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The Environment Protection Bill 2019: Arid Lands Environment Centre Submission to the social policy scrutiny committee

The Arid Lands Environment Centre (ALEC) is central Australia's peak environmental organisation that has been advocating for the protection of nature and ecologically sustainable development for the arid lands since 1980. ALEC has been advocating for the complete renewal of the environmental assessment framework for the Northern Territory (NT) for many years. We are regularly engaging government in order to highlight the key deficiencies in the current framework and support the development of an improved framework of environmental assessment that will address the modern challenges of environmental governance.

Introduction

It is widely acknowledged that a complete overhaul of the environmental assessment framework is necessary. This is a critical moment for the NT to embrace the opportunity to introduce a robust and modern framework that can address the increasingly complex challenges of environmental issues while also remaining flexible to integrate new environmental policies and knowledge as it develops.

We therefore support replacing the current *Environmental Assessment Act* 1979 with the *Environment Protection Act* 2019. The Bill represents a significant improvement in standards of environmental protection by introducing an environmental approval system that will bring greater accountability, transparency and public participation into environmental assessment.

While we acknowledge the objectives of this reform have guided the drafting of this Bill, we have concerns that there is an imbalance in the level of rights and protections afforded to proponents of an action compared to environmental and broader community interests. There is evidence of industry exerting a level of influence over the reform process because of a disproportionately high focus on 'certainty'. Environmental objective, such as restoration and stronger protection, has not been given equal weighting in the Bill. This imbalance is manifested in the Bill through key sections that provide a proponent rights to influence the environmental impact assessment (EIA) process that are not subject to public scrutiny.

The Bill is a necessary and significant shift in environmental regulation, but the current drafting does not provide the level of rigorous and accountable decision making that is necessary to curtail the prevalence of environmental harm in the NT. Our comments on this Bill have been provided in order to strengthen the rights afforded to the public to engage in open and democratic decision making and guarantee improvements in environmental outcomes.

First and foremost, this Bill should strive to achieve improved environmental outcomes for the NT and increased participation in decisions for communities impacted by proposals under the Act.

It is vital that the public are given access to environmental rights to determine the appropriate course of development. It is imperative that this Bill creates an EIA framework that is fit for purpose to address imminent high-risk activities including petroleum development, climate change and agricultural projects which all pose unprecedented challenges for the NT.

If the current deficiencies acknowledged by the community, land councils and environmental groups are not addressed, the Bill is at risk of introducing a largely symbolic framework that is incapable of achieving any functional positive reform.

The history of legacy failures and environmental harm may persist to plague the NT and degrade our natural assets, wellbeing and way of life, leaving the public to continue to unfairly compensate the cost of development.[1]

Reform process

It is important to state our concerns over the integrity of this reform process. While we acknowledge the level of consultation and engagement that has occurred before introducing the Bill to parliament, there have been multiple changes suggesting that the interests of industry have been prioritised over public and environmental interests. We reiterate our dismay at having merits review and open standing for judicial review revoked in response to industry pressure.[2] The economic coercion of business and industry lobbyists is seen to be undermining the independence of the reform process and has led to concessions that reduce the effectiveness of the reform.

We are also concerned that confidential submissions are influencing the scope of the reform without being subject to public scrutiny. This influence of industry is a core failure of the current system. Unless this level of influence is restrained, the Bill will not improve accountable and transparent EIA processes.

In moving forward, it is important that no amendments are made to this Bill without being open for transparent and balanced debate. The avenues for feeding public and environmental interests into the environmental assessment process need to be strengthened to ensure that the Act that commences can withstand the vagaries of political imperatives over the coming decades.

Reviewing this Bill without the regulations has also proved problematic. Much of the operational detail remains uncertain without the regulations and it is therefore difficult to comment on the practical application of the Act.

Supported provisions of the Bill

ALEC supports the introduction of this Bill and the intention to shift the level of protection afforded to the environment in environmental assessment and approval. The introduction of an approval framework is strongly welcomed as well as all the related administrative improvements that will strengthen public participation, accountability and transparency in the management of the NT's resources and landscapes.

