Environment Centre NT
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Date
14 June 2019

To
The Secretary
Social Policy Scrutiny Committee
GPO Box 3721
Darwin NT 0801

By Email
SPSC@nt.gov.au

Dear Members of the Social Policy Scrutiny Committee

Re: Submission on the Environment Protection Bill 2019

The Environment Centre NT (ECNT) supports the NT Government's commitment to introducing modern and effective environmental laws for the Northern Territory, and we welcome the opportunity to comment on the Environment Protection Bill 2019.

1. Introduction

ECNT is the peak community sector environment organisation in the Northern Territory, raising awareness amongst the community, government, business, and industry about environmental issues, assisting people to reduce their environmental impacts and supporting community members to participate in decision-making processes. ECNT has been calling for major environmental regulatory reform for many years and welcomes the core reforms in the Environment Protection Bill 2019:

- the establishment of an independent environmental impact assessment (EIA) process to be carried out by the Environment Protection Authority (EPA) and a requirement for an environmental approval from the Environment Minister for all proposed activities with significant environmental impacts.
- the inclusion of guiding objects and principles, including a requirement to consider and apply the principles of ecologically sustainable development (ESD).
- improved opportunities for public participation and access to information.
- strong enforcement and compliance provisions, including civil remedies and increased powers for the EPA.
- provisions to ensure industry are held financially accountable for their activities and any potential harm they cause, including environment protection levies, bonds and environment protection funds.

Despite our support for the overall reform project and for many aspects of this Bill, we have a number of concerns about the Bill as it stands. We are particularly concerned about industry efforts to prevent, delay or weaken this legislation, and encourage the committee to ensure that the legislation passed by parliament reflects the NT Government's commitment to deliver a modern, fair and effective environmental protection framework. This means ensuring balanced representation of interests so that economic and business imperatives are not used as a justification to weaken best practice environmental assessment.

In general, we support the submission from the Environmental Defenders Office of the Northern Territory (EDONT) and the detailed amendments suggested in Appendix A to that submission, both of which were generously been shared with us, including in particular the sections relating to:

- environmental protection declarations and the need for legislative provision for public input into these processes (page 8 of the EDONT submission);
- curbing Ministerial discretion (pages 10 – 11 of the EDONT submission); and
- transitional provisions (pages 14 – 15 of the EDONT submission).

2. Concerns

Our key concerns are:

a) The weakness of the provisions protecting the rights of Aboriginal peoples in relation to the processes set out in the Bill.
b) The lack of emphasis on climate change and biodiversity.
c) The definitions of "environment" and "significant impact" in the Bill.
d) The inconsistency between the proposed regime and the findings from the Fracking Inquiry as to optimal environmental regulation.
e) The generous opportunities for industry feedback with only limited ability for members of the public to challenge decisions made under the proposed regime or to enforce various provisions.
f) Inappropriate and inconsistent transition timeframes.

3. Recommendations

To address these issues, we recommend the following:

a) Strengthening the protection of the rights of Aboriginal peoples

We acknowledge and support the recognition of the rights of Aboriginal peoples in the objects of the Bill (clause 3(e)) and the duties on proponents to carry out culturally appropriate consultation with Aboriginal communities and to address Aboriginal values and the rights and interests of Aboriginal communities in relation to areas that may be impacted by proposed actions (clause 43).

Notwithstanding these inclusions, the Bill could be improved by requiring the Minister to be satisfied that proponents have undertaken appropriate consultation and engagement with affected Aboriginal people to ensure that free, prior and informed consent has been obtained. This could be done by including a specific reference to Aboriginal communities and the need for free prior and informed consent in clause 73(2). We note in this context that free, prior and informed consent is an important theme in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), recognised by the Commonwealth in 2009.

We also recommend that the Bill be amended to include a requirement in clause 291 to develop guidance for proponents about consultation with Aboriginal peoples. That guidance should be prepared in discussion with Aboriginal representative bodies and include (as recommended by the Central and Northern Land Councils in their joint submission on the previous iteration of this Bill):

- *a presumption of on-country consultation.*
- *the need for plain English and local language versions of documents, or parts of documents.*
- *the importance of culturally appropriate practices.*
- *who is to be consulted, including Traditional Owners and diverse Aboriginal communities.*

Additionally, we support the implementation in this Bill of recommendations 78, 79 and 80 from the Central and Northern Land Councils in their joint submission on the previous iteration of this Bill:

- *78: NT EPA should ensure that membership of its Board values Indigenous traditional knowledge and participation by ensuring direct Aboriginal representation on this basis.*
- *79: NT EPA should establish an Indigenous Advisory Committee under legislation to advise on the operation of the new reforms.*
- *80: Changes to the NT EPA governance structure should be undertaken in close consultation with Aboriginal communities.*

To operationalise various parts of UNDRIP, we also recommend that the Bill be amended to include the right for Land Councils or other Aboriginal representative bodies to recommend to the Minister or Administrator (as relevant) the declaration of protected areas, prohibited activities and referral triggers. If the Minister or Administrator declines to accept such a recommendation, they should be required to publicly provide reasons for doing so.

b) Emphasizing climate change and biodiversity

Climate Change - The Intergovernmental Panel on Climate Change has concluded that global greenhouse gas emissions need to decrease by close to half (compared to 2010 levels) by 2030 if humanity is going to have the possibility of keeping overall warming to an average of just 1.5 degrees Celsius above pre-industrial levels. Keeping warming at this level is necessary to avoid the most catastrophic effects of climate change.

