

3rd December 2018



Environment
Institute of
Australia and
New Zealand

Att:

environment.policy@nt.gov.au

Dear Sir/Madam,

Re: Submission to draft Environment Protection Bill and draft Regulations

The Environment Institute of Australia and New Zealand (EIANZ) represents environmental practitioners across Australia and New Zealand. EIANZ members work across the environmental sector including consultancy, government and industry. Consequently, we support industry and the economic and social benefits that it brings.

EIANZ Northern Territory (NT) has been involved in the environmental reform process for a number of years. We have argued that the existing environmental approvals processes in the NT is outdated and has been shown to be flawed. We believe that current processes have amplified the distrust the community has of industry and the industry on government process. Furthermore, the non-transparency of the current process has allowed unsubstantiated allegations of impact and environmental mismanagement to thrive, resulting in entire industry sectors being dragged into ill-deserved disrepute.

To counter this EIANZ NT believes that a consistent, rigorous and transparent process is the only way to regain trust from the community and industry. Consequently, we have supported the reform process to date with submissions to or engagement around:

- Submission to Draft Guideline for Preparing a Notice of Intent, June 2015
- Response to NT EPA on Howard Springs Sand plains, February 2016
- Comment on the NT Balanced Environment Strategy Discussion Paper, March 2016
- Comment on Draft Petroleum (Environment) Regulations, April 2016
- Comment on the NT EPA's Draft advice - Response to Dr Hawke's review, October 2016
- Submission to the Environmental Regulatory Reform Discussion Paper, June 2017
- Meeting with DENR regarding NT Mining Regulation Reforms 2018
- Submission to the Environment Protection Authority Amendment Bill 2018
- Submission to the Water Legislation Amendment Bill 2018

EIANZ NT welcomes the opportunity to make a submission to the draft Environment Protection Bill and draft Regulations.

Our submission is in four parts. The first part reviews comments made in the above submissions to see if and how they have been incorporated into the Bill and regulations. The second part makes general statements about the Bill. The third part is devoted to discussing the three pillars of ESD and how, under a



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contemporary regime, it would be expected that these would be considered during an approvals process. Part IV gives our recommendations.

Part I: How the draft Bill addressed previous issues raised

1. Project approval

Having the environment minister (EM) give an environmental approval removes the concern of 'sectorial capture' where the industry regulator and advocate being the same entity. However, the EM is still part of a cabinet so consequently could be influenced by the party. We believe that, on balance, and with the public visibility of the assessment report and associated document (s83), that this is the appropriate approval process.

However, we have concerns about the content of the draft environmental approval (s81). There are three pillars of ESD: economic, environmental and social. Under the current process- and we can't see how the proposed process differs- the NT EPA assesses environmental (biophysical) well, but the other components are poorly assessed. We discuss the detail round this further in Part III of this submission, but here we want to make the point that by not seeing the detail of social and economic we cannot see how the three pillars are considered. The public may, by way of example, accept an environmental impact if there is an appropriate economic gain.

2. There is a lack of transparency in the current system.

Currently, if the NT EPA deems that a project requires no further assessment only the NT EPA's Statement of Reasons document is published, not the referral documents. It is difficult for the public to know what the extent of information provided and indeed the detail of the project. Consequently, we support the requirement for the NT EPA to publish the referral after it is accepted.

3. Some projects not going through proper scrutiny

Due to the lack of a referral trigger many, particularly, small-scale developments were being approved without due consideration of environmental impact. We are delighted to see the defining of the referral triggers for those instances when a proposal is required to be referred to the NT EPA.

To be effective, however, these triggers need to be further developed. For example, what are the location triggers?

4. Assessment timeframes and NT EPA capacity

Currently the timeframes for many of the stages of an approval are not legislated and this has allowed for significant delays in the project assessment. Our members have reported on EIS Terms of Reference's taking > 6 months.

We support the mandated timeframes in the Bill.

However, we still have concerns regarding resourcing for the NT EPA and DENR and the adherence to these timeframes. We also would like to see further development on the transitional arrangements once the Bill is enacted; will the staff at the NT EPA be sufficiently prepared?

5. Not all places are equal, there needs to be a location-based flag for referral.

This issue was raised during our submission to *Environmental Quality Report: Biodiversity of the Howard Sand Plains SOC and Recommendations*. In that submission we recommended that high priority biodiversity areas require protection regardless of the size of the development. The point being that small developments in this important area had 'slipped through the assessment process cracks'. We note the Bill flags a locality-based trigger. We support this but would like to see a defined process and timeline when the preliminary locations that will trigger assessment will be determined.

