may not always be recorded on land records, why doesn’t the Bill require that reasonable efforts must be made to provide actual notice to occupiers?*

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

Duty to notify incidents

55. WK considered that clause 228 'Failure to notify incident – environmental offences' is unclear. As drafted, it is suggested that it could apply to activities that are otherwise legal and valid under an 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 an activity without approval.

    a. *Given WK's comments, can you clarify the intended operation of this clause?*

    Clause 227(2) states that a person does not need to notify an incident under this division if it is an ordinary result of an action required to be undertaken to comply with an approval under the Act. That is, if the incident is an 'authorised activity' there is no obligation to report and no offence arises.

56. Concern was also raised 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).* The Committee notes that a similar concern was also raised in relation to clause 175 'Compliance with requirement to provide information.'

    a. *While clauses 175 and 229 include a 'direct use' immunity, it is noted that neither clause provides for a 'derivative use' immunity. Compare, for example, section 75 of the Waste Management and Pollution Control Act 1998. What is the justification for this significant abrogation of the fundamental right against self-incrimination?*

    Section 75 of the Waste Management and Pollution Control Act 1998 provides direct use immunity, and does not extend to derivative use immunity.

    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 operation 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 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).

Injunctions and other orders

57. 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'.

    a. *To avoid ambiguity, was any consideration given to providing a definition or more guidance around who may be considered to be an affected person? If not, why not?*

Courts have well established processes enabling them to determine who may be an affected person.

Consideration was given to providing more guidance around this term, however 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.

    b. *On what basis was it determined to remove the eligible applicant test previously provided in clause 214(2) of the exposure draft?*

The eligible applicant test contained in the consultation bill reflected the standing provisions for merits review in order to provide internal consistency. The alteration of the standing provisions enabled a reassessment of the drafting of this section. Refer also to the response at question 61(b).

Civil penalty orders, other civil orders and directions

58. The Committee is concerned with the nature and extent of power the Bill confers on the CEO under clause 244 'CEO may give directions'.

    a. *Given the purpose of this Division as set out in clause 243, can you explain why clause 244(4) also provides that the direction may be given as an alternative to criminal proceeding?*

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

b. *What expectation is there that the CEO will seek advice from the Department of the Attorney-General and Justice or the Director of Public Prosecutions prior to giving a direction?*

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.

c. *Where additional information comes to hand following the making of a direction, what recourse does the CEO have to making a subsequent application for a civil order or to commence criminal proceedings?*

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.

d. *What precedents exist on the Territory's statute books in relation to the conferral of such powers on a CEO?*

Although many other jurisdictions have adopted civil proceedings processes, the Territory statute book does not currently contain such processes in its environmental and project management (e.g. Mining Management Act) legislation.

Under the Work Health and Safety (National Uniform Legislation) Act 2011, any eligible person can bring civil proceedings.

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.

e. *Do similar provisions exist in environment protection legislation elsewhere in Australia?*

These provisions were modelled on provisions in the Environment Protection Act 1993 (SA).

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

    a. *What consideration was given to implementing provisions that reverse the onus of proof or create rebuttable presumptions for pollution and environmental harm offences as recommended by the Scientific Inquiry into Hydraulic Fracturing?*

    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 of proof on the defendant to establish a defence.

Offences

60. AMEC noted that clause 266 'Liability of partners and unincorporated associations' will have a negative effect on the joint venture structure which often includes 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. It was suggested that a hierarchy of liability would provide greater clarity to this clause and transparency to business as to how to structure their finances.

    a. *Was any consideration given to the inclusion of a hierarchy of liability such as that provided for in the Contaminated Land Management Act 1997 (NSW) and the Environment Protection Act 1994 (Qld) as suggested by AMEC? If not, why not?*

    Clause 266 is modelled on s.92 of the Waste Management and Pollution Control Act. 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.

    The Contaminated Land Management Act 1997 (NSW) (refer s.6) and Environment 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 the 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.

Review of decisions

61. Concern was raised by a number of submitters regarding the review provisions set out in Part 12 of the Bill which have been substantially amended from those in the exposure draft. In particular, it was stated that as a consequence of these amendments, the proposed provisions no longer comply with the recommendations of the *Scientific Inquiry into Hydraulic Fracturing* which the Government committed to implement as part of its environmental regulatory reform process.

    a. *What is the rationale for removing the open standing for judicial review as provided for in clause 254 of the exposure draft?*

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'.

    b. *On what basis was it determined to limit who may apply to NTCAT for review of a decision and remove the eligible person test as provided for in clause 255 of the exposure draft?*

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 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 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'.

c. *It is noted that the number of reviewable decisions provided for in the Schedule to the Bill has been reduced significantly from those provided for in Schedule 3 of the exposure draft. Why is this?*

The number of reviewable decisions was reduced in accordance with Government's decision to remove merits review of Ministerial decisions made under the legislation.

The schedule now only identifies decisions made by the Chief Executive Officer and Environmental Officers.

d. *Can you comment on AMEC's concern that NTCAT is not an appropriate court for the review of decisions on projects that are measured in the tens of millions of dollars and are likely to hinge on the interpretation of complex scientific evidence and would be more appropriately dealt with by the Supreme Court?*

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.

e. *MCA suggested that the phrase 'genuine and valid submission' is too broad and would not 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. To limit the possibility of such an occurrence, has any consideration been given to defining the term in clause 4 of the Bill?*

The term 'genuine and valid' submission has been given additional guidance in clause 279(2) of the Bill. This guidance 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.

