Joint Northern and Central Land Council

Submission to the Social Policy Scrutiny Committee:

Environment Protection Bill 2019

June 2019

1. About the Land Councils

This submission is made jointly by the Northern Land Council (**NLC**) and the Central Land Council (**CLC**) (**Land Councils**), both independent statutory authorities established under the (CTH) *Aboriginal Land Rights (Northern Territory) Act 1976* (**Land Rights Act**).

A key function of the Land Councils is to express the wishes and protect the interests of traditional Aboriginal owners throughout the Northern Territory. The members of the Land Councils are chosen by Aboriginal people living in each Land Council's respective area.

The Land Rights Act sets out the Land Councils' core functions, which include:

- identifying relevant Traditional Owners and affected people
- ascertaining and expressing the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters
- consulting with traditional Aboriginal owners and other Aboriginal people affected by proposals
- negotiating on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim
- assisting Aboriginal people carry out commercial activities; obtaining Traditional Owners' informed consent, as a group
- assisting in the protection of sacred sites
- directing a Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

The Land Councils also fulfil the role of Native Title Representative Bodies under the (CTH) *Native Title Act 1993* (**Native Title Act**), whose role and functions are set out under Part 11, Division 3 of the Native Title Act. In this capacity, the NLC also represents the Aboriginal people of the Tiwi Islands and Groote Eylandt.

For the purposes of this submission, the term ***Traditional Owner*** will be used as a term which includes traditional Aboriginal owners (as defined in the Land Rights Act), native title holders (as defined in the Native Title Act) and those with a traditional interest in the lands and waters encompassing the NLC and CLC's regions.

Within their respective jurisdictions, the Land Councils assist Traditional Owners by providing services in their key output areas of land, sea and water management, land acquisition, mineral and petroleum, community development, Aboriginal land trust administration, native title services, advocacy, information and policy advice. Relevant to this submission, is a responsibility to protect the traditional rights and interests of Traditional Owners and other people with interests over the combined area of the Land Councils, which is constituted by more than 627,000 square kilometres of the land mass of the Northern Territory, and over 80% of the coastline.

2. Introduction

The Land Councils welcome the opportunity to make a submission to the Social Policy Scrutiny Committee on the Environment Protection Bill 2019. This legislation is long overdue and transformational, lifting environmental protection in the Northern Territory to the standard of other Australian jurisdictions. We commend the Northern Territory Government on taking this step.

The legislation as it stands is a vast improvement on what has gone before and has a number of strengths, particularly recognition of Aboriginal interests and more robust assessment, transparency, accountability, compliance and enforcement measures.

Notwithstanding these improvements, a number of areas of the Bill need to be strengthened to ensure that legislation provides substantive protection for Aboriginal interests and critical elements of the framework are defined and embedded in the primary legislation.

Further, the Land Councils note that these legislative reforms must be supported by robust institutions and resources in order to implement and maintain a robust environment protection framework.

An effective, representative Environment Protection Agency is a critical element of this framework. While the Bill takes some steps towards recognising the rights and interests of Aboriginal people, this principle must be embedded in key decision-making bodies. The Land Councils request that the **lack of Aboriginal representation on the NT EPA Board be addressed as a matter of urgency.** Establishment of an Indigenous Advisory Committee would also help to ensure the NT EPA has capacity to properly assess impacts on Aboriginal people and their country. Further, the NT EPA should have its own staff and resources to strengthen its independence.

As we noted in our submission on the draft Bill, it is **crucial that the legislative reforms are backed by adequate resources** to ensure that statutory processes are administered effectively, including compliance and enforcement functions. This is essential to the ongoing integrity of the framework. Both interested stakeholders and the broader public must have confidence that decision-makers and other actors will be held to account.

3. Recommendations

Recommendation 1: Strengths of the Bill

Maintain (or further strengthen) the elements of the Bill identified as strengths in this submission.