As outlined in the NT Government's Discussion Paper on Mitigation and Adaptation Opportunities in the Northern Territory, economic development generally increases greenhouse gas emissions, contributing to climate change. Climate change will also adversely affect the Northern Territory in a number of ways, necessitating adaptation. If the Northern Territory is to contribute to climate change mitigation and adapt to the effects of climate change, it is imperative that climate change mitigation and adaptation are emphasised whenever development proposals are going through the Northern Territory's environmental protection regime.

Given that this Environment Protection Bill will likely be in place for twenty years (if passed), this is a once-in-a-generation opportunity to ensure that climate change is at the heart of the environmental protection regime. Inclusion of climate considerations is essential to implement the ESD principle of intergenerational equity: the interests of future generations in a safe climate should be considered when making a decision on a project with climate change implications.

Specifically, we recommend that climate change is included as a subclause in clause 3 (the objects of the Bill), along with reference to the 1.5 degree goal of the Paris Agreement. This reference is consistent with proposed New Zealand climate legislation and would demonstrate a firm commitment from the Northern Territory to act on climate change mitigation. We suggest the following wording:

> *To support decision-making that accounts for climate change, in particular recognising the need to reduce greenhouse gas emissions in accordance with the Paris Agreement goal of pursuing actions to limit overall average warming to 1.5 degrees Celsius above pre-industrial levels, and to plan effectively for climate change impacts.*

We also recommend making consideration of the impact of a proposal on the climate (and whether the proposal is consistent with the 1.5 degree goal) as well as the impact of climate change on the proposal mandatory considerations for the Minister under clause 73 of the Bill.

Biodiversity - In addition to the climate crisis, global biodiversity is also under serious threat, as identified by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) in its recent Global Assessment Report on Biodiversity and Ecosystem Services. Biodiversity faces threats from

the interrelated problems of land and sea use change, climate change and invasive species, as well as impacts from direct exploitation. The proposed environmental protection regime will be one of the principle pieces of legislation mediating these threats to biodiversity in the Northern Territory. As such, it is essential that biodiversity conservation is emphasised in the Act. We therefore propose an amendment to clause 23 to centre the importance of biodiversity conservation and maintenance in the regime: the phrase "*and should be a fundamental consideration in decision-making*" should be added at the end of the existing clause.

c) Strengthening the definitions of the "environment" and "significant impact"

The Bill retains the definition of "environment" from the existing Environmental Assessment Act. This definition is idiosyncratic and, in our view, runs the risk of broadening the definition of environment and prioritising economic considerations. We recommend utilising a similar definition to the one contained in the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) in s528:

> *environment includes:*
>
> *(a) ecosystems and their constituent parts, including people and communities; and*
>
> *(b) natural and physical resources; and*
>
> *(c) the qualities and characteristics of locations, places and areas; and*
>
> *(d) heritage values of places; and*
>
> *(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).*

We are also concerned about the definition of "significant environmental harm" and "significant impact" contained in clauses 9 and 11: in our view, the use of the phrase "major consequence" sets too high a bar for the trigger of an environmental impact assessment and the requirement for an environmental approval. At the core of the EIA process is the identification of the environmental risks of a proposed development so that they can be avoided, mitigated or offset. If the bar to trigger an EIA and environmental approval is too high, projects with considerable environmental impacts will not be properly scrutinised, resulting in environmental degradation and clean-up costs later on – economic, social and cultural costs that will likely be borne by the Northern Territory government and Northern Territory citizens. Even with the enhanced provisions to make polluters pay (through bonds, levies and environmental protection funds), there is no guarantee that those sources will be sufficient to compensate (if it is indeed possible to compensate for some types of ecosystem, social and cultural costs) for the costs borne by people within the Territory.

We therefore recommend that the word "major" is removed from clauses 9 and 11. This would also make the definitions more consistent with the definition of "significant impact" used by the Commonwealth when applying the EPBC Act.

d) Consistency with the findings of the Fracking Inquiry

Last year, the NT Government committed to implement all 135 recommendations of the Scientific Inquiry into Hydraulic Fracking in the Northern Territory. While the Bill in some respects is consistent with some of the Inquiry's recommendations (such as the inclusion of a 'fit and proper person' test, ESD as a mandatory relevant consideration, strong compliance/enforcement provisions), there are several key recommendations that are not yet implemented by the current Bill.

The environmental safeguards that apply to petroleum activities must also apply to activities that pose an equal or greater level of risk. Creating separate scales of regulation introduces significant uncertainty and risk.