6. *There is little flexibility in the approvals process*

Under current arrangements, there is little flexibility in the approvals process, an NOI either triggers further assessment (ie EIS or PER) or doesn't; there is no flexibility allowing for a less detailed assessment of low environmental risk projects.

We support the assessment options in the Bill.

7. *Significance of impact ill-defined*

Environmental approvals are predicated on being able to determine whether an impact is significant. The Bill gives a broad framework in which to define a significant impact (s8) but this allows for considerable interpretation.

We acknowledge defining significant impact is difficult however we also believe that there is scope for further guidance around this, could the Bill not direct the NT EPA to develop guidelines for determining significance as a matter of priority?

8. *While the environmental impacts of all developments should be considered, low risk projects should be able to be approved via preliminary documentation.*

This has been comprehensively addressed. We support the multiple pathways for assessment.

9. *There is no visibility of the implementation of project approval conditions nor is there any known compliance checking*

Tasking DENR with compliance checking gives a level of credibility that the current process does not have.

To give confidence in the process we believe that reporting against approval conditions should be mandatory; s97 (1) of the draft Bill states that this may not be the case. We also believe that the method of publication of these reports should not be at the discretion of the CEO but should be, at a minimum, on the NT EPA website. We would like to see a consistent approach to ensure that these reports can be easily accessed.

We are unsure what compliance of management plans and commitments will apply to social, cultural and economic impacts?

10. *There is no publishing of offences*

To give the public comfort that industry is being held to account the Minister should publish all offences, incidents and infringements (as defined in this Regulation and the Act) and subsequent penalties.

Furthermore, an annual report should be published that summarises these incidents and the company and government response. In the Bill this is partially addressed, allowing for a public register which will outline environment protection notices.

Part II: Specific comments

1. *Lack of guidance materials*

The Bill makes reference to a number of documents that will be developed in the future. The referral and approval triggers are a case in point. While we support referral and approval triggers as in principle, not having the detail curbs our enthusiasm. Similarly, it is unclear how this Act would interact with other Acts ie *Planning Act*. We would like to see these further developed prior to the introduction of the Bill to parliament.

2. *Judicial review*

We only support the judicial review. We feel that a merits review is not suitable for the NT context. Similarly, we do not disagree with the removal of the open standing provision from the draft Bill as long as

those groups/individuals that are directly impacted and/or have put in a valid submission during the approvals process can proceed with an action.

3. Registration of environmental practitioners

We support this requirement noting that the EIANZ initiated a national certification program. The Certified Environmental Practitioner Scheme (CEnvP). The CEnvP Scheme was established in 2004 and aims to ensure that talented, skilled and ethical environmental professionals are given due recognition in line with their professional counterparts from engineering, accounting, planning and architecture. Certification provides a greater level of assurance to the community, employers, clients and professional associates of the credentials and peer recognition of an environmental professional. By certifying practitioners that meet high standards of professionalism and ethical conduct, the Scheme assists in improving environmental practice and environmental outcomes.

Environmental practitioners can be certified as a general practitioner or in a number of specialties including:

- Site Contamination Specialist
- Ecology Specialist
- Impact Assessment Specialist
- Land Rehabilitation Specialist
- Climate Change Specialist
- A national social impact assessment working group is looking at specific accreditation of social impact assessment practitioners, which will require guidance notes for assessors and access to training.

For further information, go to: <https://www.cenvp.org/>

Part III. ESD pillars and the project approval

As it stands, the proposed legislation and regulations are clearly aimed at protecting the natural environment and have negligible focus on economic, social and cultural, although this appears to be the intent of the supporting material. The documents refer to 'sustainable development' which, traditionally, has been considered as having three pillars: social, economic and environmental. That means the three should equally inform good decision-making. However, the life cycle of impact assessment outlined in the reform documents is subsumed into a department and ministry that have the natural environment as their primary focus and no staff qualified to assess non-environmental impacts.

There is no specific reference to the rights and needs of Aboriginal people, the principle of Free, Prior and Informed Consent and Australia's commitments to international principles such as the UN Declaration of the Rights of Indigenous Peoples (UNDRIP). We make only limited reference to this issue as we assume the land councils will be commenting, however we believe it is a serious deficiency in the proposed legislation and regulations.