Delegation

62. Clauses 278 and 279 provide relatively unfettered powers of delegation of the very significant powers given by the Act. It is noted that equivalent provision elsewhere in Australia provide that such powers and functions may only be delegated to a 'suitably qualified person'. See for example, s515 *EPBC Act*; ss18, 20 *Environmental Protection Act 1985* (WA); ss18c, 115 *Environment Protection Act 1993* (SA); ss68-68B *Environment Protection Act 1970* (Vic).

    a. *What justification is there for not requiring that, as an absolute minimum, the powers and functions of the Minister and CEO, other than the power of delegation, may only be delegated to appropriately qualified persons?*

The drafting of the delegation powers are consistent with the drafting of such powers within NT legislation.

The powers are also consistent with the Acts referenced, each of which provide a broad delegation to persons, employees, and where relevant, Authorities or other entities and without reference to the qualifications of the delegate.

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, such as the Public Sector Employment and Management Act 1993 and the Independent Commissioner Against Corruption Act 2017.

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

Public register

63. It has been suggested that the matters to be included in the public register should be specified in the primary legislation rather than the Regulations. 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.'

    a. *On what basis was it determined not to specify the matters to be included in the public register in the Bill?*

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.

A single Schedule identifying all public register requirements provides administrative efficiency and interpretation.

Proponent or approval holder may seek exemption

64. Clause 288 provides that a proponent or approval holder may seek an exemption from compliance with a direction notice to provide information 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 to be sought in relation to a wide range of matters.

    a. *To ensure a level of consistency in decision-making, was any consideration given to the inclusion of criteria, such as the public interest and the objects of the Act, the Minister must take into account when determining whether to grant or refuse an application for an exemption? If not, why not?*

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 or 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 may be collected within 6 months of the collection of the data. This would ensure that 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 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.

Guidance and procedural documents

65. NLC/CLC and others suggested that the Bill should either incorporate a stand-alone division regarding effective participation and engagement with Aboriginal people, or as a minimum clause 291 should be amended to include a requirement to develop guidelines for proponents regarding appropriate consultation with Aboriginal peoples.

    a. *Given the objects of the Bill specifically reference the importance of participation by Aboriginal people and communities in environmental decision-making*

processes, what consideration has been given to ensuring that project proponents are provided with guidance materials to facilitate an appropriate level of engagement with Aboriginal people?

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.

The Bill ensures that the NT EPA (and CEO and Minister) have the necessary legislative authority to prepare relevant guidance material (refer clause 291). 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.

Transitional matters

66. A number of concerns were raised by WK, EDONT, GEMCO and MCA regarding the transitional arrangements set out in clauses 295 – 303.

a. *Does clause 296 'Saving of existing assessments commenced but not completed', apply to actions for which at least a notice of intent has been submitted?*

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

b. *To avoid any ambiguity, why doesn't clause 296(2) specifically refer to the Environmental Assessment Administrative Procedures 1984 rather than simply making reference to 'the former procedures'?*

This is a matter of legislative drafting practice.

'Former procedures' is defined in clause 295. There is no ambiguity in the drafting of this clause.

c. *It has been suggested that project proponents currently undergoing EIA's should not be penalised by having the rules changed part way through the process. Was*

any consideration given to providing that these project proponents may complete the assessment process under the current assessment regime? If not, why not?

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. Relevant stakeholders were generally supportive of the transitional arrangements when they were described to them during the consultation process.

The transitional provisions have been written to ensure that proponents within the current assessment system are able to follow substantially the existing process, with some amendments.

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 Supplements to be published for comment, and converting processes to business days to support administrative efficiency.

d. While the transitional provisions provide a mechanism for managing projects at various stages of the assessment process under the Environmental Assessment Act 1992, GEMCO stated that, as currently drafted, the provisions 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. Can you clarify if and how such projects will be affected by the introduction of the new legislation?

The Bill operates prospectively.

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 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).

e. Pursuant to clause 301, where an assessment report for a proposed action is completed under the former Act after commencement, an environmental approval is required under the new legislation. It has been suggested that this is

unreasonable and would appear to contradict clause 296. Can you clarify the intended operation of these two clauses?

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.

Mining Management Act 2012

67. Concern was raised by a number of submitters regarding consequential amendments to the *Mining Management Act* under clause 312. EDONT, ALEC and ECNT expressed the view that it is 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.

    a. *What factors were taken into account when determining the three year timeframe?*

    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.

    b. *How would it impact on the operation of the legislation and mine operators if this timeframe was reduced?*

    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.

Northern Territory Environment Protection Authority Act 2012

68. The Explanatory Statement notes that clause 315 omits section 25AA(2) from the *NT EPA Act.* However, as drafted, clause 315 omits both sections 25AA(1) and (2).

    a. *Can you explain why this is the case given that in providing advice or a report to the Minister the NT EPA is currently required to have regard to the principles of ecologically sustainable development?*

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 is now using the principles established by the Bill 2019 and not separate principles established under the NT EPA Act. This provides greater consistency in its considerations and decision making.

Environmental Protection Policies and General Environment Duty

69. NLC/CLC and EDONT noted their concern that the provisions relating to environment protection polices 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.

    a. *Can you explain why it was considered necessary to omit them from the Bill?*

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 1998.

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.

Regulations

70. As highlighted by a number of submitters, ascertaining the adequacy of many of the provisions within the Bill is particularly difficult in the absence of the Regulations.

    a. *Given that draft Regulations were released with the exposure draft of the Bill, can you explain why they were not included when the Bill was introduced in the Assembly?*

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.

It is not usual however, for Regulations to be drafted with a Bill.

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.