Recommendation 2: Participation of Aboriginal people

a) As a matter of urgency and on a permanent basis, the NT EPA ensure that its Board includes adequate, appropriate Aboriginal representation, to ensure that Aboriginal rights, interests, values and knowledge are recognised and considered.
b) Amend Bill to provide for the establishment of an Aboriginal Advisory Committee under the NT EPA, to provide advice in relation to Aboriginal rights, interests, values, and knowledge.
c) Government consult Land Councils in relation to any proposed changes to the NT EPA governance structure.

Recommendation 3: Effective engagement with Aboriginal people

a) Amend the Bill to include the following requirements:

- Obligation for proponents to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter.
- Requirement that the NT EPA consider the adequacy of consultation reports and engagement plans (for example, in accordance with the guidelines) as part of its review- in consultation with Land Councils where appropriate.
- Insert a new requirement under sub-clause 73(2) that prior to granting an environmental approval, the Minister must be satisfied that 'Aboriginal values and the rights and interests of Aboriginal communities in areas that may be impacted by the proposed action have been considered, and their free, prior and informed consent obtained'.
- Provisions specifying clear protections to prevent the unauthorised use, disclosure or release of Indigenous knowledge that is submitted by Indigenous people as part of EIA processes.

b) Develop clear guidance for proponents regarding leading practice standards for engagement with Aboriginal people, in collaboration with Land Councils.

Recommendation 4: Offsets framework

a) Amend the definition of 'environmental offset' to specify that impact includes greenhouse gas emissions (cl. 4).
b) Amend cl. 125 (Environmental offsets framework and guidelines) such that the Minister 'will' establish an environmental offsets framework; and provide greater detail to ensure the framework is appropriate to the NT context.

Recommendation 5: General environmental duty

Amend Bill to reinstate provisions establishing a general environmental duty and relevant measures and offences.

Recommendation 6: Principles of ecologically sustainable development

Amend Bill to remove sub-clause 17(3).

Recommendation 7: Legal certainty

Amend Bill to ensure that critical elements of the framework (outlined in section 5.4 of this submission) are specified in the primary legislation, to ensure framework integrity and provide stakeholders with legal certainty.

Recommendation 8: Access to justice

a) Amend Bill to reinstate merits review and ensure that provisions for standing for judicial and merits review are consistent with the recommendations of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory.
b) Amend Bill to reinstate the earlier test of 'eligible applicant' or 'eligible person' for bringing injunctions and applying for NTCAT review.

Recommendation 9: Procedural fairness

a) Amend Bill to re-insert power of the Minister to extend decision times for environmental approvals, in consideration of circumstances.
b) Amend Bill to provide for a two-year period for commencing injunctions and other orders (Part 10, Division 1).

Recommendation 10: Public interest – community consultation

a) Amend Bill to require consultation with communities where consultation with proponents or approval holders is mandatory (including clauses 70(1), 80(2), 107(2), 114(5) and 122(2)).
b) Amend Bill to reinsert requirement for community consultation for proposed environmental objectives and triggers or their amendment, and proposed protected areas or prohibited actions and their revocation.

Recommendation 11: Support recommendations of the Environment Centre NT

a) Include climate change as a subclause in clause 3 (the objects of the Bill), to recognise the impact of climate change on the environment, and its importance as a consideration as part of environment assessment and protection.
b) Insert phrase "and should be a fundamental consideration in decision-making" at the end of clause 23, to reinforce the importance of biodiversity conservation and maintenance.
c) Strengthen the definitions of 'environment' and 'significant impact', to ensure that the standards for triggering an environmental assessment and approval are appropriate, and not so high as to impede the fulfilment of the objects of the proposed Act.
d) Amendments are consistent with the findings and recommendations of the Fracking Inquiry, to ensure consistency across regimes which regulate environmental impacts.

4. Strengths of the Bill

The Land Councils strongly support the following elements of the Bill:

1. *Recognition of Aboriginal people and connection to country*

The Land Councils welcome the adoption of our recommendation to include recognition of Aboriginal people and their connection to country in the Objects of the Bill (cl. 3e). However, we note that this object must be supported by strong protections elsewhere in the legislation to ensure that this object can be realised. Measures to ensure effective engagement with Aboriginal people are detailed below.