The focus of the material is on risk management and mitigation and avoidance of negative impacts. Social, cultural and economic impact assessment should pay as much attention to enhancing positive impacts, such as local economic development, community benefits and issues covered by the Sustainable Development Goals, which Australia has signed up to.

The documents have changed the wording of the National Ecologically Sustainable Development Strategy, agreed between all States and Territories. We believe the wording of ESD Principles should be consistent with this nationally agreed definition. For example:

- “Decision-making processes should effectively integrate long-term, short-term and equitable social, economic and environmental considerations” has been changed to “Decision-making processes should effectively integrate long-term, short-term and equitable considerations”.
- The principle of ‘economic competitiveness seems to have replaced “a strong, diversified and growing economy”
- The words “Natural resources should be used in a manner that is sustainable, prudent, rational, wise and appropriate” do not appear to come from the ESD principles.
- A key principle from the National ESD Strategy missing from these documents is that “Decisions and actions should provide for broad community involvement on issues that affect them.” The media release from Minister Moss in regard to the Bill being out for public comment states: “The new legislation will continue to have increased opportunities for public involvement as well as transparency and accountability structures”. This is not reflected in the Draft Bill or Regulations.

It is hard to know how the legislation and regulations will be implemented without access to:

- How the legislation and regulations align with the fracking recommendations and proposed new Petroleum Regulations and whether a consistent approach will be adopted to considering strategic assessments and assessment of social, cultural and economic impacts
- How the legislation and regulations align with the proposed social impact assessment policy yet to be developed by the Department of the Chief Minister;
- What monitoring and management regime will apply to social, economic and cultural impacts given that this doesn’t appear to be captured by DENR’s ongoing compliance role.

Part IV: Recommendations

- The NT EPA should be directed to give further guidance on the definition of significant impact.
- Further information regarding referral and approval triggers be developed prior to the legislation being enacted.
- We would like to see how the transitional arrangements consider the new transition between the old and new legislation.
- It should be clarified where assessment of social, economic and cultural impacts belongs. If in the EPA, there needs to be an appropriate injection of staff with social science qualifications and a mandate to consider these issues and how projects impact on Aboriginal cultural and economic values. If this is to sit elsewhere (eg a Director General type of approach that operates in some other states), we need to have confidence that the assessment and compliance of social, economic and cultural studies will be supported by the appropriate mandate, skills and resources.
- Any certification of social, cultural and economic impact practitioners may best sit with the Environmental Institute of Australia and New Zealand, which already has a certification scheme. The EIANZ has a social impact assessment working group that has been considering the issue of certifying social impact practitioners. However, this is a complex issue that will require guidance notes on what social impact assessment is, a process for certification and appropriate training for both practitioners and regulators.
- When it comes to considering the people issues in impact assessment, the process must be treated equally as important as the outcomes if the community is to have confidence and trust in proponents and regulators. It should be made clear that statutory periods for comment are not the same as ‘engagement’ or ‘consultation’. Reference should be made to the International Association for Impact Assessment (IAP2) which is the professional body for engagement/public participation practitioners. A guidance note should encourage early and meaningful engagement to determine the issues of concern to the community. This, in turn, should inform terms of reference, the level of

assessment required and a focus on material issues (as opposed to a 'shopping list' approach of often irrelevant issues and studies).

- Social impact and engagement policies should apply equally to planning approvals for large urban developments that impact on people and communities.
- There should be explicit recognition of Aboriginal interests in the Bill and regulations.
- Clarity is needed on Section 84 of the Regulations which leaves unresolved how social, health, cultural and economic impacts will be assessed.
- We recommend a 'guiding principles' document that has legislative support, similar to that of the Territory NRM shown at the recent values and objectives workshop. The Guiding Principles should articulate that contemporary impact assessment, similar to those in recent regulatory reforms by Canada and New South Wales:
 - o recognises Aboriginal connections to the land
 - o recognises the principles of Free, Prior and Informed Consent
 - o supports early and meaningful engagement
 - o supports social, economic, cultural and environmental sustainability
 - o aims to provide certainty and consistency to proponents and communities
 - o gives equal weight to environmental, social, cultural and economic impacts
 - o should outline both positive and negative, direct and indirect impacts over the life cycle of a project
 - o should provide a consistent, whole-of-government approach
 - o should be consistent with international best practice principles and guidelines
 - o assumes provision of appropriate information so communities can weigh up the positive and negative impacts of projects and provide informed input to decision-making.

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In closing we would like to thank-you for the opportunity to allow this submission and we look forward to further engagement.

Yours Sincerely,

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