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[1] https://www.abc.net.au/news/2019-05-04/frances-creek-mining-mine-decision-nt-government-failures/11078994
https://www.abc.net.au/news/2016-05-16/redbank-copper-mine-off-the-hook-as-nt-epa-drops-charges/7419566

[2] https://www.abc.net.au/news/2018-10-31/industry-concerns-prompts-changes-to-nt-environment-reforms/10450692

The follow sections of the Bill are welcome additions to the environmental protection framework and need to be retained to ensure there is an improvement in the quality of environmental protection for the NT.

- Introduction of an environmental approval.
- Increased tools for compliance and enforcement, including injunctions, stop work orders and audits.
- Introduction of a systematic approach to environmental protection policies.
- Declaration of prohibited actions and protected areas.
- Acknowledgement of Aboriginal people in the objects.
- Articulation of the principles of ecologically sustainable development (ESD) and its application in decision making.

Weaknesses of the Bill

Significant impact

The current drafting of the meaning of 'significant impact' does not ensure that the Bill will provide a greater level of environmental protection than currently afforded. The reality of the current framework is that not all projects that need to be evaluated for their impact are being properly assessed. 'Significant impact' needs to be defined in a way that can capture the full range of activities likely to disrupt environmental systems while confining the discretion of the NT EPA.

Including the phase 'major consequence' runs the very real risk that certain activities may not trigger an environmental impact assessment process when this is necessary. 'Major' needs to be removed from the definition to capture a broader range of referrals. There is little risk as it does not automatically determine that a project will require approval but rather simply needs to be referred for assessment. Broadening the scope of potential referral triggers will not create undue delay or cost and will instead strengthen the framework to ensure a broad range of actions are assessed for their impact on the environment.

Another issue with the definition of 'significant impact' is that it includes reference to quality. If the environment is in 'poor quality' it does not make an impact any less capable of harm. Degraded land should undergo the same level of assessment as undisturbed areas to prevent ongoing degradation and will subsequently enable a decision maker to consider the role of EIA in promoting the restoration of that environment.

The NT EPA has historically made decisions on impact that the general public would perceive as significant but were determined not to require an environmental impact statement (EIS). This is a key issue that needs to be rectified in order to achieve improved environmental outcomes and therefore deliver on the initial intent of the reform.

The reality is that the people of the NT are expecting projects that have historically slipped through the cracks to now be evaluated for their full impact on the environment. If the framework does not increase the scope of EIA, the Act will fail to improve environmental outcomes for the NT.

Recommendations

- Remove reference to major consequence in the definition of significant impact.

Strengthen the rights of Aboriginal people to engage in decision making

We support the amendment to the previous draft Bill to provide for explicit recognition of the rights of Aboriginal people in the objects of the Bill, including the need for proponents to undertake consultation that is culturally appropriate. These additions are a significant improvement but do not go so far to be able to ensure compliance with our responsibility in international law to ensure indigenous people are able to provide free prior and informed consent (FPIC) and participate in decisions that affect their land and waters.[3]

The Bill should be amended to include a process to ensure that indigenous people who will be affected by a proposal on their land are consulted in process that enables them to determine the outcome of the EIA process. No approval should be granted unless there is explicit FPIC and the Minister is satisfied that a proponent has undertaken appropriate and comprehensive consultation.

All too often project consultation is undertaken in a way that is not appropriate to the place or language and there is widespread misinformation and confusion in an affected community on the full nature of the benefits and impacts of the project. There is ample evidence of poor consultation in current EIA processes including misleading information, late engagement, linguistically inappropriate communication and a lack of ongoing reporting on the outcomes of consultation. These issues need to be rectified in law to improve the ability of communities to determine development according to their own interests.

We also officially endorse the recommendations from the Northern Land Council (NLC) and Central Land Council (CLC) to ensure that:

- NT EPA board membership includes Aboriginal representation and the inclusion of Indigenous scientific knowledge and traditional ecological perspectives.
- There is an Indigenous Advisory Committee established in the Act to advise on consultation under the new regime.
- There is consultation with members of aboriginal communities and landowners when considering changes to the governance structure of the NT EPA.

Recommendations

- Include additional duties in section 43 that require proponents to engage early, in good faith and with linguistically appropriate communication.
- Require decision makers to ensure compliance with detailed and culturally appropriate engagement guidelines, with approval conditional on compliance with those guidelines.
- Amend the Bill to provide a fully participatory engagement process that ensures consultation is appropriate and leads to broad understanding of the potential benefits and impacts of a proposal so that affected communities can make fully informed decisions.
- Outline a legally enforceable process for engaging with Indigenous landowners and affected communities to ensure that there is FPIC for projects.
- Introduce a requirement for the decision maker to be satisfied with appropriate engagement before granting approval.