2. *Stand-alone environmental assessment*

The Land Councils strongly support the adoption of a single environmental approval process, with the Minister for Environment and Natural Resources as decision-maker upon the advice of the NT EPA. This ensures a level playing field across the NT, where the level of scrutiny is determined by the environmental significance of a proposal.

3. *Protective measures*

The Land Councils strongly support measures introduced to protect and enhance the environment, including environment protection declarations, protected environmental areas and prohibited actions (Part 3), and environmental bonds, levies and funds (Part 7). These are all supported and should be actively operationalised. However, we strongly oppose the removal of the 'general environmental duty' and support its reinstatement, as outlined in more detail below.

4. *Elements of transparency and accountability*

The Land Councils welcome the inclusion of strong transparency and accountability measures, particularly the requirement for the responsible Minister or responsible authority to publish a statement of reasons for decisions and actions, and for the publication of key documents. However, the Land Councils note that the revised Bill has removed certain requirements to publish and recommends that these provisions be re-introduced.

5. *Improved decision-making standards*

The Bill introduces a high standard of decision-making that moves away from a purely discretionary approach. The Land Councils strongly support the retention of this approach.

6. *Improved compliance and enforcement*

The Land Councils reiterate our support for the inclusion of compliance and enforcement provisions that are considered, or approach, leading practice and note that these provisions remain relatively unchanged in the revised Bill.

7. *Sustainable development opportunities*

The Land Councils reiterate support for the inclusion of strategic assessment provisions. Strategic assessment has the potential to play an important role in assessing impacts, protecting the

environment, facilitating ecologically sustainable development and assisting Aboriginal communities. However, we note that despite some amendments, the Bill still provides little clarity as to what constitutes strategic assessment and merely specifies the processes around it (e.g. referral of strategic proposal and approval notice for action). The Land Councils reiterate our previous advice that the Bill clearly define what constitutes a 'strategic proposal' (as distinct from a proposed action) and strategic assessment process (as distinct from the standard environment assessment process).

8. Recognition of environmental offsets

The Land Councils again welcome an offsets framework being embedded in the Bill, but note that these provisions could be strengthened to maximise the potential benefit for Aboriginal people and the NT more broadly. Suggestions for improvement are noted below.

Recommendation 1: Strengths of the Bill

Maintain (or further strengthen) the elements of the Bill identified as strengths in this submission.

5. Concerns with the revised Bill

5.1. Effective participation of and engagement with Aboriginal people

Throughout consultation on these reforms, the Land Councils have emphasised that effective participation of and engagement with Aboriginal people is critical to the integrity of the framework.

As noted above, while the Bill takes some steps towards recognising the rights and interests of Aboriginal people, this principle must be embedded in governance structures, to ensure that these rights and interests are considered and that there is accountability around these decisions. As such, the Land Councils strongly recommend that the NT EPA ensure that membership of its Board includes Aboriginal representation. The establishment of an Indigenous Advisory Committee would also help to ensure the NT EPA have capacity to properly assess impacts on Aboriginal people and country. Further, the NT EPA should have its own staff and resources to strengthen its independence.

Recommendation 2: Participation of Aboriginal people

a) As a matter of urgency and on a permanent basis, the NT EPA ensure that its Board includes adequate, appropriate Aboriginal representation, to ensure that Aboriginal rights, interests, values and knowledge are recognised and considered.
b) Amend Bill to provide for the establishment of an Aboriginal Advisory Committee under the NT EPA, to provide advice in relation to Aboriginal rights, interests, values, and knowledge.
c) Government consult Land Councils in relation to any proposed changes to the NT EPA governance structure.

In addition to strengthened governance, the Bill must include stronger provisions around early, effective engagement with Aboriginal people.

The revised Bill does include several new duties for proponents relating to engagement with Aboriginal people and consideration of Aboriginal interests and knowledge (cl. 43), but it is unclear how compliance with these duties will be monitored and enforced. The Land Councils are concerned that as drafted, these duties are weak and will not lead to demonstrable change in stakeholders' approach to engagement with Aboriginal people.