The following recommendations must be incorporated in the Environment Protection Bill to ensure implementation throughout the entire process of environmental assessment and compliance. These recommendations are necessary to hold industry to a consistent level of accountability:

- Unrestricted open standing rights for judicial review (recommendation 14.23)
- Third party merits appeal rights (recommendation 14.24) – also an election commitment
- Civil enforcement proceedings for third parties (recommendation 14.31)
- Explicit requirement to consider cumulative impacts when making decisions (recommendations 14.19 and 14.21)
- Chain of responsibility rules to hold companies and directors to account (recommendation 14.3)
- Inclusion of public interest costs rules (recommendation 14.25)

e) Building public trust in the proposed environmental protection regime

One of the NT Government's stated purposes in undertaking environmental regulatory reform is to increase public trust in the Northern Territory's environmental protection regime. For trust to be merited, the regime must be robust, transparent and include provisions for the public to hold decision makers to account. In this context, there seem to be an inordinate number of opportunities for proponents to comment on or challenge the views of the EPA or the Minister.

Indeed, clauses 71, 72 and 78 (the show cause provisions) seem to be tantamount to a presumption that environmental approvals will be given. While we of course support the provision of adequate information by the proponent to the EPA and the Minister, once that information is received the EPA and then the Minister should be allowed to come to their own conclusions. If the EPA has questions, they have the power to request more information. If the proponent of the activity is unhappy with the decision or recommendation, then they have the right to appeal.

While proponents seem to have many opportunities to put their views forward, the same cannot be said for concerned citizens. We are seriously concerned that the NT Government's policy reversal on community appeal rights last year will increase the risk of corruption, reduce accountability and place important environmental values at risk. Communities potentially impacted by a proposal should have a genuine ability to engage in the decisions about that proposal to ensure development occurs when it is appropriate for that region. As outlined above, recommendations 14.23 and 14.24 of the Fracking Inquiry should be implemented in this Bill, giving unrestricted open standing rights for judicial review and allowing for third party merits appeals.

Clearly, our preferred option is unrestricted open standing for judicial review and for third party appeals (Option 1 of the suggested amendments to clause 276 in Appendix A of the EDONT submission). As discussed in the Fracking Inquiry, such rights have been in place in a number of other jurisdictions and there have not been "floodgates" problems. We do not support the restriction of standing based on whether or not someone has submitted on a submission – it is not a good indicator of whether someone is acting in the public interest and there may be extenuating circumstances as to why someone did not make a submission.

In particular, we are thoroughly opposed to a restriction based on whether someone has submitted a "genuine and valid" submission. We strongly object to the characterisation in clause 276 of form submissions as being something other than a "genuine and valid" submission. Here at the Environment Centre, we often encourage citizens to exercise their democratic rights to make submissions on environmental topics with the assistance of submission guides that we collaborate to prepare. Our

assistance (or the assistance of other organisations) should not preclude those citizens from taking action through the courts on environmental issues that they care about. Citizens who submit through some sort of form still have "genuine and valid" concerns or opinions – otherwise they would not have bothered to submit at all.

Requiring decision-makers to consider the principles of ecologically-sustainable development when making decisions (clause 17) adds significant vigour to the proposed environmental protection regime. However, we are concerned that clause 17(3) severely limits the transparency of the decision-making process. We recommend removing clause 17(3) and requiring decision-makers to demonstrate how they have considered those principles when making a decision on a proposal.

f) Enabling a timely and consistent transition to the new regime

Not all projects will be immediately subject to the new act when it comes into power. The Act will apply at different times depending on the type of activity that is being assessed. Mining projects that have already been assessed will not be subject to the new Act for up to three years following the date of commencement. Petroleum however will be subject to the Act immediately following commencement.

This is a serious inconsistency and poor administrative practice. It will lead to different standards of protection that increases environmental risk. The level of environmental risk should determine the level of regulation, not the industry or activity type.

Different transitional arrangements leads to a perverse outcome as not all activities will require an environmental approval despite having an equal or greater impact on the environment.

4. Concluding thoughts

No matter how robust and transparent the law, or how stringent the compliance provisions, the purpose of this law – the protection of the Northern Territory's environment – will only be achieved if there is sufficient resourcing from the NT Government to implement this legislation. It is essential that adequate resources are allocated in the NT budget for implementation of the new laws, including environmental assessment, public consultation, monitoring, compliance and enforcement. Without ensuring there is adequate agency capacity to implement the reforms, the Act is at a risk of being largely symbolic.

We at the Environment Centre NT and our members are deeply invested in the continuing wellbeing of our Northern Territory environment – our wildlife, beaches, rivers, coastlines, forests and bush – and, more broadly, to the health of our planet. We understand that the decisions that we make, and that our NT government makes, matter to the NT environment, the NT people and the planet. This is particularly so when it comes to once-in-a-generation legislation about protecting our environment. We all share a common home and we need to put in place robust legislation to protect the ecosystems that support us, now and into the future. We urge you to keep in mind the solemn responsibility that rests in your hands when you are making your decisions on this Bill.

On behalf of the Environment Centre NT,

Shar Molloy

Director