[3] United Nations Declaration on the Rights of Indigenous Peoples article 27.

- Enshrine a role for the land councils in the Act to be consulted on declarations of referral triggers, prohibited actions and protected areas.

Weakened accountability and broad discretion

During consultation about the reform process, including the draft Bill, we were assured that the new framework would empower the Minister to refuse a proposal if it posed an unacceptable level of risk. The ability to refuse certain proposals is critical to a credible and effective system of environmental protection. It is concerning to note however, that there are various sections which create an expectation that an approval is a fait accompli.[4] The current drafting makes it very difficult for an approval to not be granted as there is ample opportunity for a proponent to influence that decision at all stages without public scrutiny.

The high level of discretion afforded to decision makers has been acknowledged as a serious deficiency in the current framework, but this has not been adequately rectified in the Bill. There is simply an excessive amount of opportunities for a proponent to influence the process of environmental assessment in their favour. The Bill includes several sections that provide unfettered discretion to decision makers while simultaneously denying the public an opportunity to be consulted in an equal way. Enabling proponents to be consulted during approval without affording the same right to the public is a serious legal deficiency that tips the balance in the proponents' favour to the expense of public environmental interests.[5]

There are multiple opportunities granted to proponents to evade liability under the Bill. These include applications for waivers, amended approvals and requests for confidentiality.[6] This is problematic firstly, because the same level of protection has not been afforded to the public interest; and secondly these powers are unqualified and highly discretionary. In the absence of a requirement to demonstrate public interest in the use of the provisions and a clear case for how they are consistent with the objects of the Bill, they should be removed. These rights undermine accountable and independent decision making and therefore the intention of the reform.

Confidentiality provisions in the Bill pose a significant risk to accountable and transparent decision making. Commercial in confidence is too often used, without qualification, by proponents to evade full public scrutiny of projects. This is a key deficiency in the current EIA process that needs to be rectified as a matter of priority. Determining what information is confidential should not simply be at the request of the proponent, but rather a balancing process whereby information should be assessed against a public interest presumption of full disclosure. The potential harm resulting from disclosure to a proponent should be weighed against the importance of the information being publicly available and thereby ensuring accountable decision making.

Recommendations

- Remove section 17 (3) to strengthen accountable decision making and the role of ESD in determining outcomes.

[4] *Environment Protection Bill 2019* (EPB) s. 72.
[5] EPB at s. 70(1)(a)(ii).
[6] EPB at Ss 113(3), 70(1) and 182(2).

- Amend the Bill to reduce the ability of a proponent to abrogate their responsibilities to the people and environments of the NT.
- Qualify the definition of commercial in confidence to include a balancing process with a public interest presumption of full disclosure.
- At the stages where a proponent is given an opportunity to be heard in the decision, this should also be afforded to those who stand to be affected by the decision.

Failure to account for climate change risks

The EIA must acknowledge the modern reality of climate change and its implications on environmental impact assessment and approval. Other Australian jurisdictions are reforming EIA to regulate, manage and minimise the risk posed by climate change.[7]

Disclosing and considering the climate risks of a project are officially regarded as necessary for companies to demonstrate compliance with their financial fiduciary duties.[8] If these risks have not been disclosed and assessed as part of the EIA process, they may be exposing themselves and their shareholders to liability. The EIA process offers an important avenue to evaluate the proposal against the best available scientific data on climate change and therefore demonstrate the appropriateness of a proposal.

Climate risk is already a focus for financial regulatory bodies; it is therefore common sense to empower the environmental regulators in the NT to evaluate and assess the climate change risks of a project. Unless these risks have been properly assessed through EIA, it will be difficult for companies to prove compliance with their financial obligations.