To support a shift in practice, the Bill must specify an obligation for proponents to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter. These guidelines must specify requirements for effective engagement with Aboriginal communities, consistent with the principle of free, prior, and informed consent, including:

- 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

- careful consideration of who is to be consulted, including Traditional Owners and diverse Aboriginal communities
- resources provided to facilitate engagement.

The Bill must also include a requirement that the NT EPA consider the adequacy of consultation reports and engagement plans as part of its review and consult Land Councils as part of the review where consultation with Aboriginal people is required.

As a key accountability measure, Land Councils also recommend that a new sub-clause is included to ensure that the Minister must take into account Aboriginal values and consultation with Aboriginal people in granting an environmental approval (sub-clause 73(2)). This would recognise the unique position held by Aboriginal people as Traditional Owners and custodians of the land, and reflect the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

These provisions must also include clear protections to prevent the unauthorised use, disclosure or release of Indigenous knowledge that is submitted by Indigenous people as part of EIA processes.

Finally, clear guidance must be developed for proponents and promoted to encourage leading practice engagement with Aboriginal people. The Land Councils welcome ongoing discussions with the NT EPA to ensure that this guidance is fit for purpose.

Recommendation 3: Effective participation of and engagement with Aboriginal people

a) Amend the Bill to insert a stand-alone division under Part 4 entitled 'effective engagement with Aboriginal people', with the following:

- Obligation for proponents to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter.
- Requirement that the NT EPA consider the adequacy of consultation reports and engagement plans (for example, in accordance with the guidelines) as part of its review.
- Provision for Land Councils to have a role in the adequacy review conducted by NT EPA where consultation with Aboriginal people is required.
- Insert a new requirement under sub-clause 73(2) that prior to granting an environmental approval, the Minister must be satisfied that '*Aboriginal values and the rights and interests of Aboriginal communities in areas that may be impacted by the proposed action have been considered, and their free, prior and informed consent obtained*'.
- Provisions specifying clear protections to prevent the unauthorised use, disclosure or release of Indigenous knowledge that is submitted by Indigenous people as part of EIA processes.

b) Develop clear guidance for proponents regarding leading practice engagement with Aboriginal people, in collaboration with Land Councils.

5.2. Offsets Framework

The Bill provides for the establishment of an offsets framework, a provision that is strongly supported by the Land Councils. However, this provision would be strengthened by the inclusion of greater detail within the primary legislation.

The Hydraulic Fracturing Inquiry noted greenhouse gas emissions must be fully offset[1]. Emissions should therefore be included in any offsets framework and specified in this legislation. Implementation of an offsets framework offers significant potential benefits for Aboriginal communities, not only in helping to reduce environmental, social and cultural impacts of projects, but also supporting economic development through the participation of Traditional Owners and Indigenous ranger groups in the offset economy, including the carbon economy.

To maximise these potential benefits, it is essential this framework be developed for the unique Northern Territory context, not simply borrowed from another jurisdiction. The use of offsets also needs to be mandatory where environmental impacts cannot be avoided or mitigated, and applied as locally as possible to the area of impact, to reduce risks for communities.

Recommendation 4

a) Amend the definition of 'environmental offset' to specify that impact includes greenhouse gas emissions.
b) Amend cl. 125 (Environmental offsets framework and guidelines) such that the Minister 'will' establish an environmental offsets framework; and provide greater detail to ensure the framework is appropriate to the NT context.

5.3. General environmental duty

The Land Councils are disappointed by the Government's decision to remove the 'general environmental duty' and urge these provisions to be reinstated. These provisions are consistent with approaches adopted in Queensland and South Australia and provide a vital safeguard against adverse environmental impacts and the significant economic, social and cultural costs that will be borne by the Government and Northern Territory citizens.

Recommendation 5: General environmental duty

Amend Bill to reinstate provisions establishing a general environmental duty and relevant measures and offences.

[1] Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (2018), *Final Report*, p239.

5.4. Principles of ecologically sustainable development

The Land Councils oppose the inclusion of sub-clause 17(3) which does not require a decision-maker to specify how they have considered the principles of ecologically sustainable development. This is not consistent with transparency and accountability. As noted in our earlier submission, it is also inconsistent with an approach that places ESD principles as a central element of the Bill, and undermines the Northern Territory's approach to environment protection and environmental assessment.

Recommendation 6: Principles of ecologically sustainable development

Amend Bill to remove sub-clause 17(3).

5.5. Legal certainty

The Land Councils continue to hold serious concerns regarding the lack of detail in the primary legislation relating to key elements of the framework.

As noted previously, legal certainty is critical to the robustness of this framework and it is our firm view that regulations should only set out how substantive provisions are operationalised and that core elements of the framework be defined in primary legislation. These include:

- Provisions for methods of assessment, reasons, publication, notice and decision-making, including:
    - Process for NT EPA to carry out environmental impact assessments (cl. 57)
    - Amendment/revocation of TEO and referral trigger (cl. 33)
    - Revocation of declaration (sub-clause 39(4))
    - Process for considering referred action and strategic proposals (cl. 55)
- Definition of 'fit and proper person' – this is dealt with under legislation in both New South Wales and Victoria[2]. Further, we propose the definition include whether the person or entity has committed offences under the (NT) *Northern Territory Aboriginal Sacred Sites Act.*
- Provisions relating to variations, exemptions, environmental practitioners and environmental auditors. Practice around Australia has shown that variations (or modifications) of actions or proposals are frequently used to bypass environmental protections. Processes around variations should be set out in the Act.
- Key access to justice provisions around publication and notice.

A further concern is the inclusion of provisions for the declaration of environmental objectives and referral triggers, without any information on what these should contain. The Land Councils maintain that if objectives and triggers are to be used, they should be integrated into the primary legislation,

[2] Under the (NSW) Protection of the Environment Operations Act 1997 it is contained in section 83; in Victoria, it is found under (VIC) Environment Protection Act 1970, which refers to an offence in the last 10 years under s 20C.

with suitable triggers around climate change, water quality and use, shale gas, biodiversity, land management and cultural and social values. This is the approach taken by the Commonwealth, which includes in its primary legislation (Environment Protection and Biodiversity Conservation Act 1999) what constitutes 'matters of national environmental significance' to be protected. This Bill leaves it to the discretion of the Minister to declare both environmental objectives and referral triggers by gazettal.

As noted in our previous submission, there is nothing in the Bill or Regulations that addresses regulatory gaps. Specifically, the Hydraulic Fracturing Inquiry report identified that "the water trigger in the EPBC Act does not apply to shale gas developments"[3]. The NT legislation should seek to address this gap and provide clarity as to how shale gas proposals will be dealt with in environmental assessment and approval processes.

Recommendation 7: Legal certainty

a) Amend Bill to ensure that critical elements of the framework (outlined in section 5.4 of this submission) are specified in the primary legislation, to ensure framework integrity and provide stakeholders with legal certainty.
b) Amend Bill to outline referral triggers around climate change, water quality and use, shale gas, biodiversity, land management and cultural and social values.

5.6. Access to justice

The Land Councils hold serious concerns regarding the integrity of the consultation process for this Bill and the disproportionate influence which some stakeholders appear to have had on this process.

Midway through the consultation period on the draft Bill, the NT Government reversed its position on provisions allowing for open standing for judicial review and broad standing for merits review. This was an astonishing move, which eroded trust in a fair process and left many stakeholders concerned about the influence of interest groups. As flagged in this announcement, the test for judicial review standing now extends only to proponents, those directly affected and those who have made a genuine and valid submission, while merits review has been removed altogether.

Crucially, this is in conflict with the findings of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, the recommendations of which were accepted by the NT Government in their entirety. The Inquiry's Final Report noted both judicial and merits review "will exist in any mature and robust regulatory system" and made the following recommendations[4]:

[3] Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (2018), *Final Report*, p118.
[4] Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (2018), *Final Report*, p420.

Recommendation 14.23
That prior to the grant of any further exploration approvals, the Petroleum Act and Petroleum Environment Regulations be amended to allow open standing to challenge administrative decisions made under these enactments.