The failure to properly consider climate change will continue to leave the NT Government and proponents vulnerable to litigation. The following extract is taken from a recent expert Memorandum of Opinion:

> "There are, at the present time, significant and well-publicised risks associated with climate change and global warming that would be regarded by a Court as foreseeable. Such risks require engagement from company directors in affected sectors, particularly in (at least) the banking, insurance, asset ownership/management, energy, transport, material/buildings, agriculture, food and forest product industries."[9]

Climate change is projected to have severe consequences for the NT. Planning for long term development with EIA should therefore incorporate adaptation planning. A proponent should be obligated to consider ways to reduce vulnerability and improve resilience in the face of those climate projections as part of the EIA process.[10]

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[7] https://www.climatechangeinaustralia.gov.au/en/support-and-guidance/using-climate-projections/impact-assessment/

[8] Noel Hutley SC and Sebastian Davis, "Climate Change and Directors' Duties, Supplementary Memorandum of Opinion" 23 March 2019, Centre for Policy Development< https://cpd.org.au/wp-content/uploads/2019/03/Noel-Hutley-SC-and-Sebastian-Hartford-Davis-Opinion-2019-and-2016_pdf.pdf>.

[9] Ibid at 20.

[10] EPB s. 42.

A statement of unacceptable impact should include explicit reference to the climate change implications of a proposal and total greenhouse emissions. There is growing precedent in Australia that environmental decision makers should be taking the warming potential of a proposal into account.[11] Individual projects cumulatively influence global climate change and decision makers need to be empowered to take such considerations into account.

Providing explicit recognition of Climate Change in the Act will enable decision makers to directly consider the role of carbon offsets within the framework of environmental management. Encouraging and facilitating the development of a carbon farming industry in the NT will be critical to the future economic viability of the NT and its ability to manage the impacts of a changing climate.

Unless the Bill is amended to acknowledge the reality of climate change, decision makers will be powerless to ensure development is resilient to climate change and does not exacerbate cumulative heating.

Recommendations

- Include the need to reduce carbon emissions and encourage climate adaptation as an object of the Act.
- Include the ability to reduce carbon emissions from a project as an explicit criterion in determining the appropriate use of offsets.
- Amend section 125 to formalise the role of carbon offsets and the need to use offsets to reduce carbon emissions.

Non-compliance with recommendations from the Fracking Inquiry

This Bill will become the centrepiece of environmental governance for the NT for the foreseeable future. It should therefore be designed to incorporate the reforms necessary to regulate all aspects of petroleum development. It is critical that reforms are included in the Bill rather than attempt piecemeal reform at a later stage to address the recommendations.

Without applying the legal standards of the recommendations across the EIA framework, petroleum activities will be subject to a greater level of accountability than other regulated activities. This inconsistency will undermine the integrity of EIA and increase the level of environmental risk for those exempt activities. These recommendations have been made based off a comprehensive investigation of the potential to cause environmental harm which applies equally to activities that would be subject to the new Act such as mining and agriculture.

The following recommendations need to be implemented by this reform through direct amendments to the Bill.

1. Open standing for judicial review of decisions made regarding petroleum developments (recommendation 14.23).
2. Rights to review a decision based on its merits (recommendation 14.24).
3. Open standing for civil enforcement proceedings such as injunctions (recommendation 14.31).

[11] *Gloucester Resources Limited v Minister for Planning* (2019) NSWLEC 7: https://www.caselaw.nsw.gov.au/decision/5c59012ce4b02a5a800be47f

4. Chain of responsibility laws to ensure that a proponent is held financially responsible for any harm resulting from their activities (recommendation 14.3).
5. Inclusion of public interest exemptions to cost orders (recommendation 14.25).
6. Explicit requirement for the decision maker to consider cumulative impacts when assessing a proposal (recommendation 14.19)

Conclusion

The NT is at a critical juncture. There are significant imminent environmental challenges that need to be acknowledged and managed by a modern and robust framework of EIA. Engaging with environmental decision making is going to become increasingly important as the community takes an increasing interest in the environmental health of the NT.

This Bill will strengthen accountability and transparency in environmental decision making for the NT. However, several amendments need to be made to ensure that it empowers the Minister to properly address emerging environmental threats and ensure that affected communities can properly engage in the EIA process. This will require a rebalancing of the rights afforded to proponents in the Bill compared to the broader public. Provided that suggested amendments are recommended by the Committee, the Bill will deliver on the reform mandate to improve the quality of environmental protection and public participation in EIA.

Amendments necessary to improve environmental outcomes

The following sections need to be amended in order to ensure that the Bill achieves a shift in the quality of environmental governance for the NT. Without amending the Bill to strengthen public participation, accountability and transparency, the reform will fail to deliver any substantive change and remain largely symbolic.