Recommendation 14.24
That prior to the granting of any further production approvals, merits review be available in relation to decisions under the Petroleum Act and Petroleum Environment Regulations including, but not limited to, decisions made in relation to the granting of all EMPs.
That, at a minimum, the following third parties have standing to seek merits review:

- *proponents (that is, gas companies) seeking a permit, approval, application, licence or permission to engage in onshore shale gas activity;*
- *persons who are directly or indirectly affected by the decision;*
- *members of an organised environmental, community or industry group;*
- *Aboriginal Land Councils;*
- *Registered Native Title Prescribed Body Corporate and registered claimants under the Native Title Act;*
- *local government bodies; and*
- *persons who have made a genuine and valid objection during any assessment or approval process.*

That an independent body, such as NTCAT, be given jurisdiction to hear merits review proceedings in relation to any onshore shale gas industry.

The first version of the Bill appeared to be drafted in line with these recommendations. The Land Councils' submission to the draft Bill strongly opposed moving away from this approach:

> The Bill originally contemplated an expansive approach to standing... This was based on the assumption that all Territorians have a role to play in protecting the environment, and that community participation is crucial to the effective operation of the laws...
>
> There is no reason to restrict standing where there is a breach or anticipated breach of an environmental law, or the prospect of harm. NSW has had open standing – where any person can bring proceedings - in most of its environmental legislation for nearly forty years. During this time, there has been no evidence to suggest that open standing provisions result in frivolous or vexatious appeals – the so-called 'floodgates' argument.[5] Rather, the experience has shown that the public has shown a strong, legitimate interest in ensuring that decision-makers are held to account, and that proponents are complying with their development approval. In this regard, the ALRC has recognised that neither the Attorney General nor government agencies can be trusted with enforcement due to a "range of political, financial and bureaucratic factors".[6]

[5] The Hon Justice Peter McClellan P (2005) Chief Judge at Common Law Supreme Court of NSW "Access to Justice in Environmental Law: an Australian Perspective", paper presented at Commonwealth Law Conference 2005 London 11-15 September 2005.
[6] Australian Law Reform Commission (1996) Beyond the door-keeper*:* Standing to sue for public remedies at 2.36: see http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html

> More prosaically, the NT Government may lack the necessary resources to ensure compliance, while open standing provides public interest litigants with the opportunity to enforce. The removal of standing also shifts the analysis – and precious, limited community resources – away from the substantive matter, and onto whether the community or environmental group is entitled to be in the Court.[7]

In the revised Bill, a similar reversal has occurred with reference to who may bring an injunction and who may apply to NTCAT for review of a decision. Where standing in the draft Bill was quite broad for both of these, it is now restricted to a person who is affected. The Land Councils maintain that the earlier test of 'eligible applicant' or 'eligible person' was more appropriate. The Bill recognises protection of the environment is inextricably linked to the public interest and this should be reflected in standing.

Recommendation 8: Access to justice

a) Amend Bill to reinstate merits review and ensure that provisions for standing for judicial and merits review are consistent with the recommendations of the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory.
b) Amend Bill to reinstate the earlier test of 'eligible applicant' or 'eligible person' for bringing injunctions and applying for NTCAT review.

5.7. Procedural fairness

The Land Councils strongly oppose two key changes made to the Bill regarding timeframes for decision-making and bringing actions for injunctions. These risk further eroding the opportunity for Aboriginal people to participate in environment assessment processes.

While we recognise the need for stakeholder certainty, this need must be weighed against the unique context of the NT – the remoteness, number of remote Aboriginal communities, and the cultural obligations of affected Aboriginal populations. In addition, Land Councils have obligations around consultation pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* and *Native Title Act 1993*, and timeframes must be sufficient to allow these obligations to be met.

Under cl. 74 of the Bill, the Minister must make a decision to grant or refuse an environmental approval within 30 business days. The previous draft Bill included an additional provision (sub-clause 88(2)) that allowed the Minister to extend this timeline if the Minister considered it necessary. That power has now been removed. In many cases, a 30-day window will not be adequate, nor culturally appropriate if additional consultation with Traditional Owners is required. The provision in the draft should be reinstated, based on the consideration of factors such as project size or significance, cultural practices, weather and remoteness. Alternatively, the 30-day time limit should be removed and the NT EPA enabled to make an upfront determination of the appropriate

[7] Productivity Commission (2013) *Major Project Development Assessment Processes*, Research Report at p 272.

timeframe for particular projects, based on the referral documents, consultation report and an assessment of such factors.

The other significant change to timeframes that is of great concern is the time allowed for commencing injunctions for contraventions of the Act (cl. 241), which has reduced dramatically from three years in the draft Bill to 90 days. This is not sufficient time to allow affected Aboriginal communities to identify relevant actions or omissions and commence proceedings, or for Land Councils to undertake culturally appropriate consultation, particularly taking into consideration the extreme weather and road closures that are a regular feature of remote communities.

The Land Councils propose a two-year period for bringing injunctions. This is consistent with the approach taken in New South Wales[8] and consistent with administrative law leading practice.

Recommendation 9: Procedural fairness

a) Amend Bill to re-insert power of the Minister to extend decision times for environmental approvals, in consideration of circumstances.

b) Amend Bill to provide for a two-year period for commencing injunctions and other orders under Part 10, Division 1.

5.8. Public interest – community consultation

Public participation is recognised as one of the key purposes of the environmental impact assessment process (see sub-clause 42(d)). However, the revised Bill again fails to make provision for community consultation at key points in the process. These include:

- amended environmental approval (sub-clause 70(1))
- environmental approval granted if Minister rejects statement (sub-clause 80(2))
- amendment of approval (sub-clause 107(2))
- revocation at request of holder (sub-clause 114(5))
- transfer of environmental approval (sub-clause 122(2))

In addition, consultation requirements have been weakened or removed in the revised Bill in a number of areas, including for:

- consultation for proposed environmental objectives and triggers
- proposed amendments of objectives or triggers
- proposed protected areas or prohibited actions
- revocations of protected areas or prohibited actions

[8] See NSW Biodiversity Conservation Act s. 13.4; Environmental Planning and Assessment Act s. 9.57(5) and (5A)

This is at odds with the statement that "Decision-making processes should provide for community involvement in relation to decisions and actions that affect the community" (sub-clause 18(2)). In particular, failure to consult with Aboriginal Traditional Owners on whose land a project or action is occurring represents a failure to recognise their rights and interests.

Recommendation 10: Public interest – community consultation

a) Amend Bill to require consultation with communities where consultation with proponents or approval holders is mandatory (including sub-clauses 70(1), 80(2), 107(2), 114(5) and 122(2).
b) Amend Bill to reinsert requirement for community consultation for proposed environmental objectives and triggers or their amendment, and proposed protected areas or prohibited actions and their revocation.

5.9. Other recommendations

In addition to the above, the Land Councils support the following recommendations of the Environment Centre NT:

- Include climate change as a subclause in clause 3 (the objects of the Bill), to recognise the impact of climate change on the environment, and its importance as a consideration as part of environment assessment and protection.
- Insert the phrase "*and should be a fundamental consideration in decision-making*" at the end of clause 23, to reinforce the importance of biodiversity conservation and maintenance in the regime.
- Strengthen the definitions of '*environment*' and '*significant impact*' to ensure that the standards for triggering an environmental assessment and approval are appropriate and not so high as to impede the fulfilment of the objects of the proposed Act.
- Ensure amendments are consistent with the findings and recommendations of the Fracking Inquiry to ensure consistency across regimes which regulate environmental impacts.

Recommendation 11: Support recommendations of the Environment Centre NT

a) Include climate change as a subclause in clause 3 (the objects of the Bill), to recognise the impact of climate change on the environment, and its importance as a consideration as part of environment assessment and protection.
b) Insert phrase "and should be a fundamental consideration in decision-making" at the end of clause 23, to reinforce the importance of biodiversity conservation and maintenance.
c) Strengthen the definitions of 'environment' and 'significant impact' to ensure that the standards for triggering an environmental assessment and approval are appropriate and not so high as to impede the fulfilment of the objects of the proposed Act.
d) Amendments are consistent with the findings and recommendations of the Fracking Inquiry to ensure consistency across regimes which regulate environmental impacts.