Section	Amendment
66	• Remove 'major consequence'. • Develop guidance material on what is considered unacceptable and when offsets are not an appropriate mitigation strategy. • Include excessive carbon emissions as a factor to determine significance, for example unacceptable carbon emissions.
72	• The show case notice is not a necessary provision. This is an opportunity to influence an outcome according to the interests of the proponent. It is unorthodox and enables the proponent to unduly influence the outcome of the assessment process to the detriment of the public interest.
78	• This again enables the proponent to exert undue influence over the assessment process. It undermines the necessary level of independence in decision making that guarantees rigor and accountability. There is an obvious conflict of interest in asking a proponent to justify why approval should be granted. • Such a decision should be determined solely on the best available advice and information without direct input from the proponent. • Unacceptable impact is not a determination that the proponent should be legally entitled to make. • This provision should be removed from the Bill.

87	• An approval shall include a condition to report on compliance with conditions in that approval. • Compliance with such a condition should be demonstrated on an ongoing basis.
89(7)	• Due diligence needs to be clearly prescribed. This should not be a subjective determination by the proponent.
106	• A proponent should only be able to request an amendment in specified circumstances that do not increase the level of risk posed by a project.
109	• Add (e): The Minister can revoke the approval if there has been ongoing and consistent non-compliance with the approval.
113(3)	• Remove this section. • A proponent should not be entitled to apply for a waiver from compliance with the Act. This undermines certainty in the framework and consistency in application. • In the alternative, the power should be qualified by a test to ensure it does not cause environmental harm and is consistent with the objects of the Act.
113(4)	• Remove this section. This will create the risk of an ongoing burden of legacy contamination to the NT and will cause environmental and economic harm. • This waiver should only be utilised if there is demonstrated public interest involved and it will not lead to a risk that rehabilitation will not occur.
114(5)	• An approval should not be able to be revoked before a closure notice has been issued. The Minister should consult on issues of water before revoking an approval.
132	• This section should be strengthened by including qualifying criteria to guide the decision of the Minister in being satisfied that remediation and rehabilitation is complete.
230	• There should be open standing for civil remedies. Any person should be able to apply for an injunction to remedy a breach of the act or an apprehended breach of the Act. This is broadly recognised as best practice environmental law.
248	• Recommendation 14.32 from the Fracking Inquiry states there should be a rebuttable presumption of fault in circumstances of harm. This is a higher burden than the balance of probabilities in order to operate as a general deterrent to cause harm and allow for harm to be redressed.
276(2)	• Remove reference to 'form or form letter or petition'. This is not a definition of genuine and valid that is conducive to public confidence and participation in the environmental assessment process. These types of submissions are an efficient way, and at times the only way, for members of the general public to engage in decisions. • The submission of a petition or form letter indicates an interest or concern from the general public and should be considered expressing the public interest. To exclude the public interest from environmental assessment is to undermine the credibility of the entire system.
281	• Certain information should not be capable of being declared confidential including: the approval, approval conditions and operational details relating to the approval.

	• There should be a recognised public interest presumption of disclosure in this section to ensure information is only withheld if there is a demonstrable benefit in granting confidentiality. • Determining whether information is commercial in confidence should not be solely determined by the proponent but should include criteria to determine what harm could result and whether this harm outweighs the public benefit of full disclosure. • This section should be amended to include a balancing process.
282	• Amend section to include a presumption against disclosure unless there is a compelling a clear case made. • The public interest should be prioritised over the economic interests of the proponent. Include guidance material to confine the discretion of the EPA in determining that information is commercial in confidence.
288	• Include additional information to define what would be 'unreasonable' for the proponent to comply with. • What a proponent considers as 'unreasonable' may in fact not accord with public expectations of disclosure and transparency. • Any power that reduces public access to information should be highly regulated and qualified.
312	• 105(1)(a) should be amended to one year, not three. This will provide certainty to the community that imminent mining projects will be subject to the updated regulatory framework. • Three years could create a situation where there are five operational mines in central Australia that are not subject to the new Act and will therefore pose a level of risk that is no longer broadly acceptable. This could create a situation where a petroleum activity is regulated under the new framework, but a mining activity is not. This creates risk and reduces public and business confidence in independent and unbiased decision making. Inconsistency in the transitional timelines undermines certainty and public trust in the regulatory framework.